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TELECOMMUNICATIONS: THE ROLE OF THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

MAY 9, 1995

Serial No. 7

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TELECOMMUNICATIONS: THE ROLE OF THE DEPARTMENT OF JUSTICE

TUESDAY, MAY 9, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde (chairman of the committee) presiding.

Present: Representatives Henry J. Hyde, Carlos J. Moorhead, F. James Sensenbrenner, Jr., George W. Gekas, Howard Coble, Lamar Smith, Charles T. Canady, Bob Inglis, Bob Goodlatte, Stephen C. Buyer, Fred Heineman, Ed Bryant of Tennessee, Steve Chabot, Michael Patrick Flanagan, Bob Barr, John Conyers, Jr., Patricia Schroeder, Howard L. Berman, Rick Boucher, Robert C. Scott, Xavier Becerra, José E. Serrano, Zoe Lofgren, and Shelia Jackson Lee.

Also present: Alan F. Coffey, Jr., general counsel/staff director; Joseph Gibson, counsel; Diana Schacht, counsel; Kenneth Prater, assistant clerk; and Perry Apelbaum, minority counsel.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order. I will make a very brief opening statement. Mr. Conyers, if he chooses, and I think he will, will make a brief opening statement.

And then I will ask the Members to forgo making opening statements but put whatever they would have said in the record so that we can move along and hear from the very distinguished witnesses we have available to us today. So I will appreciate the courtesy of the Members in forgoing opening statements after Mr. Conyers and I have completed ours.

This morning, the committee considers the intersection of telecommunications with antitrust law. The Judiciary Committee has had a longstanding traditional role in legal issues affecting telecommunications. This is true because our committee has legislative jurisdiction over the Federal antitrust laws and oversight jurisdiction of the Department of Justice and the Federal system.

This morning, our focus is specifically on the role of the Department of Justice. Congress is now moving to replace the consent decree, the Modification of Final Judgment or MFJ, with a new statute. What role, if any, should be given to the Department of Justice as part of that transitional statute? Some argue that Justice should have no role at all.

They are critical of the Department's performance under the consent decree. Conversely, others believe that Justice's role under the

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new law is essential to protect competition. I have scheduled this hearing because I believe this is an important issue.

Today we have with us some excellent witnesses who will assist us in analyzing this subject. I should note that last week I introduced legislation entitled the "Antitrust Consent Decree Reform Act," H.R. 1528. That bill explicitly proposes a role for the Department of Justice in a new law that would supersede the consent decree.

However, it is important to emphasize that my bill is not the MFJ all over again. Unlike the waiver process under the current consent decree, the bill sets specific tight deadlines. The Department of Justice must act on an application by a Bell company for entry into either long distance or manufacturing within 180 days. If they don't do so, the Bell application is deemed to be approved.

Furthermore, the burden of proof is on the Department of Justice and not on the Bell companies. The degree of proof required is clear and convincing evidence. Importantly, H.R. 1528 does not use the much-criticized and burdensome standard contained in the MFJ, the VIII(C) test. Instead, the standard utilized has been adopted from the cases interpreting section 2 of the Sherman Act: whether there is a dangerous probability that the company entering a new market will use its existing market power to monopolize in that new market.

Finally, the appeal is not to the District Court, but to the U.S. Court of Appeals in the District of Columbia on an expedited basis. There would be no trial de novo, it would be an appellate review under Federal Administrative Procedure Act.

The telecommunications legislation that Congress ultimately adopts will have a great deal to do with the future health of America's economy, America's international competitiveness and employment opportunities for American workers. And today we begin this important process.

[The bill, H.R. 1528, follows:]

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I

104TH CONGRESS
1ST SESSION

H. R. 1528

To supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, United States District Court for the District of Columbia, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 2, 1995

Mr. HYDE introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, United States District Court for the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Antitrust Consent Decree Reform Act of 1995".

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SEC. 2. AUTHORIZATION FOR BELL OPERATING COMPANY TO ENTER COMPETITIVE LINES OF BUSINESS.

(a) APPLICATION.—

(1) IN GENERAL.—After the applicable date specified in paragraph (2), a Bell operating company may apply to the Attorney General for authorization, notwithstanding the Modification of Final Judgment—

(A) to provide interexchange telecommunications services,

(B) to manufacture or provide telecommunications equipment, or manufacture customer premises equipment, or

(C) to provide alarm monitoring services.

The application shall describe the nature and scope of the activity, and the product market, service market, and geographic market, for which authorization is sought.

(2) APPLICABLE DATES.—For purposes of paragraph (1), the applicable date after which a Bell operating company may apply for authorization shall be—

(A) the date of the enactment of this Act, with respect to—

(i) providing interexchange telecommunications services, and

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(ii) manufacturing or providing telecommunications equipment, or manufacturing customer premises equipment, and

(B) the date that occurs 3 years after the date of the enactment of this Act, with respect to providing alarm monitoring services.

(3) PUBLICATION.—Not later than 10 days after receiving an application made under paragraph (1), the Attorney General shall publish the application in the Federal Register.

(4) AVAILABILITY OF INFORMATION.—The Attorney General shall make available to the public all information (excluding trade secrets and privileged or confidential commercial or financial information) submitted by the applicant in connection with the application.

(b) DETERMINATION BY THE ATTORNEY GENERAL.—

(1) COMMENT PERIOD.—Not later than 45 days after an application is published under subsection (a)(3) interested persons may submit written comments to the Attorney General, regarding the application. Submitted comments shall be available to the public.

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(2) DETERMINATION.—(A) After the time for comment under paragraph (1) has expired, but not later than 180 days after receiving an application made under subsection (a)(1), the Attorney General shall issue a written determination, with respect to granting the authorization for which the Bell operating company has applied. If the Attorney General fails to issue such determination in the 180-day period beginning on the date the Attorney General receives such application, the Attorney General shall be deemed to have issued a determination approving such application on the last day of such period.

(B) The Attorney General shall approve the granting of the authorization requested in the application unless the Attorney General finds by clear and convincing evidence that there is a dangerous probability that such company or its affiliates would successfully use market power to achieve monopoly power in the market such company seeks to enter. The Attorney General may approve all or part of the requested authorization.

(C) A determination that approves any part of a requested authorization shall describe with particularity the nature and scope of the approved activity, and list each product market, service market,

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and geographic market, to which such approval applies.

(3) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (2), the Attorney General shall publish a brief description of the determination in the Federal Register.

(4) FINALITY.—A determination made under paragraph (2) shall be final unless a petition with respect to such determination is timely filed under subsection (c)(1).

(c) JUDICIAL REVIEW.—

(1) FILING OF PETITION.—(A) Not later than 30 days after a determination by the Attorney General is published under subsection (b)(3), the Bell operating company that applied to the Attorney General under subsection (a), or any person who would be injured in its business or property as a result of the determination regarding such company's engaging in the activity described in such company's application, may file a petition for judicial review of the determination in the United States Court of Appeals for the District of Columbia Circuit.

(B) The United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction

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to review determinations made under section 2(b)(2).

(2) CERTIFICATION OF RECORD.—As part of the answer to the petition, the Attorney General shall file in such court a certified copy of the record upon which the determination is based.

(3) CONSOLIDATION OF PETITIONS.—The court shall consolidate for judicial review all petitions filed under this subsection with respect to the application.

(4) JUDGMENT.—(A) The court shall enter a judgment after reviewing the determination in accordance with section 706 of title 5 of the United States Code. Whether there is clear and convincing evidence supporting the determination, as required by subsection (b)(2)(B), shall be affirmed by the court only if the court finds that the record certified pursuant to paragraph (2) provides substantial evidence for that determination.

(B) A judgment—

(i) affirming any part of the determination that approves granting all or part of the requested authorization, or

(ii) reversing any part of the determination that denies all or part of the requested authorization,

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shall describe with particularity the nature and scope of the activity, and each product market, service market, and geographic market, to which the affirmance or reversal applies.

SEC. 3. AUTHORIZATION AS PREREQUISITE.

(a) PREREQUISITE.—Until a Bell operating company is so authorized in accordance with section 2, it shall be unlawful for such company, directly or through an affiliate, to engage in an activity described in section 2(a)(1).

(b) GENERAL EXCEPTIONS.—Except with respect to providing alarm monitoring services, subsection (a) shall not prohibit a Bell operating company from engaging, at any time after the date of the enactment of this Act, in any activity as authorized by an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the Modification of Final Judgment, if—

(1) such order was entered on or before the date of the enactment of this Act, or

(2) a request for such authorization was pending before such court on the date of the enactment of this Act.

(c) EXCEPTION FOR CERTAIN ALARM MONITORING SERVICES.—Subsection (a) shall not prohibit a Bell operating company, at any time after the date of the enact-

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ment of this Act, from providing alarm monitoring services to the same extent that such company was already providing such services before such date.

(d) EXCEPTION FOR CERTAIN INTEREXCHANGE TELECOMMUNICATIONS SERVICES.—Subsection (a) shall not prohibit a Bell operating company, at any time after the date of the enactment of this Act, from providing interexchange telecommunications services with respect to telecommunications that originate in any exchange area in which such company is not the dominant provider of wireline telephone exchange service.

(e) EXCEPTIONS FOR INCIDENTAL SERVICES.—Subsection (a) shall not prohibit a Bell operating company, at any time after the date of the enactment of this Act, from providing interexchange telecommunications services for the purpose of—

(1)(A) providing audio programming, video programming, or other programming services to subscribers to such services of such company,

(B) providing the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services, or

(C) providing to distributors audio programming or video programming that such company

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owns, controls, or is licensed by the copyright owner of such programming, or by an assignee of such owner, to distribute,

(2) providing a telecommunications service, using the transmission facilities of a cable system that is an affiliate of such company, between exchange areas within a cable system franchise area in which such company is not, on the date of the enactment of this Act, a provider of wireline telephone exchange service,

(3) providing commercial mobile services in accordance with existing law,

(4) providing a service that permits a customer that is located in one exchange area to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another exchange area,

(5) providing signaling information used in connection with the provision of exchange services, or exchange access, to a local exchange carrier, or

(6) providing network control signaling information to, and receiving such signaling information from, interexchange carriers at any location within the area in which such company provides exchange services or exchange access.

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SEC. 4. REGULATION OF ELECTRONIC PUBLISHING.

(a) IN GENERAL.—

(1) PROHIBITION.—A Bell operating company and any affiliate shall not engage in the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(2) PERMITTED ACTIVITIES OF SEPARATED AFFILIATE.—Subject to subsection (b), nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture from engaging in the provision of electronic publishing or any other lawful service in any area.

(3) RULE OF CONSTRUCTION.—Nothing in this section shall prohibit a Bell operating company or affiliate from engaging in the provision of any lawful service other than electronic publishing in any area or from engaging in the provision of electronic publishing that is not disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(b) SEPARATED AFFILIATE OR ELECTRONIC PUBLISHING JOINT VENTURE REQUIREMENTS.—A separated affiliate and electronic publishing joint venture shall each—

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(1) maintain books, records, and accounts that are separate from those of the Bell operating company and from any affiliate and that record in accordance with generally accepted accounting principles all transactions, whether direct or indirect, with the Bell operating company,

(2) not incur debt in a manner that would permit a creditor upon default to have recourse to the assets of the Bell operating company,

(3) prepare financial statements that are not consolidated with those of the Bell operating company or an affiliate, provided that consolidated statements may also be prepared,

(4) after 1 year from the effective date of this section, not hire—

(A) as corporate officers, sales and marketing management personnel whose responsibilities at the separated affiliate or electronic publishing joint venture will include the geographic area where the Bell operating company provides basic telephone service,

(B) network operations personnel whose responsibilities at the separated affiliate or electronic publishing joint venture would require

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dealing directly with the Bell operating company, or

(C) any person who was employed by the Bell operating company during the year preceding their date of hire,

except that the requirements of this paragraph shall not apply to persons subject to a collective bargaining agreement that gives such persons rights to be employed by a separated affiliate or electronic publishing joint venture of the Bell operating company,

(5) not provide any wireline telephone exchange service in any telephone exchange area where a Bell operating company with which it is under common ownership or control provides basic telephone exchange service except on a resale basis,

(6) not use the name, trademarks, or service marks of an existing Bell operating company except for names, trademarks, or service marks that are or were used in common with the entity that owns or controls the Bell operating company,

(7) have performed annually by March 31 a compliance review—

(A) that is conducted by an independent entity that is subject to professional, legal, and ethical obligations for the purpose of determin-

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ing compliance during the preceding calendar year with any provision of this section that imposes a requirement on such separated affiliate or electronic publishing joint venture, and

(B) the results of which are maintained by the separated affiliate for a period of 5 years subject to review by any lawful authority;

(8) within 90 days of receiving a review described in paragraph (7), file a report of any exceptions and corrective action with the Attorney General and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section.

(c) BELL OPERATING COMPANY REQUIREMENTS.—A Bell operating company under common ownership or control with a separated affiliate or electronic publishing joint venture shall—

(1) not provide a separated affiliate any facilities, services, or basic telephone service information unless such Bell operating company makes such facilities, services, or information available to unaffiliated entities upon request and on the same terms and conditions;

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(2) carry out transactions with a separated affiliate in a manner equivalent to the manner that unrelated parties would carry out independent transactions and not based upon the affiliation;

(3) carry out transactions with a separated affiliate, which involve the transfer of personnel, assets, or anything of value, pursuant to written contracts or tariffs made publicly available;

(4) carry out transactions with a separated affiliate in a manner that is auditable in accordance with generally accepted auditing standards;

(5) value any assets that are transferred to a separated affiliate at the greater of net book cost or fair market value;

(6) value any assets that are transferred to the Bell operating company by its separated affiliate at the lesser of net book cost or fair market value;

(7) except for—

(A) instances where State regulations permit in-arrears payment for tariffed telecommunications services, or

(B) the investment by an affiliate of dividends or profits derived from a Bell operating company,

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not provide debt or equity financing directly or indirectly to a separated affiliate;

(8) comply fully with all applicable State cost allocation and other accounting rules;

(9) have performed annually by March 31 a compliance review—

(A) that is conducted by an independent entity that is subject to professional, legal, and ethical obligations for the purpose of determining compliance during the preceding calendar year with any provision of this section that imposes a requirement on such Bell operating company, and

(B) the results of which are maintained by the Bell operating company for a period of 5 years subject to review by any lawful authority;

(10) within 90 days of receiving a review described in paragraph (9), file a report of any exceptions and corrective action with the Attorney General and allow any person to inspect and copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section;

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(11) if it provides facilities or services for telecommunication, transmission, billing and collection, or physical collocation to any electronic publisher, including a separated affiliate, for use with or in connection with the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, provide to all other electronic publishers the same type of facilities and services on request, on the same terms and conditions or as required by a State, and unbundled and individually tariffed to the smallest extent that is technically feasible and economically reasonable to provide;

(12) provide network access and interconnections for basic telephone service to electronic publishers at any technically feasible and economically reasonable point within the Bell operating company's network and at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing;

(13) if prices for network access and interconnection for basic telephone service are no longer

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subject to regulation, provide electronic publishers such services on the same terms and conditions as a separated affiliate receives such services;

(14) if any basic telephone service used by electronic publishers ceases to require a tariff, provide electronic publishers with such service on the same terms and conditions as a separated affiliate receives such service;

(15) provide reasonable advance notification at the same time and on the same terms to all affected electronic publishers of information if such information is within any one or more of the following categories:

(A) such information is necessary for the transmission or routing of information by an interconnected electronic publisher;

(B) such information is necessary to ensure the interoperability of an electronic publisher's and the Bell operating company's networks; or

(C) such information concerns changes in basic telephone service network design and technical standards which may affect the provision of electronic publishing;

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(16) not directly or indirectly provide anything of monetary value to a separated affiliate unless in exchange for consideration at least equal to the greater of its net book cost or fair market value, except the investment by an affiliate of dividends or profits derived from a Bell operating company;

(17) not discriminate in the presentation or provision of any gateway for electronic publishing services or any electronic directory of information services, which is provided over such Bell operating company's basic telephone service;

(18) have no directors, officers, or employees in common with a separated affiliate;

(19) not own any property in common with a separated affiliate;

(20) not perform hiring or training of personnel on behalf of a separated affiliate;

(21) not perform the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of this section; and

(22) not perform research and development on behalf of a separated affiliate.

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(d) CUSTOMER PROPRIETARY NETWORK INFORMATION.—A Bell operating company or any affiliate shall not provide to any electronic publisher, including a separated affiliate or electronic publishing joint venture, customer proprietary network information for use with or in connection with the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service that is not made available by the Bell operating company or affiliate to all electronic publishers on the same terms and conditions.

(e) COMPLIANCE WITH SAFEGUARDS.—No Bell operating company, affiliate, or separated affiliate shall act in concert with another Bell operating company or any other entity in order to knowingly and willfully violate or evade the requirements of this section.

(f) TELEPHONE OPERATING COMPANY DIVIDENDS.—Nothing in this section shall prohibit an affiliate from investing dividends derived from a Bell operating company in its separated affiliate, and subsections (i) and (j) of this section shall not apply to any such investment.

(g) JOINT MARKETING.—Except as provided in subsection (h)—

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(1) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with a separated affiliate, and

(2) a Bell operating company shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.

(h) PERMISSIBLE JOINT ACTIVITIES.—

(1) JOINT TELEMARKETING.—A Bell operating company may provide inbound telemarketing or referral services related to the provision of electronic publishing for a separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher, provided that if such services are provided to a separated affiliate, electronic publishing joint venture, or affiliate, such services shall be made available to all electronic publishers on request, on nondiscriminatory terms, at compensatory prices, to ensure that the Bell operating company's method of providing telemarketing or referral and its price structure do not competitively disadvantage any electronic publishers regardless of size, including those which do not use the Bell operating company's telemarketing services.

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(2) TEAMING ARRANGEMENTS.—A Bell operating company may engage in nondiscriminatory teaming or business arrangements to engage in electronic publishing with any separated affiliate or with any other electronic publisher provided that the Bell operating company only provides facilities, services, and basic telephone service information as authorized by this section and provided that the Bell operating company does not own such teaming or business arrangement.

(3) ELECTRONIC PUBLISHING JOINT VENTURES.—A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not any Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, provided that the participating Bell operating company or participating affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50

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percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Attorney General may authorize the Bell operating company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

(i) TRANSACTIONS RELATED TO THE PROVISION OF ELECTRONIC PUBLISHING BETWEEN A TELEPHONE OPERATING COMPANY AND ANY AFFILIATE.—

(1) RECORDS OF TRANSACTIONS.—Any provision of facilities, services, or basic telephone service information, or any transfer of assets, personnel, or anything of commercial or competitive value, from a Bell operating company to any affiliate related to the provision of electronic publishing shall be—

(A) recorded in the books and records of each entity,

(B) auditable in accordance with generally accepted auditing standards, and

(C) pursuant to written contracts or tariffs filed with a State and made publicly available.

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(2) VALUATION OF TRANSFERS.—Any transfer of assets directly related to the provision of electronic publishing from a Bell operating company to an affiliate shall be valued at the greater of net book cost or fair market value. Any transfer of assets related to the provision of electronic publishing from an affiliate to the Bell operating company shall be valued at the lesser of net book cost or fair market value.

(3) PROHIBITION OF EVASIONS.—A Bell operating company shall not provide directly or indirectly to a separated affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing that are not made available to unaffiliated companies on the same terms and conditions.

(j) TRANSACTIONS RELATED TO THE PROVISION OF ELECTRONIC PUBLISHING BETWEEN AN AFFILIATE AND A SEPARATED AFFILIATE.—

(1) RECORDS OF TRANSACTIONS.—Any facilities, services, or basic telephone service information provided or any assets, personnel, or anything of commercial or competitive value transferred, from a Bell operating company to any affiliate as described

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in subsection (i) and then provided or transferred to a separated affiliate shall be—

(A) recorded in the books and records of each entity,

(B) auditable in accordance with generally accepted auditing standards, and

(C) pursuant to written contracts or tariffs filed with a State and made publicly available.

(2) VALUATION OF TRANSFERS.—Any transfer of assets directly related to the provision of electronic publishing from a Bell operating company to any affiliate as described in subsection (i) and then transferred to a separated affiliate shall be valued at the greater of net book cost or fair market value. Any transfer of assets related to the provision of electronic publishing from a separated affiliate to any affiliate and then transferred to the Bell operating company as described in subsection (i) shall be valued at the lesser of net book cost or fair market value.

(3) PROHIBITION OF EVASIONS.—An affiliate shall not provide directly or indirectly to a separated affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing that are not made available to un-

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affiliated companies on the same terms and conditions.

(k) OTHER ELECTRONIC PUBLISHERS.—Except as provided in subsection (h)(3)—

(1) A Bell operating company shall not have any officers, employees, property, or facilities in common with any entity whose principal business is publishing of which a part is electronic publishing.

(2) No officer or employee of a Bell operating company shall serve as a director of any entity whose principal business is publishing of which a part is electronic publishing.

(3) For the purposes of paragraphs (1) and (2), a Bell operating company or an affiliate that owns an electronic publishing joint venture shall not be deemed to be engaged in the electronic publishing business solely because of such ownership.

(4) A Bell operating company shall not carry out—

(A) any marketing or sales for any entity that engages in electronic publishing; or

(B) any hiring of personnel, purchasing, or production,

for any entity that engages in electronic publishing.

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(5) The Bell operating company shall not provide any facilities, services, or basic telephone service information to any entity that engages in electronic publishing, for use with or in connection with the provision of electronic publishing that is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service, unless equivalent facilities, services, or information are made available on equivalent terms and conditions to all.

(l) TRANSITION.—Any electronic publishing service being offered to the public by a Bell operating company or affiliate on the date of enactment of this section shall have one year from such date of enactment to comply with the requirements of this section.

(m) SUNSET.—The provisions of this section shall not apply to conduct occurring after June 30, 2000.

(n) PRIVATE RIGHT OF ACTION.—Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may commence a civil action in an appropriate district court of the United States for damages, for an order enjoining such act or practice or compelling compliance with such requirement, or for both.

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(o) SUBPOENAS.—In an action commenced under this section, a subpoena requiring the attendance of a witness at a hearing or a trial may be served at any place within the United States.

(p) DEFINITIONS.—For purposes of this section:

(1) The term "Bell operating company" means the corporations subject to the Modification of Final Judgment and listed in Appendix A thereof, or any entity owned or controlled by such corporation, or any successor or assign of such corporation, but does not include an electronic publishing joint venture owned by such corporation or entity.

(2) The term "affiliate" means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership or control with, a Bell operating company. Such term shall not include a separated affiliate.

(3) The term "basic telephone service" means any wireline telephone exchange service, or wireline telephone exchange facility, provided by a Bell operating company in a telephone exchange area, except—

(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline

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telephone exchange service that was provided on January 1, 1984, and

(B) a commercial mobile service provided by an affiliate that is required by the Federal Communications Commission to be a corporate entity separate from the Bell operating company.

(4) The term "basic telephone service information" means network and customer information of a Bell operating company and other information acquired by a Bell operating company as a result of its engaging in the provision of basic telephone service.

(5) The term "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(6)(A) The term "electronic publishing" means the dissemination, provision, publication, or sale to an unaffiliated entity or person, using a Bell operating company's basic telephone service, of—

(i) news,

(ii) entertainment (other than interactive games),

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(iii) business, financial, legal, consumer, or credit material,

(iv) editorials,

(v) columns,

(vi) sports reporting,

(vii) features,

(viii) advertising,

(ix) photos or images,

(x) archival or research material,

(xi) legal notices or public records,

(xii) scientific, educational, instructional, technical, professional, trade, or other literary materials, or

(xiii) other like or similar information.

(B) The term "electronic publishing" shall not include the following network services:

(i) Information access, as that term is defined by the Modification of Final Judgment.

(ii) The transmission of information as a common carrier.

(iii) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol con-

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version, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

(iv) Voice storage and retrieval services, including voice messaging and electronic mail services.

(v) Data processing services that do not involve the generation or alteration of the content of information.

(vi) Transaction processing systems that do not involve the generation or alteration of the content of information.

(vii) Electronic billing or advertising of a Bell operating company's regulated telecommunications services.

(viii) Language translation.

(ix) Conversion of data from one format to another.

(x) The provision of information necessary for the management, control, or operation of a telephone company telecommunications system.

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(xi) The provision of directory assistance that provides names, addresses, and telephone numbers and does not include advertising.

(xii) Caller identification services.

(xiii) Repair and provisioning databases for telephone company operations.

(xiv) Credit card and billing validation for telephone company operations.

(xv) 911–E and other emergency assistance databases.

(xvi) Any other network service of a type that is like or similar to these network services and that does not involve the generation or alteration of the content of information.

(xvii) Any upgrades to these network services that do not involve the generation or alteration of the content of information.

(C) The term "electronic publishing" also shall not include—

(i) full motion video entertainment on demand, and

(ii) video programming.

(7) The term "electronic publishing joint venture" means a joint venture owned by a Bell operating company or affiliate that engages in the provi-

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sion of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

(8) The term "entity" means any organization, and includes corporations, partnerships, sole proprietorships, associations, and joint ventures.

(9) The term "inbound telemarketing" means the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call.

(10) The term "own" with respect to an entity means to have a direct or indirect equity interest (or the equivalent thereof) of more than 10 percent of an entity, or the right to more than 10 percent of the gross revenues of an entity under a revenue sharing or royalty agreement.

(11) The term "separated affiliate" means a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company and that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

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SEC. 5. DEFINITIONS.

Except as provided in section 4, for purposes of this Act:

(1) AFFILIATE.—The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, to own refers to owning an equity interest (or the equivalent thereof) of more than 50 percent.

(2) ALARM MONITORING SERVICE.—The term "alarm monitoring service" means a service that uses a device located at a residence, place of business, or other fixed premises—

(A) to receive signals from other devices located at or about such premises regarding a possible threat at such premises to life, safety, or property, from burglary, fire, vandalism, bodily injury, or other emergency, and

(B) to transmit a signal regarding such threat by means of transmission facilities of a Bell operating company or one of its affiliates to a remote monitoring center to alert a person at such center of the need to inform the customer or another person or police, fire, rescue,

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security, or public safety personnel of such threat,

but does not include a service that uses a medical monitoring device attached to an individual for the automatic surveillance of an ongoing medical condition.

(3) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(4) AUDIO PROGRAMMING.—The term "audio programming" means programming provided by, or generally considered comparable to programming provided by, a radio broadcast station.

(5) BELL OPERATING COMPANY.—The term "Bell operating company" means—

(A) Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Tele-

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phone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company,

(B) any successor or assign of any such company, or

(C) any affiliate of any person described in subparagraph (A) or (B).

(6) CABLE SYSTEM.—The term ' cable system" has the same meaning as such term has in section 602(7) of the Communications Act of 1934 (47 U.S.C. 522(7)).

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(7) CARRIER.—The term "carrier" has the same meaning as such term has in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

(8) COMMERCIAL MOBILE SERVICES.—The term "commercial mobile services" has the same meaning as such term has in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)).

(9) CUSTOMER PREMISES EQUIPMENT.—The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, and includes software integral to such equipment.

(10) EXCHANGE ACCESS.—The term "exchange access" means exchange services provided for the purpose of originating or terminating interexchange telecommunications.

(11) EXCHANGE AREA.—The term "exchange area" means a contiguous geographic area established by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the Modification of Final Judgment before the date of the enactment of this Act.

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(12) EXCHANGE SERVICE.—The term "exchange service" means a telecommunications service provided within an exchange area.

(13) INFORMATION.—Except as provided in paragraph (17), the term "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

(14) INTEREXCHANGE TELECOMMUNICATIONS.—The term "interexchange telecommunications" means telecommunications between a point located in an exchange area and a point located outside such exchange area.

(15) MANUFACTURE.—The term "manufacture" has the meaning given such term under the Modification of Final Judgment.

(16) MODIFICATION OF FINAL JUDGMENT.—The term "Modification of Final Judgment" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

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(17) OTHER PROGRAMMING SERVICES.—The term "other programming services" means information (other than audio programming or video programming) that the person who offers a video programming service makes available to all subscribers generally. For purposes of the preceding sentence, the terms "information" and "makes available to all subscribers generally" have the same meaning such terms have under section 602(13) of the Communications Act of 1934 (47 U.S.C. 522(13)).

(18) PERSON.—The term "person" has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(19) STATE.—The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, Palau, or any territory or possession of the United States.

(20) TELECOMMUNICATIONS.—The term "telecommunications" means the transmission of information between points by electromagnetic means.

(21) TELECOMMUNICATIONS EQUIPMENT.—The term "telecommunications equipment" means equip-

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ment, other than customer premises equipment, used by a carrier to provide a telecommunications service, and includes software integral to such equipment.

(22) TELECOMMUNICATIONS SERVICE.—The term "telecommunications service" means the offering for hire of transmission facilities or of telecommunications by means of such facilities.

(23) TRANSMISSION FACILITIES.—The term "transmission facilities" means equipment (including wire, cable, microwave, satellite, and fiber-optics) that transmits information by electromagnetic means or that directly supports such transmission, but does not include customer premises equipment.

(24) VIDEO PROGRAMMING.—The term "video programming" has the same meaning as such term has in section 602(19) of the Communications Act of 1934 (47 U.S.C. 522(19)).

SEC. 6. RELATIONSHIP TO OTHER LAWS.

(a) MODIFICATION OF FINAL JUDGMENT.—This Act shall supersede only the following sections of the Modification of Final Judgment:

(1) Section II(C) of the Modification of Final Judgment, relating to deadline for procedures for equal access compliance.

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(2) Section II(D) of the Modification of Final Judgment, relating to line of business restrictions.

(3) Section VIII(A) of the Modification of Final Judgment, relating to manufacturing restrictions.

(4) Section VIII(C) of the Modification of Final Judgment, relating to standard for entry into the interexchange market.

(5) Section VIII(D) of the Modification of Final Judgment, relating to prohibition on entry into electronic publishing.

(6) Section VIII(H) of the Modification of Final Judgment, relating to debt ratios at the time of transfer.

(7) Section VIII(J) of the Modification of Final Judgment, relating to prohibition on implementation of the plan of reorganization before court approval.

(b) APPLICATION TO OTHER ACTION.—This Act shall supersede the final judgment entered December 21, 1984 and as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83–1298, in the United States District Court for the District of Columbia, and such final judgment shall not be enforced with respect to conduct occurring after the date of the enactment of this Act.

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(c) ANTITRUST LAWS.—Nothing in this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(d) FEDERAL, STATE, AND LOCAL LAW.—(1) Except as provided in paragraph (2), this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in this Act.

(2) This Act shall supersede State and local law to the extent that such law would impair or prevent the operation or purposes of this Act.

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Mr. HYDE. The Chair recognizes the distinguished ranking member from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I, too, have some comments to make this morning and I recognize that this is one of the more serious and important measures that our committee will take up. And in some ways, it marks a return to normalcy in the House Judiciary Committee, hopefully. The Contract period is up and the regular, thoughtful legislative process should resume.

And so, these hearings are critical in terms of antitrust and telecommunications reform. No issue we are facing in this Congress is more important than telecommunications, which represents a full 15 percent of our Nation's gross domestic product. That is as big as health care, and like health care, telecommunications reform will touch every one of our citizens from one end of this country to the other.

In my view, today's hearings presents the committee with at least two important issues: the first is whether the Justice Department should have a role in reviewing Bell entry into long distance and manufacturing; and the second concerns the entry test that should be applied in reviewing such entry.

The answer to the first question is clear-cut. In an industry born in, and which continues to be characterized by monopoly, it is absolutely fundamentally essential that the Antitrust Division and Justice plays a key review role.

And over the years, the Justice Department has found it necessary to prosecute three massive antitrust lawsuits against the Bell system. In 1913, 1949, and again in 1974, and the third began during the Gerald Ford administration, settled during the Reagan administration, and culminated in the landmark Modification of Final Judgment which has led to a virtual explosion in innovation in the long-distance and manufacturing markets.

I also want to point out that another committee of the Congress would have no or little role in for the Antitrust Division, even though fundamentally this is an antitrust issue. That would be greatly unfortunate. It would be very unfortunate for the committee to allow this to happen.

The answer to the second major question, the appropriate entry test to be applied by the Justice Department is more complex. The bill before us would have the Department of Justice apply an extremely weak Sherman-like entry test. And under the bill, the Department could only prevent a Bell monopoly from entering long distance or manufacturing if it could prove there is a dangerous probability it could achieve monopoly power. Further, the burden of proof is on the Justice Department and raises it to the highest possible level in the civil area; clear and convincing evidence.

Under this test, it does not take a scientist at Bell to figure out that you could enter the manufacturing line of business, even if it is clear this they would abuse their local monopoly to increase their market share from zero to nearly 50 percent, far more than any of today's competitors. And in long distance, even if it could be shown a Bell would use its power to monopolize the long-distance market, that is, obtain a 100-percent market share, the Department could not prevent entry where it could prove this eventuality by a pre-

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ponderance of evidence rather than the almost criminal requirement of clear and convincing evidence.

It is not difficult to envision that the application of such a lax standard could stifle innovation, wipe out hundreds of thousands of jobs and cost our economy tens of billions of dollars in excess monopoly profits. And under this test, it would be tough for the Justice Department to prevent GM and Ford from merging or preventing IBM from acquiring Microsoft. It is too low, and as a result I am hopeful that this committee can develop an entry test which will balance the entrance of new competitors and fair competition of technology and of jobs of Bell and their customers.

This committee has historically worked together on a bipartisan basis to ensure the telephone monopolists were subject to reasonable antitrust rules. In 1980, when AT&T sought legislation to preempt the Justice Department Divestiture Act, this Judiciary Committee actively and successfully opposed the measure. And the last Congress, when the time came to move beyond MFJ, this committee again took the lead in reporting bipartisan legislation which overwhelmingly was passed by the House.

And so I publicly express my strong concern regarding the process under which H.R. 1528 was drafted.

Despite the fact that I have repeatedly held myself out to the chairman as wanting to work on a bipartisan basis on telecommunications reform, and for that matter, everything that comes before this committee, this bill was put in the hopper without even notice, not to mention prior consultation with any of the members or this ranking member on the Democratic side. And I think we can do better than that.

While the chairman has the right to introduce any measure he sees fit whenever he wants, telecommunications is one of the most vital issues facing our committee and in dealing with many issues that we will address, nothing is more important than a bipartisan approach, especially on this matter.

There happens to be other committees waiting out there that are going to challenge us. We have the Dingell-Brooks bill worked out last year after many years of negotiation.

But let's try to move forward from here and I hope that this committee can put a policy above politics and work together and I am looking forward to hearing and particularly to welcome the Assistant Attorney General covering antitrust, Anne Bingaman, who has done such an enormous job of revitalizing and reinvigorating the Antitrust Division.

And I believe that President Clinton and the Nation are extraordinarily well served by her work as antitrust chief. And I am hopeful that the committee will be able to work constructively with her on telecommunications as well as the other competition issues we are facing today.

Thank you, Mr. Chairman. That concludes my remarks.

Mr. HYDE. Thank you, Mr. Conyers. Very briefly, I would like to respond to the ranking member's admonitions about working in a bipartisan fashion, which I wholly share.

On the question of notice and cosponsorship, I would remind the gentleman from Michigan that he already, on the first day of this Congress, January 4, joined as an original cosponsor of H.R. 411

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along with Congressman Dingell and Congressman Ed Markey. That bill is essentially the same telecommunications bill which passed the House of Representatives last year. Among other things, it would require the continued use of the standard from the MFJ, the so-called VIII(C) test. I was never called and asked to cosponsor that bill.

On a similar note in the last Congress, then-Chairman Jack Brooks and Commerce Chairman John Dingell negotiated behind closed doors on the telecommunications issue for most of 1993. They did so solely through two staff people. No Republican members or staff were privileged to attend those meetings or to know the substance of those negotiations. Then on November 22, 1993, they introduced H.R. 3626 all by themselves. The then-ranking member of the Republican Party, Ham Fish, was not asked to cosponsor at that time. He got to read the bill after it was reintroduced just like everyone else.

Now, I intend to work with the gentleman from Michigan, but since he has already introduced his own bill on the subject, taking quite a different approach, his possible cosponsorship of my bill wasn't a prospect. If he has changed his mind, which I doubt, I welcome his support. But let us not seek a standard of bipartisanship under me that the gentleman has been unwilling to abide by himself.

Mr. CONYERS. I quite agree. If I might accept the admonition that you returned to me. Could you remember, please, that I was not a primary cosponsor on the bill that was introduced on the first day.

Secondly, I am perfectly aware—I was not a major cosponsor. I was invited to go on the bill.

The second thing, I should carry the burden of Dingell and Brooks not negotiating with you. I carry all the wrongs of the Democratic majority through the last 40 years. I had no idea. They didn't discuss it with me either, I want you to know.

And finally, the bill that you objected—that you think I was a primary cosponsor on was the same bill that you and I both voted for in the last Congress.

Mr. BERMAN. Will the gentleman yield?

Mr. HYDE. Lest there be any misunderstanding, I would welcome Mr. Conyers as cosponsor on H.R. 1528.

Mr. BERMAN. Would the chairman yield?

Mr. HYDE. With—yes, I yield to the gentleman from California.

Mr. BERMAN. Just to simply point out that I think the gentleman is wrong to some extent, because on a bipartisan basis, Democrats and Republicans on the Judiciary Committee were not informed or involved in the process of telecommunications legislation in the last several years.

Mr. HYDE. Well, it is a new day and we will try to keep everybody informed.

All right. To the other gentlemen and ladies on our committee, if you have opening statements, by unanimous consent you may submit them for the record and I appreciate your forgoing delivering them in the interest of time.

Our first witness is the Honorable Anne K. Bingaman, the Assistant Attorney General in charge of the Antitrust Division at the

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Department of Justice. Ms. Bingaman has been head of the Antitrust Division since 1993. She is a graduate of Stanford University Law School, and prior to coming to the Justice Department had a distinguished career in private law practice.

Additionally, she has been a professor at University of New Mexico Law School and served in the New Mexico Attorney General's Office.

Ms. Bingaman, welcome to the Judiciary Committee. Your statement will be made a part of the record, and I respectfully request that you confine your oral testimony to 5 minutes, if possible.

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

Ms. BINGAMAN. Thank you very, very much, Mr. Chairman, Congressman Conyers. Things started on an appropriate note, because telecommunications, of all subjects in our panoply of contentious issues, has historically been bipartisan and nonpartisan. It has a proud tradition of that.

The Justice Department's role similarly has been nonpartisan and bipartisan. And let me recount very briefly, because history is important here. The Justice Department's recent involvement in telecommunications started in the mid-1960's in the Johnson administration after two previous lawsuits against AT&T. People in the Justice Department said, why should a black telephone with a rotary dial be sold only by AT&T? Why does that make sense? Anyone can make a telephone. And they filed comments with the FCC seeking the right of competitors to make competing equipment to hook up to the old Bell system, the monopoly.

That went on. The FCC agreed with it. The Bell system found a way around that. They came up with something called a protective coupling apparatus. PCA tariffs were filed all over the country in 50 States saying, OK, you may be able to make a competing telephone, but you have to hook it up through this little device which only we have and which costs a lot of money, by the way, which kept competitors out of this market. At the same time, you had MCI, an upstart, fledgling company trying to hook into what are today the 347 Bell networks, then part of the old Bell system, part of AT&T.

AT&T also had the competing long-distance market and they didn't want to let MCI hook in. They discriminated against them. They found ways to harm their business. They put static on the line. They did all sorts of things.

Finally, in 1974, in the Ford administration, after an investigation that started in the Nixon administration, the Ford administration filed the historic lawsuit in 1974 to break up AT&T saying there is no way that AT&T can compete in these competitive adjacent markets, manufacturing and long distance, while it also has this bottleneck, this monopoly, here at the center, the heart of its business.

Eight years ensued of hard-fought litigation prosecuted vigorously by the Carter administration. In 1982, my former professor in law school, a man I am proud to claim as a friend and a mentor, and I mean that so sincerely, Bill Baxter, was in this job as Assistant Attorney General for Antitrust, and he drove the historic,

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tough, terrific settlement in AT&T which broke up these monopoly companies which are now the seven regional Bell operating companies from AT&T. Just simply split them apart. AT&T had long distance and manufacturing, had no part of the local bottleneck.

We have seen what happened from that vision. The vision started in 1974 with the original suit and culminated brilliantly with the breakup in 1982. Long-distance prices have fallen almost 70 percent. Manufacturing is vibrant with a competitive manufacturing market. Faxes, modums, telephones, fiber optic cable coast to coast, and we have seen what competition can do.

What we are embarking on now as a nation is the last step toward competition; how to let the Bell companies into these two adjacent markets, the manufacturing and long distance. The last two they are barred from, and still protect competition in those markets.

What we have come to as a nation is to open up the local monopoly and to allow them in if they open up. And the chairman's recognition of the importance of a role for the Department of Justice in this historic last phase of injecting competition into telecommunications is vital and we appreciate the chairman's bill in this regard.

We believe the standard set forth in the bill is one that would be very difficult, if not impossible, to meet because it requires an extraordinarily high burden on the Justice Department, clear and convincing evidence. It requires that we prove a dangerous probability of monopolization in this second market, and the evidence would have been accumulated yet, and it requires that the Justice Department bear the burden of proof.

We think in each of those respects, the bill needs to be worked on because we need to be realistic about this. This is a tremendously complex and complicated business. Computers are at the heart of it; computer software. There is tremendous control of the local monopolies still by the Bell operating companies.

Mr. Chairman, this is not a simple matter. The Justice Department needs to be involved. It needs to be involved under an appropriate standard which will, in fact, protect competition and consumers. And we look forward to working with the committee and with the chairman to develop that standard.

We are very grateful, Mr. Chairman, for your leadership in recognizing the importance of a role for the Department of Justice, because historically it is a fact, as the chairman recognizes, it is the Department of Justice which through its actions over this period I have recounted briefly has created the most thriving, competitive telecommunications market in the world. It is a testament to the American belief in competition and success of the model we have set up as a nation.

So, with that, Mr. Chairman, I would be most pleased to answer any questions.

[The prepared statement of Ms. Bingaman follows:]

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

It is a great honor to testify before this committee concerning the role of the Department of Justice in promoting greater telecommunications competition. I am grateful to you, Chairman Hyde, and to Congressman Conyers and this committee

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for holding this hearing and for exercising leadership in this vital area of our economy and competition policy, and to you and Congressman Conyers for introducing telecommunications reform legislation that provides a decisionmaking role for the Department of Justice in connection with allowing the Bell Operating Companies to enter the long distance and manufacturing markets.

Our fundamental vision for the telecommunications future is simple to state, but breathtaking in its implications: Every company will be permitted to compete in every market for every customer. We want that day to come as soon as possible, because increased competition in telecommunications will benefit consumers, spur economic growth and innovation, promote private sector investment in an advanced telecommunications infrastructure and create jobs. We would be naive, however, if we expected an uncomplicated transition from the regulated monopolies that characterize many segments of the telecommunications industry to fully competitive markets.

Vice-President Gore put it best at the Federal-State-Local Telecommunications Summit held earlier this year: "Competition is always better than monopoly. But monopoly power must never be confused with competition. Two enemies of competition are monopoly power and unwise government regulation. We must remember, after all, that the goal we seek is *real* competition. Not the illusion of competition; not the distant prospect of competition."

There is today, we believe, a broad, bipartisan consensus in favor of moving telecommunications policy out of the courts and into the statute books so that Congress, representing the public, can craft the kind of comprehensive framework for competitive telecommunications that the nation deserves. The key test for any telecommunications reform measure is whether it helps the American people. To meet this test, it must be effective in opening all telecommunications markets to competition, including—first and foremost—currently monopolized markets. And it must ensure that monopolists cannot harm consumers and competition in the transition to competitive—and then deregulated—markets.

If we unleash monopolists rather than achieve real competition, American consumers and businesses will pay higher prices and have less choice. We would have less innovation and lower quality. We could lose our position of international leadership in telecommunications, and American businesses could lose a competitive edge. Real competition enables—and must precede—real deregulation.

The Administration shares your belief that an essential element to protecting and promoting competition is conditioning Bell Company entry into long distance and equipment manufacturing on a Department of Justice assessment of actual marketplace facts to ensure that such entry will not unravel a decade of progress in opening the long distance and telecommunications equipment markets to competition. Your new bill, Mr. Chairman, H.R. 1528, represents a valuable and important contribution to the ongoing discussion about telecommunications reform. It endorses the sound policy of requiring DOJ approval of Bell Company entry into long distance and equipment manufacturing. It also places a strict time limit on DOJ review. This approach was a critical aspect of legislation that enjoyed broad bipartisan support last year in this committee as well as the House Commerce Committee and that passed the entire House with more than 420 votes. It also received strong bipartisan support last year from the Senate Commerce Committee.

I would like to devote the balance of my testimony to discussing why a DOJ decisionmaking role is essential to ensuring that telecommunications reform results in real competition, instead of unregulated monopoly.

THE HISTORY OF THE BELL SYSTEM DECREE

It is appropriate to begin with some history, because the competition that we have today in long distance and equipment manufacturing is a relatively recent phenomenon, made possible by DOJ's landmark antitrust case against the Bell System. That case, as you know, was a completely nonpartisan undertaking. It began with an investigation that was initiated in 1969 during the Nixon Administration, accelerated with the filing of the case in 1974 in the Ford Administration and was pursued vigorously through the Carter and Reagan Administrations until it was settled in 1982 by my former law professor, William Baxter, President Reagan's Assistant Attorney General for Antitrust. That historic settlement resulted in the entry of the Modification of Final Judgment (or MFJ), which dismantled the Bell System's vertically integrated telephone monopoly.

The seven Regional Bell Operating Companies (Bell Companies) were created by the MFJ and each has a monopoly over local telephone service in its respective region. The MFJ restricts the Bell Companies from entering the long distance and equipment manufacturing markets. These line-of-business restrictions grew out of

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the central issue in the case: the ability of the local monopoly to impede competition in those other markets.

Before it was broken up, the Bell System used its control over local telephone service to maintain monopolies in long distance and equipment manufacturing. *See United States* v. *AT&T*, 552 F. Supp. 131, 162 (D.D.C. 1982), *aff'd sub nom., Maryland* v. *United States*, 486 U.S. 1001 (1983). Long after competition in long distance service and communications equipment became technologically and economically feasible, the Bell System abused its control of the local bottleneck to frustrate consumer choice and actual competition.

As Judge Harold Greene, who presided over the eleven month trial of the case and who continues to administer the terms of the MFJ, has explained, it was control of local exchange service

> that gave the Bell System its power over the competition. That control enabled the System to foreclose or impede interconnection to its network of lines of its long distance competitors and of equipment produced by its manufacturing rivals. It also made possible the subsidization of one activity with the profits achieved in another.

United States v. *Western Elec. Co.*, 673 F. Supp. 525, 536 (D.D.C. 1987), *aff'd in relevant part*, 900 F.2d 283 (1990). In other words, control of the regulated local monopoly bottleneck gave the Bell System the incentive and the ability to discriminate against competitors in other markets in the terms, price and quality of interconnection with the local network and to shift costs from unregulated markets to the regulated local market, where they were passed on to local ratepayers.

Until the success of the Department's suit, regulation and litigation had not been effective in breaking through that local bottleneck. The Bell System proved itself adept at devising new ways to use the bottleneck to hurt competition in other markets more quickly than the courts and regulatory agencies could order solutions. Among other things, the Bell System used its monopoly profits to hire legions of lawyers to make sure that any proceeding that challenged any aspect of the monopoly was bogged down in endless proceedings. For example, the struggle to allow telephone customers the right to use their own equipment on their own premises, rather than being forced to purchase that equipment from the Bell System, spanned decades—from the beginning of the Hush-a-Phone litigation in the 1940s to the break-up of the Bell System in 1984, which finally resulted in open competition in customer premises equipment. *See. e.g., United States* v. *AT&T*, 552 F. Supp. at 162–63 (discussing a portion of this struggle—the Bell System's use of "protective connecting arrangements" to discourage the use of competitors' equipment).

The Benefits of Competition After the MFJ

The MFJ addressed the problem of the local monopoly bottleneck and promoted competition in the long distance and equipment manufacturing markets by strictly separating the local monopoly from those markets. Because the local monopolies were barred from competing in the long distance and equipment manufacturing, they had significantly less incentive to impede competition in those markets. Competition in those two markets subsequently exploded. The result has been dramatically lower prices, better quality and more choice for American businesses and consumers.

MCI, Sprint and hundreds of smaller carriers vie with AT&T to provide long distance service to businesses and residences. The New York Times recently reported that in 1994 more than 25 million residential customers changed long-distance carriers—spotlighting the MFJ's incredible success in bringing real choice to consumers. Residential long distance rates have fallen more than 50 percent since the break-up of the Bell System. The United States now has four fiber optic networks spanning the country, another by-product of competition. Incidentally, AT&T lagged behind its competitors in building a fiber optic network—not surprising given that monopolists often are not the most innovative companies. These networks make possible all kinds of new services and enhance others, including the Internet. Similarly, businesses and consumers enjoy lower prices, more choice and better quality in communications equipment, as competition has eroded AT&T's power in that market and forced it to compete for customers.

Because of lower prices and better quality, Americans are communicating with each other, by phone, fax and computer, more than ever before. We are closer to each other and in better touch with each other, for business and pleasure, because of the MFJ and its benefits.

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The challenge facing the Nation today is to move forward by expanding competition without losing the hard-won benefits in the markets in which competition has flourished since the entry of the MFJ.

ALLOWING THE BELL COMPANIES INTO LONG DISTANCE

Section VIII(C) of the MFJ provides that any Bell Company may obtain a waiver of the line-of-business restriction as soon as it can show that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter. Judge Greene has granted over 250 such waivers. In fact, just last week, Judge Greene approved a waiver request made by all the Bell Companies and supported by the Department that will allow the Bell Companies to provide long distance services to their wireless customers. The core restrictions on the Bell Companies' entry into long distance for land line customers and into equipment manufacturing remain, however.

Ideally, we would like to remove these restrictions and allow the Bell Companies to be able to enter those markets, in keeping with our goal of a future in which every company is free to compete in every market for every customer. The trick, of course, is to ensure that removing the restrictions does not result in the re-creation of the old Bell System, this time on a regional rather than a national basis, complete with the incentive and the ability to impede competition in the long distance and manufacturing markets. Seven separate monopolies, each controlling one large region of the United States, would be scant improvement for the cause of competition over a single national monopoly.

And there should be no doubt that the Bell Companies' bottleneck still exists. Customers simply have no choice for local service. In fact, in the vast majority of states, it is illegal for would-be competitors to offer a local dial tone. To be sure, some companies have made in-roads in offering alternative means of access to long distance carriers for certain business customers. And imaginable technological developments may eventually provide a basis for widespread competition in the future. But that competition is not here yet.

As long as this bottleneck exists, it is imperative that a judgment be made—based on market *facts*—whether Bell Company entry presents a substantial possibility of impeding competition in other markets, before such entry occurs. Such a judgment requires expertise in markets and competition.

THE NEED FOR A DEPARTMENT OF JUSTICE ROLE

The responsibility for making that judgment should be assigned to the Department of Justice. DOJ is the agency with competition expertise, the agency whose unwavering focus is on the protection and promotion of competition. It has effectively enforced the antitrust laws in the telecommunications industry on a completely nonpartisan basis throughout this century, including, of course, bringing the suit that dismantled the old Bell System.

This focus on competition is fundamentally different than the technical, regulatory focus of the FCC. The two agencies *complement* each other; they are not substitutes. We believe that it is important that the FCC apply a public interest test to Bell Company applications to enter long distance and manufacturing. But such a test does not obviate the need for a market-based analysis by the Department of Justice.

In fact, wasteful duplication will arise if DOJ does not have a direct decisionmaking role, because requiring the FCC to filter the Department's antitrust analysis on such a critical issue would lead the FCC to duplicate expertise that DOJ already possesses and analysis already done by DOJ. As long as we agree that competition must be our guide, the most efficient, common-sense approach is to have a direct, decisionmaking role for the competition agency.

DOJ has supplemented its basic expertise in markets and competition with specific experience and expertise in telecommunications. Over the past decade, it has assisted Judge Greene in administering the MFJ—through Republican and Democratic Administrations alike—by reviewing over 350 requests for waivers under Section VIII(C), an average of about one every two weeks. Many of the most recent waiver requests have involved complex issues related to the competitive impact of the Bell Companies' provision of long distance services or equipment manufacturing.

In addition to reviewing requests for waivers, the Department has worked diligently with Bell Companies and other industry participants in searching for ways to remove the line-of-business restrictions consistent with protecting competition in markets that the Bell Companies seek to enter. Last month, the Department asked Judge Greene to modify the MFJ to permit a limited trial of inter exchange service by Ameritech, one of the Bell Companies, in two LATAs in Ameritech's service area,

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once Ameritech faces actual local exchange competition and there are substantial opportunities for additional local exchange competition in those cities.

The proposal builds on the idea that one possible basis for lifting the line-of-business restriction is the existence of local competition. It already has had an effect in promoting competition, as last Wednesday AT&T announced its plans to compete with Ameritech in providing local service in the trial area. The Department's motion was filed along with a stipulation by Ameritech and AT&T that the modification is in the public interest. The proposed modification represents an unprecedented consensus of industry participants, originating from a proposal by a Bell Company and now supported by major long distance competitors, local competitors, state regulators and consumer groups.

The proposed modification is the product of thousands of hours of staff work by the Department over the course of more than a year, including several rounds of public comment, as well as intensive discussions with Ameritech, state regulators, potential competitive local exchange carriers, long distance carriers and consumer groups. During that process, the Department deepened its already extensive expertise in telecommunications competition and its understanding of the competitive implications of Bell Company entry into long distance. Last week, we filed our brief in support of the motion, and we hope that Judge Greene will agree with us that the modification is in the public interest.

In short, the Department's experience in working with the MFJ uniquely positions it to assess what is actually happening in the market and whether there is a danger that entry by the Bell Companies could impede competition in other markets.

The only principled basis for concern about a DOJ role is whether it will inject unnecessary delay into the process of deregulation. This concern is utterly misplaced with regard to telecommunications legislation, as any DOJ review can be required to be completed within a specified period after filing of a Bell Company application—as it is by your bill, Mr. Chairman, and by Congressman Conyers' bill. Your bills take precisely the correct approach. DOJ would make its determination by a date certain; it is as simple as that. Congress can require it, and that is what these bills do.

The idea that DOJ review would cause unnecessary delay to Bell Company entry into long distance is a smokescreen that obscures the truth: DOJ review will not slow Bell Company entry into long distance unless such entry would be harmful to competition and thus undesirable for American consumers and businesses. Entry will be permitted as quickly as possible consistent with the appropriate entry test established by Congress.

No consideration of this question is complete, however, unless it also considers the long term savings in time and money of DOJ review. Bell Company entry that occurs without assurances that the entry presents no substantial possibility of impeding competition in long distance likely will result in the proliferation of complex, expensive antitrust and other suits under federal and state law, suits that will consume resources better spent on competing to offer American businesses and consumers better service and higher quality. Having DOJ apply a marketplace test as a condition to entry will avoid this waste.

Finally, a DOJ decisionmaking role has enjoyed overwhelming, bipartisan support in the past. It is an intelligent, effective approach to putting consideration of competitive facts and analysis at the center of our telecommunications reform efforts. It puts the interests of American consumers and businesses first.

Mr. Chairman, it is also critical that the test that DOJ applies be suited to achieving the fundamental purpose of DOJ review: protecting competition in long distance and equipment manufacturing, and we are deeply concerned that the test set forth in H.R. 1528 does not accomplish that. But we are grateful for your leadership and for introducing this important legislation that constructively addresses a crucial policy issue in the telecommunications reform effort. We very much look forward to working cooperatively with you and this committee on inclusion of an appropriate test for allowing Bell Company entry into those markets as soon as such entry does not threaten competition.

CONCLUSION

I am proud that our country and this Congress have the courage to take on the tough issue of telecommunications reform. It took a lot of courage to break up the Bell System's vertical monopoly and allow competition into the markets for long distance and equipment manufacturing. But we did and as a result we now lead the world in telecommunications.

The easy thing, of course, would be for us stay where we are today. That, however, is not the American way. We welcome the challenge of striving toward a future

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of open telecommunications markets. But let us confront that challenge in the wisest way possible, and that is by making real competition our guide. A DOJ role in authorizing Bell Company entry into long distance and equipment manufacturing bill is essential to assuring the kind of telecommunications competition that can and will lead the Nation to prosperity in the 21st Century.

Mr. HYDE. I certainly thank the gentlelady for her most welcomed words. I think we will go into the questioning now, before we hear from the next panel. And just kind of a housekeeping question. How many people do you have, more or less, in the Department of Justice, who concern themselves with the issue of telecommunications?

Ms. BINGAMAN. Mr. Chairman, we have approximately 50 people all told, including lawyers, paralegals and economists, support staff, who work on a full-time basis in this incredibly complex and difficult area. Those people have worked from the early 1970's. Many of them have been there. We have other new ones coming in.

What they do today is the difficult process of administering waivers and working with the Bell companies to grant waivers. They have developed tremendous expertise through that process, Mr. Chairman. We have granted with the Bell companies almost 270 waivers to allow the Bell companies into businesses they were prohibited by the consent decree from entering.

We work hard to allow them into businesses and to protect competition to do it. We have tremendous expertise because of that work and we work very hard at it.

Mr. HYDE. The business of the Antitrust Division of the Justice Department is to look at markets and competition and monopolies. That is your specialty. That is what your people are trained to do and that is what they do. And when you get into the subject of Bell—regional Bells moving into another line of work, so to speak, involving such an impact on the economy of our country, it seems to me that you cannot do that without effective market analysis which only your Department can perform, as contrasted with the regulatory approach, the approach that is used by the FCC.

So it just seems clear to me that you have to be at the table if we are to comprehensively and intelligently deal with these shifting markets.

Ms. BINGAMAN. Mr. Chairman, you said it better than I could. I could not agree more.

Mr. HYDE. I know that the bone of contention throughout all of these hearings, or one of the main bones will be the standard. There is no question. What you have said and what we have talked about and Mr. Conyers and others, we are going to have to work that out, struggle with it, and try to come up with something that is going to work best for everybody.

But I do have to ask you, why shouldn't Congress use the standard test that would apply to all other industries in these circumstances, a company entering a new market that they aren't currently in, which is the Sherman 2 standard? Why is that anathema in this particular situation?

Ms. BINGAMAN. Mr. Chairman, you have a very unusual historic situation here. The events we have all lived through and that I recounted in my opening statement and the chairman is so well aware of, were based on where we are today is 21 years of history

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with the Bell companies and potential dangers and real dangers which were the subject of the breakup case.

We did 8 years of discovery, the Department of Justice, against the old Bell system. We put on 11 months of evidence, 90 percent of our case, and we believed we had proved the case. AT&T, the former AT&T entered into the breakup in 1982, at the conclusion of 11 months of testimony at trial.

That testimony showed, Mr. Chairman, that the monopolies, which are now the regional Bell operating companies, which were struggling how to enter into these last two businesses, the core of the decree, the evidence showed in that case that they had cross-subsidized from their tremendous cash-flow base.

These are huge companies. The smallest of the regional Bell companies is $10 billion a year in cash-flow, your own Ameritech is $12.5 billion. The largest is $16-plus billion. These are big companies. And they have tremendous power to cross-subsidize and to harm competition and other markets because of it and the evidence in the case showed that.

It also showed tremendous power to discriminate against competitors from that monopoly control to not hook them up to their lines, to slow up hookups, to degrade quality, all kinds of specific actions the Justice Department proved in that case, we believed after 11 months of trial, were the cause of that.

So, Mr. Chairman, we are writing on a slate with an awful lot written on it. This is not a clean slate. These are not new issues.

They are issues that the Nation has struggled with, and the Antitrust Division specifically, with the Bell companies for over 20 years now. And, therefore, the consent decree that was entered into put the burden on the Bell companies to prove that there was no substantial possibility that they could impede competition in these adjacent markets from their monopoly base. That was the standard that was agreed to. That is the standard we have applied for 11, 12 years now. That is the standard under which they have gotten into many, many markets, including real estate, foreign telecommunications.

Just 10 days ago Judge Greene, on our recommendation, granted the Bell company's waiver request to get into long distance in cellular communications. Many, many waivers have been granted, including now waivers that go to the core of the decree, that is long distance.

So the standard is not impossible to meet. It is a standard that was imposed because of facts that have not changed very much since 1982, which is the monopoly bottleneck. And that is why we feel it is appropriate to retain.

Mr. HYDE. I just want to say to the distinguished Assistant Attorney General that you talk about the affluence of the regional Bells. If we were to pass a law making it illegal for a teenager to use a phone, they would all be bankrupt.

Ms. BINGAMAN. Well, Mr. Chairman, that is what competition has gotten us. You realize we have more phones, more digital phones, more faxes, more modums, you can buy phones through the mail and even at a gas station. You can certainly buy them at Sears. And that is because we have competition in phone markets which we didn't have 12 years ago.

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Mr. HYDE. And that is what we are trying to foster, absolutely. The gentleman from Michigan.

Ms. BINGAMAN. That is what we are about.

Mr. CONYERS. Thank you, Mr. Chairman.

And I want to compliment the Assistant Attorney General, because I think she has got a very onerous responsibility. You know, I am glad that Chairman Hyde asked you how many people you had. You have 50 people working on antitrust matters. I can remember when you had so many waivers, you could hardly put a person per waiver.

Can you describe how you are flooded with requests even now?

And maybe, as lawyers coming in from everywhere file very different kinds of suits, which you have to investigate first before you begin to make any kind of a legal judgment, which if we had a time period running, you would have to come back to Congress under circumstances that are very unlikely that you would be able to get the number of personnel and the resources that you need in your budget.

Can you take us through that for just a minute?

Ms. BINGAMAN. Congressman Conyers, we work hard on the waiver process. Over 350 waivers have been filed since 1984 when the decree took effect. Waiver requests, one every 2 weeks.

The original waivers were much simpler than the ones we deal with today in that they did not go on to these core restrictions at the heart of the decree, manufacturing and long distance. They went to such things as real estate, foreign telecommunications, other businesses which the original intent of the decree was to bar the Bells from because of this financial power.

As they became experienced and we gained experience, the conclusion was that was not necessary. It was unfair. It was harming the competition in those other markets and we let them into it. But that all took a significant amount of work.

We are now into, in this period, the difficult core issues of the decree. We have granted many waivers that go to the core of the decree. Most recently, within about the last month, the Ameritech waiver.

I see that Mr. Hester, my friend from Ameritech, the general counsel from Ameritech is on the panel following me. That is an example of a waiver that we worked on diligently and put literally thousands and thousands of hours into it because rather than rejecting it out of hand at the start, because we thought it was overbroad, we said this presents a way to allow a Bell company into long distance by opening the local market. Let's roll our sleeves up and get to work. We did.

We went to the State commissions. In fact, I have a very generous letter from the head of the Ameritech associated regional commissioners, the five-State PFC's that regulate Ameritech, dated April 25, if I could submit it, complimenting us for our work with them. We worked on the Ameritech waiver and granted it. We granted generic wireless waiver to let the long distance be supplied with cellular. We granted royalty waiver on manufacturing.

[The letters follows:]

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The Public Utilities Commission of Ohio

George V. Voinovich, *Governor* Craig A. Glazer, *Chairman*

April 25, 1995

Ms. Anne Bingaman
Assistant Attorney General
United States Department of Justice
Antitrust Division, Room 3109
10th & Constitution Avenue N.W.
Washington, D.C. 20530

Dear Ms. Bingaman:

I am writing to you in my capacity as Chairman of the Ameritech Regional Regulatory Committee (ARRC). ARRC is an ad hoc group of the five state regulatory commissions in the Ameritech region: Illinois, Indiana, Michigan, Ohio, and Wisconsin. The ARRC mission is to facilitate the exchange of information among the public utility commissions of the five states regarding telecommunications issues in general and telephone companies operating within the five respective jurisdictions in particular. The ARRC is made up of representatives of the commissions and/or staffs of the Illinois Commerce Commission, Indiana Utility Regulatory Commission, the Michigan Public Service Commission, the Ohio Public Utilities Commission and the Public Service Commission of Wisconsin.

On behalf of the ARRC, I want to thank you and members of the Department Staff for devoting many hours to meeting with the ARRC to seek input from and accommodate concerns raised by the respective state regulatory commissions and/or their staffs concerning the proposed request to Judge Greene to authorize an interLATA experiment in parts of Michigan and Illinois. Specifically, Mr. Willard Tom and Robert Litan of your Staff traveled to the region and met with the ARRC staff on a number of occasions concerning the proposed experiment. Moreover, the ARRC staff representatives received and were allowed to have input on the various drafts leading up to the proposed modification of the Decree filed with the Court on April 3, 1995. Although there may still be issues which individual state commissions and the ARRC may be raising in comments before Judge Greene, I can say on behalf of all of the ARRC states that the willingness of the Department of Justice to work with and specifically accommodate a number of state concerns represented an exemplary level of cooperation and teamwork between the Department and the state commissions.

Should the modification to the Decree be adopted by Judge Greene, by its own terms it calls for various regulatory and enforcement activities to be undertaken both by the States and the Department of Justice. I am heartened by the cooperative process that has occurred to date and

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feel that it bodes well for implementing the proposed trial in a manner which is in the public interest.

Again, on behalf of the ARRC, I express my sincere thanks for the Department's extra efforts to hear and attempt to accommodate state regulatory issues and concerns.

Sincerely,

Craig A. Glazer
ARRC Chairman

cc: Willard Tom, Department of Justice

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Mr. CONYERS. You are all heart. You are just so generous.

Ms. BINGAMAN. We are patsies. We roll over like that.

Mr. CONYERS. Let me point out, though, that we are not here to create seven regional monopolies after we finally have the largest antitrust case in American history that has gone on for all these years and all these administrations. And with the new technology coming on line, that is precisely what I worry about.

The FCC, bless their hearts, they are wonderful. I like them all; every Commissioner. But they have about as much real ability to deal with this subject as any other agency. This is an antitrust matter. It is an antitrust issue. And this case leaves me worried.

The alarm industry is already getting their lunch eaten by at least one regional Bell who is already starting the business up. Giving them a 3-year waiver is going to be very funny when they are already making it curtains for small businesses that are going to try to get into this.

I think that the reason we are doing this is because this is the largest antitrust case in America. And I would like you to respond to it.

But before you do, this flash just in: Olivia Alexandra Reyes Becerra was born to Prof. Carolina Reyes and Congressman Xavier Becerra Tuesday morning, April 25, 1995. That is the gentleman in the front row. The new baby.

I am asking for extra time, Mr. Chairman. The new baby was born at Good Samaritan Hospital in Los Angeles, weighed 6 pounds, 2 ounces; measured 18 inches and both mother and daughter are doing very well at home.

Congratulations, Xavier.

Could you make any comments about everything about the last announcement just in that I have been rolling together? And that would conclude my questions.

Ms. BINGAMAN. Thank you, Congressman Conyers.

I think the American people share the chairman's and your concern that competition be maintained. And the chairman and you agree on the role for the Department of Justice and the importance of strong and vigorous antitrust enforcement and the important role it has played.

Let me clarify what I said about waivers, because I was joking with you a little bit. But the important and the really true point is we could always simply say no to waivers. Just say no. We don't do that. We roll our sleeves up as we did with Ameritech. We get in and spend the tough time. And it is complicated work. These are incredibly complicated businesses and issues with competitors who have legislative concerns.

The Bell companies have legitimate concerns and we are in the middle, properly so. Someone needs to be in the middle and we work at it. We work at it to modify the original requests, send them out for second comments so that we can eventually let the Bell companies into the businesses in a way that is safe for competition in these other markets.

So, we are proud of our record on that, and we look forward to working with the committee in any way appropriate.

Mr. CONYERS. Thank you so very much.

Mr. HYDE. The gentleman from California.

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Mr. MOORHEAD. Thank you, Mr. Chairman.

One thing that concerns me about this is that we are talking about ancient days under a ruling by the court that is going to be overturned basically by legislation that is adopted about a giant AT&T that controlled long-distance and local telephone. We are talking about an era in which the cable companies, Metro Media, Time Warner, all giants, many of them are capable of competing very well with Bell operating companies.

General Telephone still is operating and able to go into any area that they want. AT&T now will be able to compete under the legislation that we are discussing with the RBOC's. You have got more competition than anyone could dream of. And always the power with the Department of Justice if it doesn't work out to move in and regulate when monopolies develop, if they do.

But it seems to me, that what we are talking about, the opportunity to develop a monopoly is not going to be very good.

Ms. BINGAMAN. Congressman, if I could respond to that, that is the picture the Bell companies paint. And it is a vision of the future we share. But it is not here today. As Bill Baxter said in a letter to the Senate just a week ago, to be able to imagine competition does not mean that it exists. And here is the problem. These companies do exist but they have been prohibited by law to date from being in local telephone service.

To effectively offer local telephone service, a cable company which has lines to the home and could imaginably be a telephone company has to interconnect its switches. It has to have telephone switches, not cable switches. There has to be number portability in place which doesn't exist today. The software hasn't been developed.

In other words, if you had to buy a telephone from a competitor and you were going to save $3 a month, but you had to change your phone number to do it so none of your friends could find you, and if you had a business none of your former customers could find you, that is a huge barrier to entry.

Number portability alone is a tough technical problem. Interconnection, access to poles, there are all sorts of issues that we worked through with Ameritech and the State commissions in Illinois and Michigan are working through.

So, it is true there are potential competitors out there for the local telephone business, but they are not in that business yet by and large. There are some and it is growing and we want it to grow and we applaud it, but there are many steps that have to be taken at the local level or at the FCC if this is done nationally as we hope it is before that actually happens.

Mr. MOORHEAD. But you already have some competition in local markets, the people that are cherry-picking. We know that. Does AT&T not have the ability to move in pretty rapidly in the local operating field if they desire?

Ms. BINGAMAN. It depends on the State, Congressman. We have a large number of States that still actually prohibit anyone except the local telephone franchise from offering local telephone service; other progressive States have moved to allow it. But interconnection is still an actual offering of local dial tone service and is very,

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very new. It is within months, 18 months old in the country. And it is not a major portion of the market. It is simply not.

Mr. MOORHEAD. Well, it depends, does it not, whether the legislation that is eventually adopted allows the State to prohibit open competition or not.

Ms. BINGAMAN. Yes, and we support that. But here is the problem. If you do not have a Department of Justice role in the middle, if you simply say as a legal matter open up your markets and you will get into long distance, you are tilting the playing field toward the Bell companies. Because what you are saying is, Hey, folks you can litigate what you have to open up, whether you have number portability, access to poles, there are a myriad of issues.

There are hundreds of issues you can litigate from now until the year 2010, and meanwhile they are in long distance and that is the danger of competition in these adjacent markets. To get it right and it can be done right, you need to open up first, interconnect, let competition begin.

Let there be real competition, a very short time frame for the Department of Justice, 180 days in the chairman's bill is absolutely fine. No problem. Let us look at it, see if there is real competition.

We had 120 days in the Ameritech order and then let them into long distance. That gets the incentives right. It keeps you from having to litigate forever about all the details of opening up the local market. And it gives them the incentive to open it up so that they can get into long distance.

Mr. MOORHEAD. Where my problem comes in, I have a difficulty having two agencies having basic control over who can get into these fields and who cannot, when you already have the Department of Justice always able to move in if there are antitrust situations that arise.

Ms. BINGAMAN. But, Congressman Moorhead, we move in only after a serious fact situation has developed and there is a terrible structural problem in the market. And you see, that is unscrambling eggs. We unscrambled this egg once in the breakup. We don't want to have to do it again.

The point is to look forward to apply the test that was developed because of the breakup, forward-looking, fast and to avoid that ever happening again.

Mr. MOORHEAD. With the chairman's permission, I would like to ask just one more question.

Is it fair to attribute the past behavior of the old united AT&T Bell system to the Bell companies today? Why should we assume that they will have the same incentive to discriminate and cross-subsidize that AT&T had?

Ms. BINGAMAN. It is really not an assumption, it is a fact. They have, by and large, they still retain, in most States, monopoly control. So you are not assuming they have the incentive. It is a fact, or the ability, I should say. And if you give them the incentive by letting them into long distance, that is what we have seen happen.

Mr. HYDE. The gentleman's time has expired, I regret, but we have another panel.

The gentlelady from Colorado.

Mrs. SCHROEDER. Well, thank you very much, Mr. Chairman, and thank you so much for being here.

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I wanted to ask about the standards, the standards that are in the Hyde bill. If you look at page 4, paragraph B, I assume that is the standard that you are to use, the Attorney General shall approve the granting of the authorization requested in the application unless you find by clear and convincing evidence there is a dangerous probability that the company or its affiliates would successfully use market power to achieve monopoly power in the market.

Now, what about that? How do you view that standard vis-a-vis other standards that you would be applying in the antitrust area?

Ms. BINGAMAN. First, clear and convincing evidence to my knowledge has never been required in an antitrust case. So that is extraordinary in that situation.

Second, this takes a standard for a situation, the dangerous probability of success of monopolizing, the Supreme Court last year in Spectrum Sports said that that requires 50-plus percent. In effect, the Court said that of the market that they seek to enter. That is a very high market share.

Now, if you look at what you are saying, we have to prove by a clear and convincing evidence, you are saying in 180 days, nothing would have happened. This is looking forward. Most monopolization cases are looking backwards. They are looking at conduct that caused 50-plus percent of this market to be gained. Now you are looking forward and you are saying, will they gain 50-plus percent and can I prove it by a clear and convincing evidence?

The combination of all of those factors means, we believe, in practical terms, this standard is virtually impossible to meet because of developing the need to develop evidence in advance, before anything has happened.

The standard itself can be applied in other cases looking back. It is applying in this case looking forward, before anything has happened that creates the problem.

Mrs. SCHROEDER. Have you precedents for other areas where you look forward, standards in other areas where you would be called upon or the Attorney General would be called upon to look forward?

Ms. BINGAMAN. We do, the VIII(C) test, of course, was developed specifically for this case. That is a standard that looks forward that says because of the past conduct of the entire Bell system, the regional Bell operating companies must prove there is no substantial possibility that they can impede competition in this market. That is one standard. It is the one that we support.

There is a second standard in merger cases section 7 of the Clayton Act. I don't have the exact wording right here. It is easy to find. It essentially is a forward-looking standard under which we judge whether there will be harm to the structure of the market from an acquisition. Here the question would be, would there be harm to the structure of the market from entry into that market.

It is a little different question, but it is a forward-looking standard. So those two we have tremendous and deep experience with. The VIII(C) standard we have been applying for 12 years now, a lot of litigation, a lot of court cases on it. It is very well understood and many, many markets have been entered by the Bell companies around that standard. So we don't see a problem with that.

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Section 7 of the Clayton Act is the second one that has never been applied in this situation, but it is a second forward-looking standard.

Mrs. SCHROEDER. But basically what I think I hear you saying is the standard in the bill that we have in front of us would be one that would be almost impossible for you to find against someone?

Ms. BINGAMAN. I think that is the fact because of the fact that it requires 50 percent-plus market share to prove it and you are doing it on a forward-looking basis before anything has happened. And that is the guts of the problem.

You can look forward and predict what will happen. You cannot in 180 days, I think, realistically expect to develop the evidence to look forward and say they are going to have 50-plus percent of the market and I can prove it by a clear and convincing evidence.

Now if you had a document in their files that said here is what we are going to do. We are going to do X, Y, and Z, by doing that we are going to get 50 percent of the market. Well, if you found such a document, you could prove it. But I would not stake my life here sitting here on the chances of finding that document.

Mrs. SCHROEDER. Well, that is very interesting. Has my time expired? I know you forgot to turn the light on.

Mr. HYDE. Yes, we have been watching carefully. The gentlelady's time has expired.

The gentleman from Pennsylvania.

Mr. GEKAS. I thank the chairman. I noticed it seemed to me that you began to wince during your opening statement when you were talking about the burden of proof by this bill being shifted to the Justice Department. And in the colloquy that you just had with the lady from Colorado you touched upon it.

Would it suit your purposes better, do you think the Justice Department would be better served if in the application by a Bell that there would be an averment, an averment made by the applicant that it would not stifle competition and outline why?

In other words, even though the burden of proof would still remain under this bill with the Justice Department, wouldn't it be easier to handle it if there were a requirement in this bill that the applicant aver that it would not damage competition and give provisions therefor?

Ms. BINGAMAN. I have never heard that suggestion, but I think what you are getting at, as I am interpreting it here, is something like a consent decree in effect which is easier to prove a violation of than proving the case originally from scratch.

You are positing a situation, as I take it, where you would be proceeding for violation of an affidavit, in effect, or an agreement, and you would be prosecuting violation of those words as opposed to the entire market fact; is that the basic concept?

Mr. GEKAS. Yes, go ahead.

Ms. BINGAMAN. I don't know if averment is the right form. And I don't know—to tell you the truth, I need to consult with my 50 people. I have never heard this question. Your basic idea that it is easier to prove a violation of a consent decree that is very clear on its face than it is to build an entire antitrust case, that is completely correct. And conceivably there is a way we could work with that concept. I really having never heard it, honestly, I cannot——

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Mr. GEKAS. Mind you, that I do not seek at this juncture to try to persuade anybody to change the texture of the bill that leaves the burden with the Justice Department. All I am saying is that leaving that burden alone, leaving it in fact, could we not bring the issue to a head if we did something like I am offering that in the body of the application there would be averments—I call them averments or statements——

Ms. BINGAMAN. Sworn statements under oath.

Mr. GEKAS. Statements that X and Y applications would not stifle competition, whatever we can craft in that regard?

Ms. BINGAMAN. Well, I will tell you, I would be very interested in sitting down with you and your staff and my staff and all of us sitting and thinking through this concept. I don't know if an averment is the right way as opposed to a consent decree, and, honestly, I don't—I am not positive it will work, but I think it merits serious exploration; I really do.

Mr. GEKAS. I am worried about sinking back into a consent decree status, because that means maybe we haven't moved anywhere from the existing law. So it is somewhere in that middle ground that we are going to have to explore. I think you and I will be meeting later this week anyway, and perhaps we can discuss that.

Ms. BINGAMAN. Yes. I will get prepared on it before I come in. I would very much like to talk to you about it.

Mr. GEKAS. I will try and learn something more about what I am talking about.

Ms. BINGAMAN. Hey, that is the business we are all in, right?

Mr. GEKAS. I thank the Chair.

Mr. HYDE. I thank the gentleman. The gentleman from Virginia.

Mr. BOUCHER. Thank you very much.

I would like to join with the others in welcoming you to the committee today. In preparation and in preference, preceding a set of questions that I want to ask you, I would make a couple of comments concerning the bill itself, which I find to be a better starting point for the debate on this subject than was the bill approved by this particular committee in the last Congress.

First, I would note that the chairman's bill contains what I think is a more appropriate standard that DOJ would use in reviewing applications from Bell companies to enter interLATA service; that was the very high hurdle of the VIII(C) standard contained in last year's bill. I think it is better, in fact, than section 2 of the Clayton Act, the standard relating to a dangerous probability from anticompetitive firms arising.

Unlike last year's bill, there are time limits in this measure that must be respected by the Department of Justice in passing on the application of a Bell company to enter the long-distance market, and if those limits are exceeded, then the application of the Bell company will be deemed to be approved. Therefore, the Department of Justice review itself cannot be used merely as a delaying tactic, a potential that clearly was presented in last year's legislation.

The chairman's legislation also exempts from the prohibition on interLATA services certain incidental services, such as the offering of cable TV service across LATA boundaries, the offering of wireless services across LATA boundaries, the provision of network sig-

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naling information necessary for operation of a long-distance network itself, when that information crosses LATA boundaries, and it also appropriately exempts from the prohibitions on interLATA service the origination of long-distance calls outside the service territory of the Bell company that is seeking to get into the business. I think that all of those exemptions make a great deal of sense, and I strongly support them.

The bill also extinguishes the GTE consent decree, which in view of the fact that GTE has now divested its interest in the Sprint long-distance network, clearly no longer has relevance. Having said those things, I would also note that I think some troubling questions remain, and I would note these and ask for your comments concerning them.

First of all, I would ask whether we should create this new and unprecedented role for the Department of Justice in exercising preapproval powers with the respect of the entry of one business into the market of another business. All of the current preapproval power is exercised by DOJ, the requirements of the MFJ itself excluded, relate entirely to the entry of one business into effectively its own market through a merger or acquisition within its own market, and we are presented in this instance with a very different circumstance, and I wonder about the appropriateness of having DOJ exercise that kind of preapproval power. Perhaps it would be better to leave this kind of decision to the expert agency in communications matters, the Federal Communications Commission, and specifically, its Bureau of Competition.

Second, I am somewhat concerned that the approval of legislation by this committee could lead to the eventuality of Bell companies having to get approval not only by the Department of Justice, but also by the FCC. I don't know where this legislative process may lead. Perhaps in a compromise between this committee and the Commerce Committee and the House, a dual approval role can be asserted.

Perhaps in a compromise between the conference in the House and whatever Senate product that finally emerges, that same compromise might be put into place and require that Bell companies obtain dual approvals from the Department of Justice and the FCC, and I think that is troubling.

Third, it ought to be noted that the present average time for the approval of waiver requests under the MFJ at the DOJ is about 4 years, and I think that is an unreasonably long time.

The Department has also failed to fulfill its promise to prepare triennial reviews of the operation of the MFJ, since the first one was prepared and presented in 1987. And given those facts, I wonder if you have adequate staff to carry forward and discharge the new tasks and duties that would be imposed upon you by this legislation considering the fact that in all likelihood, you will have seven companies coming to you roughly within the same time frame asking for approval of the right to offer long-distance service, and you will only have 180 days under the provisions of this bill in order to answer those requests.

So let's start with the question of staff. Do you think that you would have adequate staff to discharge these responsibilities given

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the vary narrow time frames, and if not, what additional staffing would you be requesting and do you think you will need?

Ms. BINGAMAN. Congressman Boucher, No. 1, there would be no further waiver process underway, so the 50 people who are experts and deal in tremendous depth, 10, 11 hours a day with these issues, would be available. That is No. 1.

No. 2, we have a total of 300-plus lawyers in the Department, and we would probably have to move some of them into this for crash training; we would have to get them up to speed. I don't question that. But—and could we do it? Yes. We can do it. Will it be hard? Yes, it will be hard. But is it important to the Nation? It is fundamentally crucial to this Nation, as we have shown from the last 12 years and what competition has done in long distance.

Mr. BOUCHER. So you are saying you could do it without additional staff?

Ms. BINGAMAN. Yes. Without additional—you mean from the Congress, you mean without coming back to the Congress for appropriations?

Mr. BOUCHER. Right.

Ms. BINGAMAN. Yes. We would have to—you are always balancing in a management job priorities. This would be a short crunch for a year-and-a-half, whatever it took to actually get through this, staff up, do it and move on. And there would be things that would not be done of priority too, but that is—you never have enough people.

Mr. BOUCHER. Well, I think that is a question that might bear a little further examination later.

Let me quickly ask one other question, because my time has expired. We have today a number of long-distance companies that also have local exchange businesses. Sprint, for example, has about 6 million local access lines. Are you familiar with complaints that have been raised with regard to those companies using their local exchange business as a bottleneck, to create a disadvantage to their long-distance competitors?

Ms. BINGAMAN. I have understood that there have been such complaints. I am not——

Mr. BOUCHER. They haven't come to you in your enforcement role with regard to the Sherman and Clayton Acts, however; have they?

Ms. BINGAMAN. Congressman Boucher, I have to get back to you on that. I know at the most general level what you are talking about, but I can't state specifically.

Mr. BOUCHER. All right. If there have been complaints raised with the Department of Justice and, more particularly, if the Department of Justice has acted on those complaints, I think it would be very helpful for us to have that information.

I am personally unaware that any complaint has been put forward by the Department itself that an existing long-distance company that also has a local exchange business has used that local exchange business as a bottleneck to the disadvantage of its long-distance competitors. And after all, that is the entire issue that we are discussing here today.

Mr. HYDE. The gentleman's——

Mr. BOUCHER. I would be interested in knowing what the history is.

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Ms. BINGAMAN. I think I'll see you later in this week also and I will endeavor to have the answer.

[The information follows:]

You have asked whether the Department has received any complaints, or acted upon any complaints, alleging that an interexchange company which also provides local exchange services has used its local bottleneck to disadvantage its interexchange competitors. Aside from the actions filed against AT&T and GTE, we have not taken enforcement action against any company alleging that the company used its local bottleneck to disadvantage its long distance competitors. We have from time to time received complaints about local telephone companies abusing their bottleneck monopoly to favor their own or affiliated businesses. We also have received complaints similar to those made by MCI in filings before the California PUC and AT&T in its countersuit against Bell Atlantic. In those proceedings, the interexchange company has alleged that the BOC was using its local monopoly to impede its intraLATA toll competitors.

The Department introduced evidence in its case against AT&T showing the ways in which AT&T used its local monopoly to impede competition in the interexchange market. Because of this evidence the Department insisted, and the Court agreed, that structural separation of the local and interexchange business was necessary. The fact that the Department has not taken enforcement action against other interexchange carriers with small or dispersed local operations is not probative of whether there should be concerns about allowing the BOCs to enter long distance while still retaining their local monopolies. The potential incentive and ability of a BOC, which controls nearly one-seventh of the country, to disadvantage a competing long distance competitor is far greater than for other companies that offer both local and long distance service. Even GTE, the largest of the independent companies, generally serves non-urban areas, and its local operations are geographically dispersed. That is why the BOCs were subject to the line-of-business restrictions while GTE was allowed to offer long distance services through a separate subsidiary.

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

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the chairman.

Ms. Bingaman, as it has been said previously, it is good to have you with us today. Ms. Bingaman, let me make a general statement or two and then I will invite you to either affirm or reject the contents thereof.

It appears to me that the broad challenge before us as we develop telecommunications policy, to advance longstanding interrelated goals of competition and diversity, brings us about the business of balancing certain interests in the arena of telecommunications. The Department of Justice I am confident has gained valuable experience, for want of a better word, in policing the telecommunications industry since the breakup of the old Bell system in excess of a decade ago.

During that time, the Antitrust Division of the Department worked with Judge Greene to enforce the terms of the consent decree under which much of the telecommunications industry has been operating. The imposition of government regulations generally result in an increase of consumer prices. But proper enforcement of antitrust law should result in competitive markets that hopefully reduce these prices in the best of all worlds. Participation by the Department of Justice in the entry process, it seems to me, will further the goal of ensuring that every company is free to compete in every market for every customer. For this reason, Mr. Chairman, I applaud you for having introduced the bill, No. 1; and No. 2, for having convened this hearing, to ensure that the Department of Justice will play a role in shaping our telecommunications future.

Now, Ms. Bingaman, confirm or reject, or both.

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Ms. BINGAMAN. I agree with every word you said as far as I know. I think that is exactly right. I don't think law enforcement is regulation. I think it is a very different animal and a very different business we are in. We are about not regulating in order to have competition which we have already seen has drastically lowered long-distance prices, made it more available, made manufacturing and other equipment more available, more innovation, lower prices, so I am with you 100 percent. I don't disagree with anything you said.

Mr. COBLE. Well, there is an old saying, Ms. Bingaman, in the world of sales. Once you close the deal, get the heck out of there before he changes his mind. So having said that, Mr. Chairman, I am going to yield back my time, and again, I thank you for being with us this morning.

Ms. BINGAMAN. Thank you.

Mr. HYDE. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I yield to the gentleman from Michigan.

Mr. CONYERS. Thank you. I thank the gentleman for yielding.

Ms. Bingaman, could you make me feel a little bit better about the response you gave to a number of questions from my colleague from Virginia, Mr. Boucher. You know, it is hard for us to come up with Bell violations now because there is a firewall. I mean it is after the firewall goes down that the fun starts. So whether they have had their cookie in—their fingers in the cookie jar before the walls go down is begging the question. I would hope they would be on their best behavior now. But what about afterward? And that is what you are trying to do, to look ahead to find out what is likely to happen.

And you know, I respect the Baby Bells as much as anybody else. But this has not been a very happy factual history about the kind of battles, commercial battles that have been engaged in in trying to make sure that the local monopoly has been kept in tact.

Ms. BINGAMAN. I think—I agree with you completely, the Bell companies present a different fact situation than the Sprint situation. I think that is what Congressman Boucher was referring to. The Sprint has local phone companies and also long-distance. So it is vertically integrated, but it is very different than the Bell companies in that they tend to be small, not large contiguous regions. They have different incentives and ability to discriminate, I am told. Because of that, I will get up on it, Congressman Boucher, we do have different experts in the Department on this. He was speaking of, I believe, Sprint and Sprint's vertical integration into long distance and asking what lessons we have learned from it.

Sprint is a very small company in local markets. I believe it is in Tallahassee, FL, and Hawaii, and I don't know where else, but it is very small. It is a very small fraction of U.S. phone service and their small local markets compared to the regional Bell operating companies which are, of course, regions of the country, large and vast regions contiguous with tremendous market share and market power in their regions.

Mr. CONYERS. Now, this view that is being brought forward by myself and a number of my colleagues is not necessarily a liberal or Democratic view, and I would like to get the record very clear

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on this. I can't remember quoting Judge Robert Bork before, but I will at this moment in history. Let the record show I quoted him: these restrictions on Bell companies are still supported by antitrust law and economic theory and should be retained. The Bell company's argument is that the decree's line of business restrictions are relics of the 1970's. The industry has changed dramatically, and the restrictions are the product of outmoded thinking. And he goes on and on and on.

But the point is that this is not a liberal or conservative, Democratic or Republican, view about how this economic question ought to be treated. Are there others of this opinion that are not Democratic or from the administration that are supporting this?

Ms. BINGAMAN. There are actually a number that have been heard from recently. Of course, Professor Baxter at Stanford was the person in charge of the decree in the Reagan administration. He is number one and has written several letters. Judge Bork is a second. Vin Weber, the former Congressman, had a letter to the editor in the Washington Times on Sunday; Vin Weber expressed the same sentiments a couple of days ago. I don't have it here with me, but it was published in the Washington Times. Jim Miller, former Budget Director at OMB, has expressed similar sentiments. So those are four individuals I am aware of.

This is a question of free markets and competition and not allowing monopolies to stifle competition in adjacent free markets. It really has nothing whatsoever to do with politics, as the history of the AT&T case itself shows most dramatically.

Mr. CONYERS. Let me ask you finally, suppose we don't take your sound advice. You are telling us that you are going to probably have big trouble with a standard as low as this. Wouldn't we be moving back into an antitrust situation? I mean I see a backing up. If you are right, you are the one that has been prosecuting, you are the one that has been working with this in the courts, you have been taking the modifications for all this period of time. What do you see? I mean what is the bottom line in terms of us moving the wrong way? What will happen in the economy?

Ms. BINGAMAN. No one can predict with certainty, but my deep concern is that if the incentives are not done right so that the Bell companies have a very strong desire to get into long distance and therefore to open up the local markets, as the Bells last year required, and if the entry test is too low, so that we had to approve 50 percent or more market share in that second market before any action could be taken, my concern would be that we could not step in to act until the situation had gone so far down the road that markets had been seriously harmed and competition in those adjacent markets had been seriously harmed, which means higher prices for consumers, less innovation, less innovation for the country. Innovation is an important byproduct of this that shouldn't be overlooked.

The breakup spurred the delaying of fiber-optic cable coast to coast and that is the information superhighway. We are 10 years ahead of the rest of the world, maybe 20 years, because we broke up AT&T. So innovation contributes enormously to the economy, as do low prices. And the problem is, if you don't have that, you lose precious time. And this Nation is in a race against some very smart

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competitors around the world. We need every year, we need to do it right, we need to do it smart, we need every ability of every company, and we need every competitor, we need the benefits that competition can bring to these markets which we have already seen. So our concern is, if we step in 5, 6, 7 years down the road only after significant harm has occurred, that will be a tremendous loss to the country, to our innovation, to prices, to consumers, and to where we could be if we do it right.

Mr. CONYERS. Thank you for your response.

Mr. HYDE. I would just say parenthetically, in this very important discussion we do hear opinions from celebrated jurists, professors, authorities, and as with the new major league baseball teams with so many different names, if they didn't have a uniform on, you wouldn't know which team they were playing with, and it would be helpful, perhaps if we had a scorecard and we would know who has retained whom so we can filter their opinions through that retention, just as an idle wish.

The gentleman from Indiana.

Mr. BUYER. I reserve my time.

Mr. HYDE. I warmly thank the gentleman from Indiana.

The gentleman from California, the new father.

Mr. BECERRA. Thank you, Mr. Chairman, and of course this will affect my new child sometime in the future, I suspect.

Ms. Bingaman, thank you very much for being here and enlightening this committee on the Department of Justice's position on this matter. I think it is still very complicated and, quite honestly, I think most of America probably understands very little about what we are discussing, the technicalities of antitrust, of monopolies, and the difficulties in discovering what is best to do in this area of technology for telecommunications.

Let me ask you a question which I think has a great deal of validity and concerns me greatly with regard to the residential customer. And I make this question because I am not so much concerned about the business customer or the residential customer that has the high-tech facilities to communicate more than just with a telephone, but the residential customer who right now receives highly subsidized residential phone service from the regional Bell operating company.

There is a concern that if we wait until the long-distance carriers get heavily into the local market and provide that competitiveness within the local market, until then, we will not let the RBOC's get into the long-distance market. Some argue that that will never happen, because the long-distance carriers will never want to do more than just cherry-pick the lucrative segments of the local market and leave most of the residential customers behind because it is not lucrative to go after the grandmother and grandfather in the rural area of a State where it costs a great deal of money to provide a connection for that individual and you get very little out of the person.

How do we guarantee that in saying that we want to see the long-distance carriers be able to compete in the local market, that we will ensure that the long-distance carriers will universally compete in the local market to ensure that every customer, including the average residential customer, is able to maintain reasonable

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residential telephone rates, given that right now the RBOC's have to subsidize tremendously the cost of that residential service?

Ms. BINGAMAN. Again, the future is hard to sit here and say with certainty, but I can tell you what the hope is and what the belief is that will occur. First, the bills that have been proposed in the Senate here and last year establish a universal service fund so that a universal service board, a joint Federal-State board can assess charges and ensure that residential rates don't rise because of this. That is number one. That is a very important point that everyone shares your concern, and it is a vital one, that phone service remain affordable, available, open and there for the entire country, because that also has made us great as a country, universal service, and that is an important principle.

Two, on competition for residential consumers, long-distance companies are not the only possible competitor, although they are an important competitor, certainly. Cable companies have wires to the home right now; cable companies provide 96 percent of Americans with a cable line. If the interconnection and unbundling is done right and it happens before the Bell companies get into long distance, so that you have portability that I talked about, Joe Blow can say or I can say, hey, I would rather buy my telephone service from my cable company because I can get it all at one price, it is a good deal, I have to keep my phone number to do that. If we do these things right, cable companies can interconnect wherever they want to to the intricate phone system and it is open to them, and you have—a number of portability and access cable companies are a second important potential competitor for local phone service. Competitive access providers are principally in downtown regions, as you note. I think eventually they will get to residential areas as well.

So those are the points. There are several competitors and the goal of universal service is addressed by the universal service fund.

Mr. BECERRA. Let me see if I can ask two more quick questions. One, and I think your answers to Congressman Boucher somewhat addressed this, but the review period of 180 days provided for under H.R. 1528 seems to be a period that given current circumstances would be difficult to meet or the current situation that DOJ finds itself in. But you indicated that you thought you had enough personnel to handle any crunch that might occur.

Are you saying that the 180-day review period in the bill itself would be adequate for your purposes? Would you feel comfortable with that period of review?

Ms. BINGAMAN. We will meet that period of review. We will meet whatever the Congress says. We can live with that, if that is the question.

Mr. BECERRA. Mr. Chairman, if you will indulge me one last question.

You stressed something that I don't believe can be emphasize—overemphasized, and that is that looking prospectively makes it very difficult for anyone, whether it is DOJ or FCC, to somehow determine if there will be competition in a particular market. And because any review of a monopoly situation always requires you to be able to look at past experiences and gather evidence from the past, it would be very difficult to ever determine if in fact an

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RBOC, in trying to get into long-distance business, would monopolize that business and ultimately get us back for what we were in before.

Are you saying that the standards of review and the standard of evidence that is contained in 1528, H.R. 1528, because of its prospective review, makes it impossible for anyone, whether it is DOJ or FCC, to be able to make any determinations on future monopolistic behavior?

Ms. BINGAMAN. What I am saying is the standard in this bill, which says that the Attorney General shall approve the application unless the Attorney General finds by clear and convincing evidence that there is, there is a dangerous probability that such company or its affiliates would successfully use market power to achieve monopoly power in the market the company seeks to enter, that is the standard I am talking about.

What I am saying is that the combination of prospective judgment, of facts that haven't occurred, of the need to prove by clear and convincing evidence 50-plus percent market share would be obtained in this market, all of those things together mean I think as a practical matter this standard would be very, very, very difficult to meet. Unless you found the document I referred to earlier that——

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

Mr. BECERRA. Thank you very much.

Mr. HYDE. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman. Thank you, Ms. Bingaman.

As Mr. Becerra has said, I too share the concern, representing a relatively rural district in Tennessee, that we always have that telephone service available to people out in the rural parts of the country at a reasonable rate, and I take your answer to his question to mean that the Justice Department is fairly comfortable, too, this will continue, given the active competition?

Ms. BINGAMAN. Given the active competition and the provision of the bills with which I assume this bill would eventually be merged for the universal service board and the universal service fund. Those are important protections for rural telephone customers.

Mr. BRYANT of Tennessee. From a factual, historical perspective, was this argument also made in the earlier efforts to break up the Bells?

Ms. BINGAMAN. Was this——

Mr. BRYANT of Tennessee. Long-distance service, was that——

Ms. BINGAMAN. Was the argument made about the need to protect residential consumers?

Mr. BRYANT of Tennessee. Particularly, yes.

Ms. BINGAMAN. Truthfully, I can't—well, I mean yes. I guess the short answer is yes. AT&T defended the original case on the principal grounds that it needed to have the local monopoly, because it was a way—the cross-subsidies that had been built into the telephone system historically were a way to, in effect through the tariffs or through the rates charged, protect low rates for residential consumers by charging high rates to business customers. Yes, that was part of the case.

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Mr. BRYANT of Tennessee. Well, this is obviously a very important issue. An awful lot of us here in Washington who represent these types of districts—and we also want to have that same level of comfort, that if we go this route, our voters back home will have that service.

Let me go into another issue, that of the alarm industry, the burglar alarm industry. I understand, being a new Member, I don't have a historical background, but I understand that agreements in the past have given this industry a number of years, I think up to 6 year's protection. I know the chairman's bill allows for 3 years before the RBOC's can get into the alarm industry, or business. And I understand that maybe some of them are already doing it anyway. But how would the DOJ weigh in on that issue of providing the alarm industry some period of time?

Ms. BINGAMAN. My understanding on this alarm industry situation is that the bill last year, and I have no understanding about the bill this year, but last year, was the result of a long series of discussions and compromise. I don't think there is any magic number. And, frankly, that was the agreement reached and it was livable, if it was acceptable to the people directly involved. We would judge discrimination or cross-subsidies in the alarm industry just as we would any other competitive adjacent market. There is no difference in the law between harming a competitor in the alarm industry versus harming a competitor in long distance or manufacturing, if you are using monopoly power to discriminate, not hook them up, cross-subsidize or whatever. So conceptually the law is not different for the alarm industries than for otherwise as a matter of principle.

Mr. CONYERS. Would the gentleman yield briefly on that subject?

Mr. BRYANT of Tennessee. I would be happy to.

Mr. CONYERS. But the alarm industry is smaller businesses, and smaller businesses are going to have a more difficult way of finding their way around, and it seems to me there might be a difference, when we are talking about information services, media industries, telecommunications, we are talking about businesses on a different order of magnitude. And it seems to me that could put them in harm's way in a very—very rapidly.

Ms. BINGAMAN. And apparently that was taken into account. I take it that that has been a factor in thinking about this.

Mr. BRYANT of Tennessee. And the Justice Department would play an active role; if such an agreement were in a bill, DOJ would play a role in making sure that people don't violate that and the alarm industry is protected?

Ms. BINGAMAN. Yes.

Mr. BRYANT of Tennessee. I yield back the balance of my time.

Mr. HYDE. The gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman.

I wanted to follow up a little bit on the questions asked by Mr. Becerra and Mr. Bryant relating to universal service. We basically have universal telephone service in this country today and we all want to make sure we continue to have universal service at reasonable prices. I am further concerned, however, that in addition to protecting that goal, which we largely have achieved, that as we move forward technologically into fiber optics and the information

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superhighway that we have whatever is required in place to make sure that we don't have relatively less lucrative parts of the country, to wit, impoverished inner cities as well as rural areas, that don't get service.

So the question I have for you is how would Mr. Hyde's bill and the other bills address this, both with the quasi-monopolies and the competitive markets, to make sure that when the fiber optics are done east San Jose and rural Tennessee get service, because if that doesn't happen we will have a greater division of have and have-nots in this country that will almost be impossible to overcome?

Ms. BINGAMAN. I don't believe the universal service concept is addressed directly in this bill. There is another bill in the House that does, and the Senate bill that is pending there does. It is obviously an important issue that needs to be addressed.

My understanding of it is that the legislation—I am more familiar with it on the Senate side because it has been there longer. The House bills were just introduced last week and I honestly have not had time to read that portion of them. But generally, what is—the structure that has been understood to be workable was to set up a joint universal service board, a joint Federal-State board, that would define universal service in a changing way, so that it would rise as the standard of technology rose.

For instance, 50 years ago universal service might have been a telephone like this on a wall that you rang up with a four-party line. Today universal service means a single party line without any question, and of course we buy our own phones today. We don't—because of what we have been talking about here. So the concept of universal service is one that goes up as technology improves, and this universal service board and the legislation that has been discussed would have the authority to define universal service to be, I believe, the language of the Senate bill, that is all I can address, something like the universal service is service which a majority of Americans receive, or language to that effect.

The point is that universal service changes over time; it improves over time. Your concerns are right on. We don't want to have some people with a black box telephone while everyone else is on fiber optics. But on the other hand, you can't by law say that everybody gets the absolute best technology available at this instant in time, because we can't afford that. So it is a gradual ramping up of the whole country as technology improves.

Ms. LOFGREN. Let me ask a followup question. One of the issues that is being talked a lot about in California today is the necessity of providing as soon as possible fiber-optic service to schools, and in fact the Bell, Pacific Bell, has just come out with a brandnew program to really accelerate fiber optics into schools, although it is not every school.

What mechanisms could we use to promote and accelerate that effort so that every school in America has access to that as quickly as possible?

Ms. BINGAMAN. I think your concern is again shared over on the Senate side. There is an amendment in that bill; it has been worked on for several months, so they are a few weeks ahead of the process here in the House. But it addresses the same issue, and it would provide the amendment in question. Whether it passes or

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not, I don't know, but it would provide for again the universal service fund to impose, in effect, a levy on providers of telephone service and to wire up to whatever standard the universal service board and the legislation set forth. So that is the idea, basically.

Ms. LOFGREN. One final question, and it is one that has been posed to me by local governments repeatedly. Where would these bills leave local government in terms of regulating the things that they traditionally regulate, to wit, their streets being ripped up for cable to be laid? And there is an issue actually in part of my district right now, in Milpitas, where the city has been challenged on whether it has the authority to regulate which streets are going to be torn up at what time. Does this deal with their concern, this bill or any of the bills?

Ms. BINGAMAN. I don't believe this would preempt any kind of local jurisdiction over issues like that that I am aware of. I mean I have said at other times, we live in sort of a messy system, but our Founding Fathers created it that way. We have many different levels of government. They each have overlapping responsibilities. This is one place it overlaps. But clearly, local jurisdictions need to deal with such things as streets and so forth. I am not aware of a problem.

Ms. LOFGREN. Would that permit them to continue to have franchise fees and that sort of thing?

Ms. BINGAMAN. I am not aware that it wouldn't, I will put it that way. I have not heard it said that it would not. I would not purport to know exactly, but I don't believe so.

Mr. HYDE. The gentlelady's time has expired. The gentleman from Illinois, Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman.

Ms. Bingaman, thank you for coming in today. I know you have been here a long time and you have answered a lot of questions. But I would like to take you back to one of the primary roles of this committee, and that is oversight of the Department of Justice, and ask you a couple of questions about the new decisionmaking role that you are going to have. This is a new responsibility for you at the Department of Justice. I have two questions about whether we might be—I hesitate to use slippery slope, but I will say starting into an area that may be expanded later.

First, in the operation of the Department of Justice itself, the staff that you have devoted to telecommunications issues is sizable as well as the intellectual property section, the foreign commerce section, computers and finance section, energy and agriculture section, transportation section. You have stated on several occasions that the expert in antitrust is DOJ and they should be involved in the decisionmaking process.

In regard to these other areas, are we looking forward to DOJ coming forward and seeking to have a decisionmaking role for questions in these areas as well as telecom?

Ms. BINGAMAN. I think the role envisioned for telecom is unique because of the unique history of the AT&T case. We share with the FTC general authority for preapproval of mergers in all industries, and so it is a little bit similar, but that is a law that has been on the books for many, many years and works just fine. The telecommunications industry is unique because of this 20-year history

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we have talked about. So the answer, the short answer is no, we don't envisage anything like this.

Mr. FLANAGAN. OK. That is the answer I was hoping to hear.

The second question I have is overreaching in the other direction into the industry. This legislation provides for the Bells to enter into the long-distance market in an incidental way in several ways without seeking permission, or without seeking a waiver or any other such rule from you. If I were a prudent chief counsel for one of the Bells, or for anyone else seeking to enter in here, I would seek an advisory opinion from you as to whether this qualifies for such a situation where we don't need to seek an opinion.

Do you envision this happening, that is, DOJ actually having to answer far more questions than this legislation provides because of the heavy penalties possible against the bills that come from antitrust legislation?

Ms. BINGAMAN. No, I really have never heard that suggested or thought about it. You are saying would it generate more requests for business reviews as to the legality of conduct?

Mr. FLANAGAN. Right.

Ms. BINGAMAN. I don't believe so. I think the legislation is clear enough. I think the ideas are familiar enough, because they have been worked through for, frankly, a long, long time, that I think the—whatever finally emerges would be well enough understood that it would not generate additional business review requests.

Mr. FLANAGAN. All right. I yield back, Mr. Chairman. Thank you very much.

Mr. HYDE. I thank the gentleman. The gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, I thank you very much for convening this hearing and as well the ranking member for his very instructive comments. Assistant Attorney General Bingaman, I also thank you for the time that you have given, and I want to share just a few comments that I have as it relates to the consumer.

This era, as we move into the 21st century, reminds me somewhat of the era of the budding industrial revolution as we moved into the 20th century. The telecommunications industry sort of poises as—poses itself as that kind of industry moving on into the next couple of years. For example, it is to be viewed as the employer of the 21st century, and I would think that we view it also as the economic wind of this Nation for the 21st century. And so as we look to making sure that it meets all of those inspirational goals, I think it is important that we not look at regulation as a distraction. Before 1974, the previous monopoly in Bell was not intended to be malicious, but without regulatory involvement, wound up resulting in an absolute bar to competition, some might think. So my questions are geared toward making sure that what we are trying to do prepares us well for this continued industry into the 21st century.

Let me briefly ask a question that has been asked before, but I would like to put a different spin on it. In this climate of deficit reduction and reinventing government, can you firmly tell me in terms of your view of the section that you are in charge of that you will come out unscathed, if you will, and be able to have the necessary personnel to comply with what might be the results of the passing of this legislation? Meaning that I noted the numbers 50,

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I have heard you say 300, and would you have to cast those into the lot? Can we count on the Department having the necessary staff to do this job?

Ms. BINGAMAN. Again, I can't predict the future, but I can tell you this: We have approximately 800 total employees in the Department, in the Antitrust Division right now, 330 roughly or perhaps 340, I don't know the exact number of lawyers, the rest paralegals, economists, and support staff.

Believe me, I share your concern on almost an hourly basis about the effects of talks about budget cuts on us, as does any other head of an agency. I am very concerned about it. We are working hard to rebuild. I will tell you honestly, the Antitrust Division was cut in half in the 1980's. We had, we had more people in 1972 in the middle of the Nixon administration than we do today. That is a fact.

So I am arguing to the Budget Committees that we need these people, because the economy has tripled, and I hope, I hope and trust that argument will hold sway. But if something—in answer to your question, 50 people is not a huge percentage of our 800, and this area is so vital that if this bill were to pass, this responsibility given to us as I believe it should be, I cannot conceive that budget cuts which I hope will not happen, but people talk of them, would be so great as to destroy our ability to even function with the staff we need and to devote 50 people to this. So I think it can work.

Ms. JACKSON LEE. Well, I ask that question, and I am going to ask you three others and I am going to ask one of them to be in writing and I am going to ask them together. I asked that question because I think the Department of Justice involvement creates what I think helps to be an even playing field, and that is what I am seeking, is that opportunity, not a discriminatory effect, if you will, on one group versus another, but an even playing field.

I would ask the question following Congressman Lofgren's inquiry regarding local involvement and local opportunity to regulate, and since you have to maybe assess that again, I would appreciate maybe getting an inquiry. I am particularly concerned coming from the city of Houston having the right to be involved locally.

My questions that I would like you to answer would be, again, trying to get back to this proposed distinction or standard change from VIII(C) to the so-called dangerous possibility. I would like you to articulate for me what you think the role of the Justice Department is to be or should be if this legislation is passed as we are looking to create the even playing field and how a newly changed standard might impede that role. That is the first one. And then if you would give me your spin on the Justice Department's role in the Ameritech customer's first plan and how effective that was. Those two questions I would appreciate you answering and I appreciate you being here.

Ms. BINGAMAN. Thank you very much. I will do so.

[The information follows:]

I believe the Division played a very important role in helping to forge an unprecedented consensus between the parties involved in Ameritech's Customers First plan. The plan has been supported from practically all sides: AT&T and Sprint, Ameritech's future competitors in the long distance market, have endorsed the plan; potential local competitors of Ameritech such as MFS support the plan; consumer groups and state regulators have also voiced their support.

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Enthusiasm for the trial and satisfaction with the process by which the plan was devised and modified were evident in the briefs filed by interested parties last month. Illinois Governor Jim Edgar wrote in his filing that he "would welcome this carefully considered and innovative first step toward full interexchange competition," and praised the Department "for its consideration of the views of a variety of industry participants and its inclusion of state regulators in developing the Proposed Order." Similarly, the state commissions of Ohio, Illinois, Indiana and Wisconsin commended the plan as "a decisive step toward the goal of a competitive telecommunications market," and applauded the Department "for its active role in engaging in discussions with the Ameritech Regional Regulatory Committee . . . and for its diligent efforts to address concerns regarding the original Draft Order proposed by Ameritech."

These types of comments have been characteristic of the response we have received from the various parties directly affected by the plan. We believe the Ameritech trial will prove an important step on the road to nationwide telecommunications competition, and we look forward to continuing our work with interested parties in the months to come.

In order to ensure that competition develops to its fullest potential in the telecommunications arena, the Department of Justice should have a role in assessing marketplace facts in advance of Bell entry into long distance and manufacturing markets. Such an assessment is vital prior to entry, as an examination after the fact could prove to be too little too late in view of competition lost and could be as time-consuming and costly as was the original AT&T case that spawned the Baby Bells. The Antitrust Division has had years of experience of investigation, litigation and oversight of consent decrees in the telecommunications area, and it is most expert in dealing with competition matters.

The standard by which the Department would assess the Bell Companies is important as well. We have always supported the VIII(C) standard, in use now for more than a decade, which says there should be "no substantial possibility" that a Bell could use its power in the local market to impede competition in the market it seeks to enter. When Chairman Hyde introduced H.R. 1528, we applauded his recognition of the proper role for the Department as markets make their transition from monopoly to competition. We were very concerned, however, that the standard initially proposed in committee would not have provided meaningful protection for competition. The revised standard adopted on May 18 is a step in the right direction and we welcome that change.

Aside from the standard, however, there are important procedural issues that remain to be resolved—for instance, because, unlike current law, the burden is placed on DOJ and not the BOCs in the bill, it remains to be seen what powers DOJ will be permitted to use to obtain information from applicant BOCs and what incentives the BOCs will have to provide such information. We look forward to working with the Congress as the legislative process develops to try to resolve these types of important issues.

Mr. HYDE. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Thank you for bringing forward this legislation, which I think is in a vitally important field.

Ms. Bingaman, I very much agree with your comments earlier about the need to promote innovation and the speed with which that innovation takes place. I think we have seen a dramatic explosion in technology in this area that is wonderful for this country and for anybody who needs to avail themselves of these services, which is everybody in the country.

I would like to follow up on Congressman Boucher's questions, because I very much respect the role of the Justice Department in this process, and I hear you when you say that you will get the job done as quickly as the Congress' legislation requires you to get it done, and I know in the Senate you testified that you could get that done in the 180-day period to process waivers. But I also know the track record of the Justice Department—and I don't lay all that at your doorstep by any means. We are talking about things that

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have been going on for several years before your watch, if you will, but nonetheless, the processing time for these waivers has been exceedingly long. I understand that there have been nine waiver requests that have taken 5 years or more.

How is it that you can meet any timetable that we might set? Is it because there hasn't been a timetable set in the past, that there really has been no timeliness in the processing of these?

Ms. BINGAMAN. We balance many things in doing our work, just as anyone does. As I mentioned before, the Bell companies file a waiver request every 2 weeks, literally. Some of them are extremely—in fact, since the middle of March they have filed one a week. We have had seven filed in the last 9 or 10 weeks. So there are a lot of these waiver requests and this is technical work.

It is highly important and it is highly technical, and we get tremendous numbers of comments from interested parties. The number of comments in the last 2 years, 1993 and 1994, has gone up six times over what it was 5 or 6 years ago, which reflects the increasing complexity, difficulty, and important nature of the waivers we are dealing with now. If these waivers were off the table because the legislation passed, because they would be, all of that difficult technical work, which has created tremendous expertise in the people who do it, would be available to work solely on these applications for long distance. I don't tell you it wouldn't be difficult, because it would.

On the other hand, we would do what we have to do, and I think it is so important to the country that it benefit from the tremendous depth of expertise and experience of these people at the Justice Department who have done this, that we would simply pull our socks up and do it.

Mr. GOODLATTE. With that increasing expertise, is there hope that with pending legislation which we hope to come forward with and get through, but have no idea when that is going to happen, that the processing time for these waivers will improve? I understand that the average is now about 3 years, and for all motions that are before the Department and before the court, it is about 4 years.

Ms. BINGAMAN. Let me tell you, there is a balance in these waiver requests. To talk about them in gross does not do justice to them, because I have looked at the list carefully myself. Some of them are extremely small. They involve a very small region by one company, one product; they are simply not on a par with major national waivers involving——

Mr. GOODLATTE. Well, let's talk about the major national ones.

Ms. BINGAMAN. Well, with those, here is what happens. We get broad requests from the Bell companies, for instance, LATA's in the long distance generally for cellular. The long-distance companies worry tremendously about that. We worry about it, because every cellular call goes through the local bottleneck. So we get in and work with the Bell companies.

As I said earlier, we don't just say no. The generic wireless waiver which covered all seven regional Bell companies, it covered all cellular services, covered long distance for all cellular services, a lot of people have these, it affects a lot of consumers and affects the long-distance market. We did not just say no to a very broad initial

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waiver request. We got in and worked with them, and it took a lot of work. But you know what happened? We eventually supported their waiver, because we got them to agree to modifications that satisfied us. It took thousands of hours.

Mr. GOODLATTE. Let me interrupt you, if I could sneak in one more question before my time runs out and shift to a slightly different subject regarding one of those waivers. If Judge Greene approves your agreement with Ameritech, what services will they be allowed by the court to begin offering immediately?

Ms. BINGAMAN. Long distance. That is what it is about. It is about offering full-fledged long distance to their local service customer.

Mr. GOODLATTE. It is my understanding this just begins the process by which they can apply to the Department to enter into long distance; it doesn't actually give them authority.

Ms. BINGAMAN. No, no, that is true. I thought you meant assuming all of the predicates. I am sorry, I misunderstood.

There are three essential steps. As I said, we worked with the Michigan and Illinois Commissions. They have underway right now proceedings to unbundle the Ameritech network and let competitors interconnect. A very technical, difficult process, but it is well underway in those two States.

Presuming they issue their orders, which I assume that they will, Ameritech will then comply with them, interconnect, let competitors hook up, let other people begin selling local service. They then apply to us; we have 120 days to rule on their application. We get facts, we look at the marketplace facts, we look at whether competitors can sell, is there real competition, will there be more, what are the possibilities, and at the end of the 120 days, we rule on Ameritech's request to get into long distance.

Mr. GOODLATTE. Can you terminate that trial at any time?

Ms. BINGAMAN. Yes. We can for cause. We can't just terminate it because somebody walks in some day and decides they don't like Ameritech. If Judge Greene grants this order or under whatever order he sees fit to grant, there will be conditions set forth for termination, and it would be a violation of the order, or a determination that there is a substantial possibility of harm to competition in these adjacent markets. So it would be terminated under the order of the court, not at someone's whim.

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

The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. Mr. Chairman, whenever we revisit some aspect of the AT&T case, I am always reminded of another case, *Jarndyce* v. *Jarndyce* which was written about in "Bleak House," which goes on from generation to generation and that seems to be the case here.

I do commend the chairman for tackling—beginning to tackle, here a very thorny issue. And I also appreciate the Department and particularly the Antitrust Division working very constructively with this committee and with the chairman to fashion some legislation that will, I think, add substantially and positively to this aspect.

Ms. Bingaman, with regard to section 2 of the proposed bill, the time limits set forth therein are very reasonable, yet they are tight-

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ly drawn, which I think is necessary and which I believe you have indicated the Department believes it can live with and function within.

There are, of course, also provisions in section 2 for judicial review. One concern that I have and it follows on a couple of the other questions here, and that is that if we reach the point, or the Department reaches the point where the number of cases, the number of matters to be determined under these provisions presented to the Department, exceed the Department's capability to respond to them, what recourse will the Department have?

Obviously, under the terms of this bill, then the applications will be deemed approved. Would you envisage, if there are problems, the Department coming back to the Congress asking for additional positions, additional authorization? Or do you see some other way to go to the courts to seek some relief in the courts?

Ms. BINGAMAN. Congressman, I don't envisage either of those. If the bill passes, presumably it will have an effective date so there will be some lead time. Presumably it will be part of a more general bill. There is another bill pending that goes into unbundling and interconnection requirements and that would have to occur.

In other words, I would not wake up next week and have 180 days to do this and the Department of Justice would not, not me personally but there would be some period of time to plan for this, to staff it, and it will be an overwhelming amount of work. You are not wrong about that. I understand that and we understand that.

But the waiver process we go through now would no longer be necessary. That would all be off the table. You would have the 50 core staff who are expert in this available and we would have a period of time to transfer people and to staff up and I think we would have to do that. And we would have to get down and look very hard at how many people we needed.

I believe it would probably be substantially more than 50. But as I stated, it is not for 10 years. It is for a short period. We have many cases where we cross staff from other sections for emergencies, and I think that is what we would have to do and we would do it.

Mr. BARR. OK. Thank you.

Mr. HYDE. I thank the gentleman. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I have no questions at this time, Mr. Chairman.

Mr. HYDE. I thank the gentleman.

And I warmly thank the witness, the Honorable Anne Bingaman, for a very enlightening presentation which was interesting and helpful. And we will, with the gentlelady's permission, submit some questions in writing.

Ms. BINGAMAN. Please do, Mr. Chairman.

Let me again thank you personally for introducing this important legislation, for holding this hearing. We, the Department of Justice, and I personally appreciate your leadership and look forward to working with you and the entire committee on this.

We thank you very much.

Mr. HYDE. Thank you very much.

Now we turn to a panel of three distinguished witnesses who will testify regarding the same topic. This panel consists of Mr. Bert C.

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Roberts Jr., the chairman and chief executive officer of MCI Communications Corp.; Thomas P. Hester, Esq., the executive vice president and general counsel of Ameritech, and Mr. Timothy J. Regan, who is division vice president with Corning, Inc.

Welcome gentlemen. Each of your written statements will be made a part of the committee record in its entirety. I ask respectfully that you confine your oral testimony to 5 minutes each and if you have caught your breath and shuffled your papers properly, we will recognize you first, Mr. Roberts.

STATEMENT OF BERT C. ROBERTS, JR., CHAIRMAN AND CHIEF EXECUTIVE OFFICER, MCI COMMUNICATIONS CORP.

Mr. ROBERTS. Thank you, Mr. Chairman.

Mr. HYDE. Would you turn your mike on? Some of us are lip-readers, but not all.

Mr. ROBERTS. I am Bert Roberts, chairman and chief executive officer of MCI Communications Corp. Thank you for allowing me to testify before this committee concerning telecommunications reform and to discuss the specific issues raised by H.R. 1528, the Antitrust Consent Decree Reform Act of 1995.

MCI's position on telecommunications reform is well-known. We look forward to a fully competitive, fully deregulated marketplace. The first and highest priority of any bill must be to bring competition to the last bastion of monopoly, the local telephone market. And while this monopoly market is under transition, there must be strong safeguards to protect and promote competition.

Historically, the Department of Justice has held the pivotal role in ensuring fair and open competition in the economy. We believe that this role must continue. MCI knows full well the critical part the Department played in opening up the long-distance markets to competition. The DOJ should continue to be actively engaged in promoting competition in all telecommunications markets.

I believe everyone in this room would agree that without the extraordinary and ongoing efforts of the Department of Justice today, there would be no competitive long-distance industry, there would be no MCI and, most importantly, the United States would not exercise the level of world leadership in telecommunications and information services that it does today.

I commend H.R. 1528 for its recognition of the Department's rightful role to protect and promote critical public interests affected by telecommunications reform legislation.

However, MCI cannot support the bill in its current form. Important revisions are necessary. We believe that the focus of legislation must be on bringing about competition in the local telephone market. There is currently no meaningful competition in local telephone markets. To state the obvious, local phone service is dominated by the Bell companies. For example, everyone here knows if you want to switch from Bell Atlantic, you can't. There is no alternative.

The same dominance of the local exchange has always been at the heart of the Bells' power. Bell company control of the local monopoly was the basis of the 1982 consent decree. There are some people who would like to forget that, dismiss it as part of the past. We cannot. MCI cannot forget the way the Bells treated us and

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other potential competitors, the FCC, and even their own customers.

We cannot forget the predatory pricing or the burden on our customers of inconvenient multidigit dialing and lower quality interconnection arrangements. We cannot forget that the Bell companies stonewalled for years on providing equal access, resisting and refusing requests until the consent decree required it. Or how the Bell system negotiated in bad faith over new forms of interconnection and deliberately delayed agreements with MCI.

In some cases in the mid-70's, the Bells went so far as to rip out our lines. At MCI we will not forget the Bell's history of anticompetitive abuses and that is why we are adamant that legislation must not create a scenario in which these abuses could be repeated.

Mr. Chairman, examples of harm by the Bell system are not merely of historical interest. The risks they highlight continue to exist today. The RBOC's currently dominate the $15 billion intraLATA toll market and regularly thwart competition there. They exercise control over the $90 billion local telephone market and are going to do everything they can to preserve their monopoly.

That is why MCI cannot support H.R. 1528 as introduced and why we strongly recommend the following revisions. First, telecommunication reform legislation must effectively open local markets and RBOC entry into long distance must be conditioned on the development of actual competition in the local market.

Second, the existing VIII(C) test, evidentiary standard burden of proof should be retained. I find it a little ironic that the Bells are now arguing against this standard. Last year, Bell Atlantic President James Cullen testified, and I quote, that the standard from section VIII(C) of the AT&T consent decree "is the correct test for whether a Bell company should be allowed to provide interstate long-distance services."

Mr. Cullen's testimony was echoed by Sam Ginn, the chairman of Pacific Telesis who stated the VIII(C) test which focuses on the ability to impede competition in the market the RBOC's seek to, the long-distance market, is the appropriate test.

Now, for some reason, this year the RBOCs don't want to meet that test and it is difficult to contend with their constant change of positions.

The third revision: critical post entry safeguards—separate subsidiaries and a strong imputation requirement—need to be added to the bill.

And fourth, the definition of an affiliate shouldn't permit immediate RBOC entry into long distance through an entity in which they have a substantial equity interest. Without these revisions, there is a great risk that history will repeat itself. The Bells will use their bottleneck control to extend their market power into long distance and other competitive markets.

And there are other risks. The interference of Bell monopolies with free market force might lead to an environment of greater regulation and less entrepreneurial opportunity. We could see hundreds of new antitrust suits and more litigation and regulation. Worst of all, we would see a vibrant industry become stagnant as monopolies drive innovation out.

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MCI wants to avoid such a scenario, a return to the past, when the courts were crowded with suits over the Bells' anticompetitive acts is not the way to go.

We look forward to working with you, as well as Chairman Bliley and Fields, to produce reform legislation that makes sense, that is right, and that works.

[The prepared statement of Mr. Roberts follows:]

PREPARED STATEMENT OF BERT C. ROBERTS, JR., CHAIRMAN AND CHIEF EXECUTIVE OFFICER, MCI COMMUNICATIONS CORP.

Good morning, Mr. Chairman and members of the Committee. My name is Bert C. Roberts, Jr. I am the Chairman and Chief Executive Officer of MCI Communications Corporation. It is an honor to have this opportunity to testify before the Committee on critical issues regarding telecommunications reform generally and, more specifically, on issues raised by H.R. 1528, the "Antitrust Consent Decree Reform Act of 1995."

I commend you, Mr. Chairman, for your interest in bringing U.S. telecommunications policy in line with changing technological and marketplace developments. We all share a common goal: vigorous competition in *all* telecommunications markets characterized by expanded entrepreneurial opportunity, unprecedented technological innovation and lower consumer prices. The legislative challenge facing the Congress is how best to bring competition to the monopoly local telephone market. It is essential to ensure that this occurs *before* the Regional Bell Operating Companies BOCs) are permitted entry into adjacent competitive markets, so that they do not remonopolize the industry and reverse a decade of gains for consumers.

In this context, MCI applauds Chairmen Tom Bliley and Jack Fields for introducing H.R. 1555, the "Communications Act of 1995." This legislation is intended to open local markets to competition and, critically, to ensure that the RBOCs face full and robust facilities-based competition before they are permitted to enter the long distance market. MCI looks forward to working with the Congress on legislation that achieves this result.

It is appropriate for the Judiciary Committee to hold a hearing on telecommunications legislation. First, this Committee has jurisdiction over our nation's antitrust laws. Given the history of this industry and the scope of comprehensive telecommunications reform, legislation will directly affect the antitrust laws. Importantly, both the antitrust laws and this legislation share the same goal of promoting competition. If legislation were enacted, Congress would, for the first time in its history, override an antitrust judgment and consent decree formally entered by a federal district court after Tunney Act review and affirmed by the United States Supreme Court.

Also, this Committee has jurisdiction over the Department of Justice (DOJ). The Department has played a critical part in opening up long distance and other telecommunications markets to competition, and it continues to serve an active role in promoting competition in all markets. Telecommunications legislation should, and will, affect DOJ's role. I applaud H.R. 1528's recognition of the Department's critical role in overseeing RBOC entry into long distance markets. However, as discussed further below, I urge this committee to revise H.R. 1528 in several significant ways, including the standard of review—the RBOCs should be required to demonstrate that there is no substantial possibility that they can use their monopoly power to impede competition in the long distance market.

OVERVIEW

My testimony will focus on two markets: the market for local telephone services and the long distance market. The first and most urgent telecommunications policy priority is to bring competition to *local* markets. There is currently *no* meaningful competition in local markets. It is a monopoly—pure and simple. As a result, the price of local service has increased over the past decade at the rate of inflation.

During the same period, the price of virtually all other telecommunications services and products has decreased—in the long distance market, by nearly 70% in real terms. That is because long distance and other markets have become intensely competitive even while the RBOCs have retained their local monopolies. Accordingly, any legislation must create the environment that will ensure competition in local monopoly markets. To accomplish that goal, Congress must establish basic market-opening ground rules and preempt state and local laws and regulations that preclude effective local competition.

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It is important to recognize that mere elimination of legal and regulatory barriers to local competition alone will not cause local competition to develop overnight. There is no magic wand. There are significant economic and technological barriers. Companies like MCI are attempting to surmount all of these barriers. MCI has committed hundreds of millions of dollars to develop a competitive alternative to the local Bell monopolies—just as MCI spent billions of dollars to develop a competitive alternative in long distance over seemingly unbeatable odds.

Removal of legal and regulatory entry barriers is a crucial first step before new entrants will make the massive investments necessary to build new local telephone networks. Capital markets will not put these huge sums at risk unless and until the law is changed to give potential competitors a fair opportunity. Even once legal and regulatory barriers are removed, it will take time for these investments to occur and to pay off. In the meantime, the expert federal agencies must oversee the transition to ensure that artificial barriers are removed and to monitor the progress of competitors.

Once that fundamental step has been accomplished and effective local competition has emerged, restrictions needed to protect competition in other markets from Bell bottleneck abuse can be—and should be—lifted. The issue of Bell entry into long distance has never been a question of whether, but when: either when a Bell Company divests its local monopoly or when effective competition develops in the local telephone services market.

However, if the pro-competitive safeguards of the consent decree are lifted prematurely, the result will be catastrophic for both consumers and competitors. The Bell Companies will leverage their local monopolies and seek to recreate the vertically integrated Bell System that stifled competition for so long in all telecommunications markets. We would likely end up with a dramatic concentration of power in the telecommunications, information services, and media industries, leaving only a few integrated companies that would not compete aggressively against each other. The result would be less rapid technological innovation and significantly higher prices than vigorous competition would produce. If the sequencing isn't done right, there is a grave risk of replacing regulated telephone monopolies with much larger unregulated multimedia monopolies. The hundreds of entrepreneurial companies, many now operating in the states of members of this committee, would go out of business. Small businesses are the real job creators and a key source of innovation in the U.S. economy. Legislation must create an environment in which market forces, not monopolies, decide which companies survive.

Mr. Chairman, without proper safeguards, the industry will become mired in the kind of regulatory and legal proceedings that so preoccupied state agencies, the FCC and the courts in the 1970s. The need for regulation and litigation will *increase*, because regulators will have to struggle with the problem that they have never been able to solve: how to force the Bell Companies to act contrary to their monopolistic incentives and cooperate with companies against which they are competing.

Of course, the Bell Companies have it within their power to enter the long distance business *tomorrow*. If they don't want to wait until effective local competition develops, they can provide long distance service immediately by spinning off their local telephone business. All the Bell Companies have to do is make a choice between their local bottlenecks and long distance. Once they give up their monopoly power, there is no reason why they cannot provide long distance service.

It is no surprise that the Bell Companies have been unwilling to make this choice. They want it both ways. They want to keep their local monopolies *and* compete in the long distance business. But they do not want to compete in long distance without the unfair anticompetitive advantages that simultaneous retention of their local bottlenecks would provide. The last thing they want is a level playing field.

Allowing them such an unfair advantage would cripple the prospects for local competition and threaten to roll back the progress achieved in long distance since divestiture severed the tie between local and long distance. Long distance competition has flourished because long distance carriers have been able to compete on an equal basis. The Bell Companies lost the incentive and ability to discriminate in favor of an affiliated carrier.

The progress in long distance competition should be preserved and progress toward meaningful competition in local services should begin. An open, deregulated marketplace characterized by entrepreneurial opportunity and technological innovation will best serve consumers—as well as ensure America's leadership in information technologies well into the next century.

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LONG DISTANCE COMPETITION: SUCCESS STORY FOR THE ECONOMY AND CONSUMERS

Such a marketplace exists today in the long distance industry. Mr. Chairman, the changes spurred on by the Department of Justice and the FCC have meant that Americans now have multiple options for long distance telephone service. Both large and small entrepreneurial companies now compete in the long distance industry. In Illinois, 87 long distance providers are providing customized service to consumers and small businesses. In California and Texas, over 100 companies offer a variety of long distance services. In Michigan, New York, Colorado, Florida, and Pennsylvania, over 50 long distance companies are today offering service. The vigorously competitive long distance industry has been a windfall for the U.S. consumer and the engine for the unprecedented technological innovations sweeping the telecommunications industry.

A study by Dr. Robert Hall of Stanford University, *Long Distance: Public Benefits from Increased Competition* (October, 1993), confirmed what the world already knew—that competition:

Created a vibrant long distance market with thousands of innovative services offered by hundreds of carriers. (A listing of MCI's major products is attached as Exhibit 1).

Stimulated an unprecedented surge in technological innovation. New features and enhanced billing options are made possible by substantial investments in new technology. Carriers such as MCI have invested billions of dollars in creating state-of-the-art digital networks. Over the last five years, MCI has invested virtually all of its cash flow into its network infrastructure. MCI will spend $3 billion again this year to upgrade its network and transmission technology to hasten the widespread availability of Internet access, broadcast quality videophones, electronic data interchange, long distance medical imaging, multimedia education and a single-number personal communications service that will use the same pocket-sized telephone anywhere in the world.

MCI's technological investments are also helping the cause of addressing mankind's next challenges. Two weeks ago, MCI and the National Science Foundation announced the launch of a new high-speed network to use advanced information technologies that enable massive amounts of voice, data and video to be combined and transmitted at speeds nearly four times faster than current technology. Initially, the network service will tie together the Pittsburgh and San Diego Supercomputing Centers; the Cornell Theory Center; the National Center for Supercomputer Applications in Urbana, Illinois; and the National Center for Atmospheric Research in Colorado.

Some of the possible applications for high performance computing and the highspeed network service offered by MCI include building more energy-efficient cars; improving environmental modeling; and designing better drugs. The existence of a national highspeed broadband backbone for experiments in networking between super computing centers will enable researchers to develop technologies such as high-density video conferencing from personal computers, remote telemedicine and two-way communications between citizens and their government.

Caused quality to soar as long distance companies criss-crossed the nation with fiber optic networks that today comprise the Information Highway. Digital transmission, particularly digital fiber, enhances quality. The dropped calls, echoes, and noisy lines that once plagued the pre-divestiture Bell System long distance service are a thing of the past. Calls across the country now typically sound as though they are coming from next door.

Drove real long distance prices to American consumers down by more than 60 percent between 1995 and 1992, net of access charge reductions.

Since 1992, long distance prices have dropped even further. Professor Hall recently updated his study to reflect long distance price changes in 1993 and 1994. He found that real long distance prices continued to decline in 1993 and fell again in 1994 by 5 percent. As of today, Mr. Chairman, the vigorous competition in long distance has produced a nearly 70 percent decline in real prices. The same long distance call that cost $1.77 (in 1994 dollars) ten years ago, would cost less than 58 cents today. Exhibits 2 and 3 provide graphic evidence of these significant price reductions.

Vigorous price competition abounds in the long distance industry. Many discount plans are available. All long distance customers—both residential and business—have numerous opportunities to cut their long distance bills substantially by signing up for one of these many options. For example, business customers that make term commitments can save by 20, 30 or 40 percent. Similarly, residential customers that make use of various calling plans, such as MCI's new Friends and Family program,

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can also save from 25 to 50 percent. Discounting dramatically lowers the effective price to the customer and is the principle mechanism by which vigorous and aggressive price cutting is achieved.

The benefits of long distance competition can be replicated in industry sectors now dominated by monopolies if legislation follows the appropriate "blueprint."

"BLUEPRINT" FOR PRO-COMPETITION LEGISLATION

If legislation is to accomplish for consumers and for all sectors of the industry what divestiture did for long distance competition, it must remove entry barriers that today thwart the achievement of effective local exchange competition. These barriers deny consumers the lower prices, innovative services and information infrastructure enhancements that competitive forces have provided to long distance telephone consumers. True local number portability; dialing parity; unbundling of local service elements; interconnection requirements; nondiscriminatory, cost-based access; and unrestricted resale availability are among the important features that will, over time, break down the RBOCs' bottleneck monopoly and spur competition in the local exchange.

Legislation should provide for reasonable and achievable conditions for RBOC entry into the competitive long distance marketplace. Legislation can promote competition in all telecommunications markets and protect consumers by:

Requiring the Federal Communications Commission (FCC), with an appropriate role for the states, to find that the entry barriers to local exchange competition have been removed, to prescribe and ensure full implementation of rules for interconnection, cost-based nondiscriminatory access and true number portability, among other things.

Providing the appropriate sequencing for RBOC entry into the long distance marketplace. Actual competition in the local exchange *must* occur *first*. Only then should the RBOCs be permitted to seek entry into the long distance market.

Giving the DOJ an appropriate role and requiring the RBOCs to satisfy a test based on market facts that ensures that there is no substantial possibility that the RBOCs can impede competition before the DOJ can approve their entry into the long distance market.

Effective telecommunications legislation must establish important post-entry consumer safeguards to guard against anti-competitive abuses. For example, opportunities for cross-subsidization must be reduced by requiring that the RBOCs provide long distance services through a separate subsidiary.

DOJ-AMERITECH AGREEMENT

Mr. Chairman, Congress has an historic opportunity to pass legislation that will complete the transition from a monopoly telephone system to an open and competitive multimedia marketplace. To assist you in that effort, I commend the recent Justice Department—Ameritech agreement to your attention. That agreement itself is an historic event. For the first time, DOJ, a Bell Company and AT&T have reached agreement on a plan for opening up the local telephone market and, if that succeeds, then allowing Ameritech to provide long distance service. This agreement is very important to the telecommunications reform debate for several reasons:

Ameritech has agreed to open its local network and further agreed that actual local competition must exist *before* entering the long distance market. Under the terms of the agreement, Ameritech would stay out of long distance until DOJ determined that actual local competition exists.

It includes a competition-based test designed to make certain Ameritech cannot block competition in the future—requiring the Justice Department to make sure there is no substantial possibility that Ameritech could use its position in local exchange telecommunications to impede competition.

It includes continued oversight by the Justice Department. The order gives the DOJ ongoing power to order Ameritech to discontinue conduct that impedes competition in the long distance market. It also allows the Justice Department to order Ameritech to cease offering long distance services if it finds that Ameritech is blocking competition.

It requires separate subsidiaries. Under the agreement, Ameritech must keep its long distance operations in a separate subsidiary, with its own officers and personnel, its own financial and accounting records, and its own facilities. This requirement is absolutely critical if we are to have any chance of policing and preventing RBOC cross-subsidization of their long distance operations with local ratepayer revenues. I urge this committee to include such a requirement in H.R. 1528.

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PRE-DIVESTITURE BELL SYSTEM ABUSES HARMED THE PUBLIC

MCI pioneered competition in long distance. MCI knows from experience the benefits of competition in the marketplace—as well as the anti-competitive harm that can occur when a monopoly leverages its power. Competition makes a big difference. As we look to the future, it is critical for Congress to reflect on and draw from the lessons of the past.

Prior to divestiture in 1984, the Bell System had a virtual monopoly in almost all segments of telecommunications in the United States—local telephone service, long distance service and equipment manufacturing. Competitors were forced to file antitrust cases because regulators were unable to prevent the unfair and anti-competitive exercise of market power. The DOJ initiated its *second* formal investigation of the Bell System in 1974 and sued on behalf of the U.S. government later that year. The DOJ charged that the Bell System violated federal antitrust laws by conspiring to monopolize three major markets: long distance, customer premises equipment, and network switching and transmission equipment. Among the anti-competitive abuses suffered by MCI and identified by DOJ in its lawsuit were predatory pricing and denial of equal access to essential local exchange facilities:

> Customers of the competitors were burdened with inconvenient, multi-digit dialing arrangements and lower quality services. The Bell System did nothing to further the provision of equal access (1-plus calling with presubscription) for years after MCI requested it. Equal access was not implemented until it was required under the terms of the consent decree.
>
> The Bell System negotiated in bad faith over new forms of interconnection. They persisted in slow-rolling MCI on interconnection agreements. During the interconnection fights of the mid-1970's, *several Bell companies went so far as to rip out MCI's lines.* To get the lines restored, we had to go to court.
>
> The Bell telephone companies and Bell Labs delayed releasing technical information long distance carriers needed to develop new services.

These kinds of illegal, anticompetitive behavior impeded MCI's bid to compete in the long distance market for many years. And consumers were denied the lower prices, innovation and better quality that competition has since delivered.

Mr. Chairman, these examples of Bell System harm are not merely of historical interest. The risks they highlight continue to exist today. As long as the Bell Companies maintain a stranglehold over local telephone services, they have the same ability and incentive to engage in this kind of anticompetitive conduct. Regulatory "safeguards" have never been adequate to prevent it; nor will they ever be. As Assistant Attorney General Anne Bingaman recently testified before the Senate:

> Until the success of the Department's suit, regulation and litigation had not been effective in breaking through that local bottleneck. The Bell System proved itself adept at devising new ways to use the bottleneck to hurt competition in other markets more quickly than the courts and regulatory agencies could order solutions. Among other things, the Bell System used its monopoly profits to hire legions of lawyers to make sure that any proceeding that challenged any aspect of the monopoly was bogged down in endless proceedings.

The framework of the 1982 consent decree is based on the Justice Department's basic theory of the antitrust case: the bottleneck monopoly had to be separated from potentially competitive services in order to allow competition to develop. The RBOCs were prohibited from engaging in long distance, equipment manufacturing and information services because only a structural separation between monopoly and competitive markets could prevent anticompetitive abuses. Decades of experience had proven that regulatory oversight of Bell System behavior was insufficient to prevent those abuses.

The same sort of anti-competitive abuse will happen all over again if the Bell Companies are allowed into adjacent markets, such as long distance, with their local monopolies intact. Few people today remember the plain old rotary dial telephone, but it defined the limits of customer choice for decades. Few people today remember Bell System abuse of over a decade ago, but it existed. We should not allow a generational gap to blind us to the lessons of the past. MCI learned these lessons the hard way—from experience.

BELL COMPANY THREAT TO COMPETITION REMAINS

The economic incentive to leverage control over the local monopoly to impede competition in related markets is substantial. Unless excluded from these markets, the Bell Companies will have both the incentive and the ability to provide their competitors with inferior connections and set discriminatory rates for bottleneck local tele-

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phone services as well as to cross-subsidize by allocating the costs of providing the competitive services to monopoly ratepayers.

The very same Bell monopolies that fought against competition—who opposed competitive private line service in the 1960s . . . who fought direct dial long distance competition in the 1970s . . . and who denied MCI interconnection . . . now argue that the telecommunications marketplace has substantially changed. Now the RBOCs argue that they should be allowed to enter the long distance marketplace. The changes that have occurred since divestiture have been in competitive markets: long distance, manufacturing and information services. Local telephone service is still a monopoly and all of the Bell Companies continue to abuse their monopoly power.

Exhibit 4 describes recent anticompetitive activities by all seven of the RBOCs. These abuses run the gamut from discrimination in interconnection of potential local competitors, to predatory pricing, to deceptive marketing practices. In several instances, the RBOCs were found to have violated clear and specific rules—they simply broke the law.

In recent testimony before the Senate Judiciary Committee, an executive testifying on behalf of a company that is trying to compete with the RBOCs said that they have experienced "systematic and widespread pricing and marketing practices that pose a direct threat to the possibility of any new entrant establishing a viable market position in competition with the Bell Operating Companies." He then went on to elaborate:

> The most basic tactic that the Bell Operating Companies have sought to use against competitors is the price squeeze. Because, as I explained earlier, interconnection is an absolute necessity, the Bell Operating Companies can control the revenues (and, accordingly, the market opportunity) of their competitors by establishing the price of interconnection. When the FCC first ordered the larger telephone companies to permit competitors to collocate in their central offices in 1992, they responded with rates that were in many cases nearly as high as the prices of the services that they provided to customers for whom we wanted to compete. In several cases the charges for construction of a 10-by-10-foot wire-mesh enclosure for our equipment inside the phone company's central office were in excess of $100,000, which is more than the cost of constructing a typical single-family home in many metropolitan areas in the U.S. (Testimony of Royce J. Holland, MFS Communications, May 3, 1995.)

Today, MCI and the entire competitive long distance industry are still dependent upon the Bell monopolies. All long distance companies need to interconnect with the local telephone company's network in order to complete our customers' calls. As discussed below, we pay nearly half of our revenues to local telephone companies for access to their networks. The local telephone monopolies are "gatekeepers" between MCI and its customers.

Imagine, Mr. Chairman, if United Airlines had to compete against American Airlines in Chicago but American also owned O'Hare airport and the roads going to the airport, and controlled all the landing slots. Further, imagine that American had a pre-existing customer relationship with all of United's customers. With a competitor controlling facilities United needs access to and acting as a "gatekeeper" between it and its customers, how long would it be before United Airlines was grounded?

LOCAL COMPETITION IS A BELL COMPANY MYTH

In any given geographic area, only one company provides the connectivity that allows us to communicate with one another through the telephone. Anyone who wants telephone service—local *or* long distance—must rely on the local telephone company to provide that connectivity. The monopoly market for local services is a $90 billion market. Today, the Bell Companies retain a monopoly on three kinds of local telephone service: local exchange (calling friends and family across town), exchange access (connecting you to your long distance phone company for long distance calls), and intraLATA toll calls ("short-haul" long distance calls).

The easiest way to prove there is no competition is to observe that there is no place in the country today where a consumer has a meaningful choice of carriers for local exchange service. When consumers move into a new home, they can buy a telephone at a store or bring their old one with them. They can order long distance service from any of a number of interexchange carriers. Mr. Chairman, the *New York Times* recently reported that nearly 25 million customers switched long distance companies last year. However, if they want to be able to use the phone to call their office or neighbors, or to make a long distance call, they must order service

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from the single local telephone company serving their area. There is no effective competition for local telephone service as long as consumers have no choice but to order that telephone service from the incumbent local telephone company.

The Bell Companies claim that they have been facing significant competition for exchange access traffic. This statement ignores the fact that long distance companies pay nearly half of every revenue dollar for access, and approximately 99.4 percent of those dollars go to the local telephone monopolies. As an industry, long distance company payments to local monopolies last year exceeded $20 billion. MCI's access payments to local telephone monopolies approached $6 billion. Compared to the billions of dollars paid to the Bell Companies, MCI paid only $25 million—*less than four tenths of one percent*—to competitive access providers (CAPs).

CAPs hold less than one-half of one percent of the exchange access market—that's the Bell Companies' idea of competition? The Bells' claim is further belied by continuing growth in their access traffic volumes. In the last three years, local telephone company access traffic has grown by approximately seven percent a year. Interestingly, in two states where the presence of CAPs would likely erode local telephone company access business—Illinois and New York—the growth in access has also been significant. In both Illinois and New York, interstate access traffic carried by Ameritech and NYNEX grew by more than seven percent in 1994.

Nevertheless, the Bell Companies argue that competition in the local telephone market is already here, taking away customers and driving down prices. Do not to be misled—the Bell Companies are not describing actual local telephone competition. Instead, they are describing the potential for competition for some of the physical elements of the local exchange in some areas. This was the conclusion of a 1993 study entitled *The Enduring Local Bottleneck* by Economics and Technology Inc. and Hatfield Associates:

> Expansion of alternative access provider services, FCC mandated interconnection requirements, the growing use of wireless services, even multi-billion dollar alliances between traditional telecommunications carriers and potential future alternative local service providers, have all contributed to a *perception* that local competition has arrived. While these developments may have increased the prospects for competition, their actual *economic impact* on the traditional local exchange monopolies is, at the present time, far more smoke than fire. Furthermore, the enormous investments required to build alternative local networks across the country, the time it will take to win customers away from the incumbents, and the power of the dominant local exchange carriers to thwart competitive entry ensure that effective competition will not occur overnight.

Very limited competition for parts of the local exchange in a few geographic areas does not translate to effective competition for local telephone service. *The Enduring Local Bottleneck* points out the limits of competition in local markets today and the resources available to the RBOCs to maintain their bottleneck control, including:

> Wireless services, principally cellular services, are not substitutes for local service. The costs, capacity constraints, quality and reliability of wireless services relative to basic local service preclude direct substitution. More than ninety-five percent of all cellular calls today are carried by the local telephone network. Consider, too, that the Bell Companies are the dominant players in the cellular market today, controlling nearly two-thirds of the cellular spectrum.
>
> No cable system offers local telephone service. These systems require significant capital investments to provide two-way telephony. In view of the magnitude of investments required, it will be some time before any significant number of consumers would have a competitive alternative available from cable operators, even under the most favorable scenario.

Even if current technologies were able to duplicate the local exchange function, competition could not exist in most states today. Most states prohibit competition by law or regulation.

Mr. Chairman, US WEST—the company that's selectively selling off rural exchanges—and other Bell Companies argue that monopolies exist in areas that no one else will serve. That's because they've seen to it that it's illegal. In most states, including Virginia, Texas, South Carolina, Florida, Ohio, Colorado, Nebraska, Louisiana, Hawaii, Kentucky, West Virginia, Alaska, Mississippi, Tennessee, New Mexico and Rhode Island, potential competitors cannot legally provide local exchange service. In Washington and Pennsylvania, state statutes allow for competition, but the state regulators have yet to authorize service. In only 13 states do regulators allow any level of competition for basic local services.

In the few states that are trying to open local markets, the RBOCs are doing everything they can to thwart competition and they are succeeding. A March 20, 1995,

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Wall Street Journal article entitled "Not Welcome Here" examined competition in the local market. It found that, "In the states already open to competition, Baby Bells routinely deny or slow access to their networks, price their services below cost, and invoke arcane statutes to protect their turf. Once rivals are up and running, the local Bell can force customers to dial complex access codes or give up their phone numbers when they sign with a competitor."

The tiny pockets of emerging competition, which the Bell Companies prefer to show you through a magnifying glass to overstate their importance, do not today provide consumers with choices for local telephone service.

BELLS FIGHT TO MAINTAIN $15 MILLION INTRALATA TOLL MONOPOLY

Mr. Chairman, clearly there is no real competition in either the local exchange or exchange access markets. Nor does it exist in the intraLATA toll ("short-haul" long distance) market. The Bell Companies allege that emerging competition in that market justifies permitting them to offer interLATA long distance services. The Bell Companies would have you believe that all entry barriers in the intraLATA market have been or are about to be eliminated and that the market has been free from Bell Company anti competitive abuses.

Unfortunately, that simply isn't true. Exhibit 5 summarizes the current status of intraLATA competition and demonstrates the extent to which the Bells will go to ward off competition. It also provides numerous examples of Bell Company abuses which have significantly limited the growth of competition in the "short-haul" market.

First, while some degree of intraLATA competition exists in 44 states, nowhere does intraLATA "equal access" exist. By equal access, I mean "1+" dialing parity and the ability of consumers to presubscribe to their intraLATA carrier of choice. Without equal access, customers must dial a special five-digit access code to reach a long distance carrier. Most consumers either don't know this is possible, don't know the access codes, or don't want to be bothered. Only with intraLATA equal access can consumers benefit from fair and open competition. Ten states have *ordered* intraLATA toll dialing parity, but let me repeat: *today there is no RBOC territory in America where intraLATA equal access exists.* Thus, the local telephone companies still control virtually 100 percent of the intraLATA direct dial market.

Second, the RBOCs have opposed intraLATA competition in every state that has tried to open that market to competition. The most notorious contemporary example of RBOC interference with "basic" intraLATA authority is Pacific Bell's improper conduct before the California Public Utility Commission (PUC). Aver fighting competition for years, Pacific Bell finally relented and seemed prepared to let California move forward. The PUC issued an order in November 1993 to allow basic intraLATA authority for long distance companies starting January 1, 1994. Then, in a truly outrageous act, one of Pacific Bell's senior regulatory officials engaged in a series of inappropriate "ex parte" contacts with PUC staff members on sensitive subjects such as Pacific Bell contracting authority, local network unbundling and imputation of access charges. This executive's impropriety led to a PUC conclusion that the entire intraLATA competition order was "tainted," and it was rescinded late last year. Although a new order was recently issued, Pacific Bell's actions in this one incident successfully delayed intraLATA competition for an additional year.

In California, intraLATA competition was finally authorized effective January 1, 1995. Despite that ruling, Pacific Bell refused to re-program its Centex services to allow business and government customers to use the services of long distance companies. Pacific Bell's resistance to competition forces consumers to dial five-digit codes to access alternative carriers. MCI filed a complaint in February against Pacific Bell charging it with anticompetitive and unlawful behavior by denying California business and government Centex customers the right to select their "short-haul" toll call provider. Four months later, an Administrative Law Judge ruled against Pacific Bell and cited it for illegal and anticompetitive practices. The ruling requires Pacific Bell to allow Centex customers to make "short-haul" toll calls without having to dial cumbersome and unnecessary access codes.

Beyond outright opposition to basic authority in some states and "equal access" everywhere, the RBOCs are fighting intraLATA competition in other insidious ways—consider the following two examples:

Large expansions of "local calling areas." The RBOCs preclude competition for toll calls by reclassifying them as local calls which only they can provide. Despite the surface "proconsumer" appeal of expanded local calling plans, consumer groups often oppose them because, in reality, they are anticompetitive and are subsidized by other captive ratepayers. By designating an area a "local calling area," and by pricing such services below cost, competition is artificially

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precluded—even for providers that would be more efficient than the incumbent RBOCs—and consumers are denied the benefits of competition.

Failure to impute access charges. Failing to impute access charges into their intraLATA toll rates, while their would-be competitors must nevertheless pay them, is another way the RBOCs have engaged in "intraLATA foul play." In South Carolina, for example, Southern Bell Company charged intraLATA toll rates below 10 cents a minute, while it assessed long distance companies access charges above 12 cents a minute. In other words, the Bell Companies charged long distance companies a higher "wholesale" price than their own "retail" price.

There are many other examples where the RBOCs have proposed various ingenious ways to fight intraLATA equal access and perpetuate its monopoly over potentially competitive intraLATA services. The bottom line: there is no substantial direct dial intraLATA competition anywhere today, and there will not be unless legislators and regulators actively curtail these Bell abuses.

Consumers are the big losers as a result of the Bells' anticompetitive behavior. The *Wall Street Journal* on March 24, 1995 reported, "By using a rival to the local Baby Bell, customers in some cases could save almost 30 percent on the cost of in-state toll calls. . . . " For instance, the article cited sample rates for five minute direct-dial daytime calls between two cities in California. A call from Los Angeles to Long Beach, a distance of 19 miles, would cost 39 cents if carried by Pacific Bell and only 32 cents if carried by MCI. A call from Cloverdale to Oakland, a distance of 81 miles, costs 69 cents if carried by Pacific Bell and only 54 cents on MCI.

"SEQUENCING" BELL ENTRY: LOCAL COMPETITION FIRST

Mr. Chairman, given the decades of Bell anticompetitive behavior prior to divestiture and their continuing pattern of abusive practices, affirmative legislative and regulatory actions are needed to foster local exchange competition. The proper legislative framework and safeguards are as critical to managing the transition from a government-sanctioned monopoly to effective local competition as divestiture and equal access were to ensuring a competitive long distance market. Successfully making the transition to full, fair and open competition in all markets requires that local competition occur first.

In other words, proper "sequencing" is critical. Monopolies and free markets don't mix. After local market-opening measures are fully implemented and after effective local competition develops—then and only then should the Bells be allowed into long distance. Private sector commentators have examined the telecommunications marketplace as it stands today and reached the same conclusion about the need to retain the prohibition on entry by the Bell Companies into the long distance industry until they cease to be monopolies—that is, until real local competition is evident. Robert H. Bork, a noted antitrust expert who formerly served on the U.S. Court of Appeals for the District of Columbia Circuit, recently stated:

> After examining the issue and the arguments advanced by the Bell Companies and their supporters, I conclude, as I have before, that these restrictions [line-of-business restrictions against entering long distance and manufacturing] are still supported by antitrust law and economic theory and should be retained. The Bell Companies' argument is that the decree's line-of-business restrictions are relics of the 1970s, the industry has changed dramatically, and the restrictions are the product of outmoded thinking. To the contrary, the basic facts of the industry that required the decree in the first place, basically the monopolies of local service held by the Bell Companies, have not changed at all. The antitrust and economic reasoning that led to line-of-business restrictions remain completely valid. (*The Ban on Bell Company Entry into Long-Distance and Manufacturing: Why it Should Be Retained Until the Local Exchange Becomes Competitive,* February 1995, pp. 1–2.)

Similarly, economist and former Director of the Office of Management and Budget Director Jim Miller, a champion of deregulation, reviewed the issue recently and concluded:

> If the MFJ's line of business restrictions against RBOC entry into long-distance markets were to be removed prior to the establishment of competition in local markets, the RBOCs would be able to exploit their regulated-monopoly positions, leading to higher prices for local telephone services, predatory behavior in long distance markets, and discrimination against rivals in access to the local exchange—causing a significant misallocation of the na-

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tion's telecommunications resources. (*Deregulation of Telephone Markets: RBOC Entry Into Long-Distance Service,* March 28, 1995, p. 1.)

It is clear what must occur—the Bell Companies must cease to be monopolies before they expand into the long distance and other competitive markets.

"SIMULTANEOUS ENTRY"—DON'T BE FOOLED BY THE BELLS' RHETORIC

The RBOCs advocate "simultaneous entry"—allowing them into long distance at the same time that they are required to open local markets. At first blush, this may sound reasonable and fair. The truth, however, doesn't lend itself to the quick Bell Company rhetoric.

The Bell Companies control 99 percent of their local markets. It is going to take some time for long distance or any other companies to effectively compete in the local exchange. Any new entrant will have to finance and build alternative facilities, as well as successfully negotiate complex interconnection, resale, and equal access arrangements with the Bell Company. On the other hand, the RBOCs could begin offering long distance service within their regional territories immediately. A Bell Atlantic official recently told the *Wall Street Journal,* "We have the facilities to provide long distance service in our region as we speak." The Bell companies would also likely take advantage of a tremendously competitive long distance resale market to provide customers long distance services outside their regions. More than five hundred companies already resell long distance service purchased at deep discounts from MCI and three other long distance companies with nationwide networks.

As soon as they can, the Bell Companies will aggressively market "one-stop shopping" of local, wireless and long distance services to their existing customer base—virtually every home and business in the country. Given their existing local monopoly and wireless duopoly, the RBOCs will be the only ones able to do so. In other words, a "simultaneous entry" approach is really a "Bell first" approach that confers an overwhelming marketplace advantage to the Bell monopolies, an outcome that is neither reasonable nor fair.

Monopoly status has conferred significant financial advantages on the RBOCs as well. In analysis completed by MCI in February, 1995 ("RBOC Cash Flow and Deregulation: A Level Playing Field"), the RBOCs' unreasonably high cash flow levels, produced by monopoly pricing and excessive access charges paid by long distance companies, is clear. MCI's analysis was compiled from data on file at the FCC and from other public sources of information, and was verified by Price Waterhouse LLP. Among this paper's key findings are:

The RBOCs' operating cash flow margin (46 percent) is the highest in American industry, exceeding those of oil companies (37 percent), electric utilities (34 percent) and drug companies (27 percent). Contrast the RBOC margins with those of competitive long distance companies (19 percent). See Exhibit 6.

RBOC operating cash flow margins have been consistently 46 percent or higher since the Bell System break-up in 1984.

Access charges paid by long distance companies give the RBOCs a 71 percent margin and account for 45 percent of the excessive RBOC operating cash flows.

The huge margins in access charges allow the RBOCs to self-fund their investment activities. Unlike companies in competitive markets, they have rarely sought funding from capital markets.

Without legislative changes which de-monopolize local markets before allowing RBOC entry into other markets and which reduce access charges to cost, the RBOCs can effectively prevent meaningful local competition, as they have to date, while also cross-subsidizing their entry into long distance. They have the ability to do this because they have operated as government-sanctioned monopolies and their profits have never been disciplined by the competitive market. Unless the right sequencing and incentives are provided, the Bell Companies will leverage their marketplace and financial advantages unfairly to keep their local monopoly intact and extend it into the long distance market.

MCI VIEWS ON H.R. 1528, ANTITRUST CONSENT DECREE REFORM ACT OF 1995

H.R. 1528 properly recognizes the need for DOJ review on the question of RBOC entry into long distance. The DOJ, as the economy's "guardian of competition," is the right agency for this role. MCI also supports the bill's antitrust savings clause. However, MCI strongly urges the committee to substantially revise many of H.R. 1528's other provisions:

Comprehensive telecommunications reform legislation must effectively open local markets and condition RBOC entry into long distance on the development of actual competition. H.R. 1528 would allow the RBOCs to provide out-of-region

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and "incidental" long distance services upon enactment and to apply for in-region authority immediately. While MCI recognizes that local market-opening provisions are within the jurisdiction of the Commerce Committee, "sequencing" is fundamental to the goal of achieving competition in all telecommunications markets. Whether the RBOCs seek to provide long distance services within or outside their service territories, such authority must be conditioned upon DOJ review and a determination that there is no substantial possibility that the RBOC could use its market power to impede long distance competition.

MCI strongly opposes the proposed "dangerous probability" test, the higher "clear and convincing" evidentiary standard, and shifting the burden of proof to DOJ. As discussed more fully below, the existing consent decree "VIII(C)" test, evidentiary standard and burden of proof should be retained.

Critical post-entry safeguards—separate subsidiaries and strong imputation requirements—need to be added. Separate subsidiaries have proven to be a useful and important complement to other safeguards that prohibit the cross-subsidization of affiliates in competitive businesses. An RBOC long distance affiliate must be structurally, operationally and physically separate from the local business. Each must have its own facilities and personnel, and maintain its own books and records. Separate subsidiaries reduce the risk of discrimination because they make it easier to determine what services and information the local affiliate is providing the long distance affiliate, and how much the long distance affiliate pays for them. By eliminating shared costs, and by making sales between the entities more visible, separate subsidiaries make it harder for the local company to subsidize the activities of the long distance company. Separate subsidiary requirements also promote enforceable imputation rules, which require long distance affiliates to set prices that cover all their costs. Separate subsidiaries are not a panacea, but would help consumers, competitors, and government agencies determine if the RBOCs are complying with equal access and nondiscrimination safeguards, and to obtain more complete relief if the RBOCs violate these protections.

The definition of "affiliate" should not permit immediate RBOC entry into long distance through an entity in which they have substantial equity interest. The bill contains a "loophole" that appears to allow the RBOCs to enter long distance immediately by owning up to 50 percent of an entity that could provide long distance.

THE JUSTICE DEPARTMENT'S CRITICAL ROLE IN PROTECTING COMPETITION

Effective competition in all telecommunications markets will benefit consumers by challenging carriers to provide better services at lower prices. Congress has made the Department of Justice the principle guardian of competition economy-wide. For decades, DOJ's efforts have complemented and reinforced the work of federal and state regulators to promote and protect competition—not competitors—in all segments of our economy.

As the courts have uniformly recognized, Congress intended telecommunications carriers to be subject to the antitrust laws. There is no inherent conflict between the antitrust laws and telecommunications regulation. DOJ has played an extraordinarily important and constructive role in promoting competition in telecommunications markets. While the Bell System was able to stymie the FCC's efforts to introduce competition in the 1970s, DOJ was able to get the Bell System to take the steps that have opened up long distance and manufacturing markets to unprecedented competition. As noted earlier, that competition has produced dramatically lower prices, explosive technological innovation and vastly expanded choice for consumers. Competition has benefited residential consumers, large and small businesses, and both rural and urban America.

Through decades of experience, DOJ has developed substantial expertise in telecommunications markets. DOJ has effectively promoted telecommunications industry competition on a non-partisan basis. DOJ's investigation of the Bell System began during the Nixon Administration, the case was pursued during the Ford and Carter Administrations, and divestiture occurred during the Reagan Administration. Since then, DOJ has reviewed over 350 RBOC waiver requests. Through this combination of experiences, DOJ has gained special insight into ways of effectively promoting telecommunications competition.

Consistent with the preference of the antitrust laws for competition over regulation, DOJ has taken the lead in searching for ways to promote competition without intrusive regulation. In telecommunications markets—as in other markets—antitrust oversight has reduced the need for regulation, and caused what regulation remained to be simpler and more streamlined.

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THE "VIII(C)" TEST IS THE APPROPRIATE STANDARD

Section VIII(C) of the consent decree provides that the decree's line-of-business restrictions on the RBOCs shall be removed (or waived) upon a showing by the petitioning RBOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

It would be a mistake to replace the VIII(C) test with the "dangerous probability" test of H.R. 1528. Section VIII(C) was agreed to by the parties to the consent decree because it was recognized that the RBOC's monopoly control of bottleneck facilities gives them the ability to harm competition in adjacent markets. Over the past 11 years, the RBOCs have repeatedly acknowledged that the VIII(C) test is the right test and that it is a "classic antitrust standard." DOJ and the industry understand how VIII(C) applies in the telecommunications context. In fact, applying this test, the RBOCs have been granted 250 waivers. Replacing it with a different test not designed to deal with this particular competitive problem would lead only to confusion and litigation.

Although the RBOCs are now dismissing the VIII (C) test as over regulatory and too burdensome, their past statements reflect a much different position. As the RBOCs told the D.C. Circuit a few years ago:

> The elements of Section VIII(C) together prescribe *a classic antitrust standard:* a line of business restriction shall be removed when there is no reasonable likelihood that a Regional Company could obtain market power through misuse of its local exchange monopoly. Consistent with antitrust precedent, that standard requires a factual assessment of the scope, structure and dynamics of the market, the probable conduct of the Regional Company in that market, and the probability that the Regional Company could achieve market power. (Joint Brief for the Regional Telephone Company Appellants, at 56, in *United States* v. *Western Electric Co.* (filed D.C. Cir. April 17, 1989) (Case Nos. 87–5388 and consolidated cases).)

The RBOCs emphasized the roots of VIII(C) in established antitrust law: ". . . the meaning of prophylactic standards like the line of business restrictions is well established in existing antitrust jurisprudence." The D.C. Circuit interpreted section VIII(C) of the consent decree consistent with the principles the RBOCs argued.

The RBOCs have also reaffirmed that VIII(C) is the right test on several occasions in communications to Congress:

William L. Weiss, then Ameritech's Chairman and CEO, in an October 20, 1993 letter (Exhibit 7) *on behalf of all seven RBOCs* to Senator John C. Danforth, wrote:

> An entry test based on antitrust principles, must focus on conditions in the market that one is seeking to enter. The Modified Final Judgment (MFJ) provides just such a test. Recognizing that excluding a competitor from a market harms consumers, the MFJ provides that the line of business restrictions, including the long distance prohibition, shall be removed when there is "no substantial possibility that a (regional company) could use its monopoly power to impede competition in the market it seeks to enter."
>
> In a March 8, 1994 letter to Senator Ernest Hollings (Exhibit 8) and again in his May 12, 1994 testimony before the Senate Commerce Committee, James G. Cullen the President of Bell Atlantic agreed that the "standard from section VIII(C) of the AT&T consent decree is the correct test for whether a Bell company should be allowed to provide interstate long distance services."
>
> In a March 16, 1994 letter to Senator Hollings, Sam Ginn, then Chairman and CEO of Pacific Telesis, stated: "The VIII(C) test—ability to impede competition in the market we're entering, the long distance market—is the appropriate test."

The VIII(C) test asks the right question—whether the RBOCs can leverage their local bottleneck power to impede competition in the long distance or manufacturing market. That is why leading antitrust scholars, including William Baxter (who headed DOJ's Antitrust Division in the Reagan Administration when the consent decree was entered), former Judge Robert Bork and Professor Phillip Areeda (author of the leading treatise on antitrust law) support the VIII(C) "no substantial possibility" test. Professor Baxter, in an April 26, 1995 letter to Chairman Bliley, wrote of the appropriateness of the VIII(C) test:

> [I]t is intended to protect against a clearly visible, unusually damaging risk of monopolistic pricing and technological stagnation. At a minimum, such a showing could be made only after the BOC's local exchange facilities have been opened to competition—not theoretical or potential competition, but

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real competition that gives consumers a genuine choice among competing local service providers. Unlike the retrospective Sherman Act test used by the courts to determine whether an antitrust violation has occurred, this competitive entry test is forward looking and prophylactic. Thus, the test will prevent antitrust violations from occurring and will preserve and protect existing competition in the long distance market.

Turn the question around: are the RBOCs seriously arguing that they should be permitted to get into long distance even if their entry would create a significant possibility that they will reverse the trend of the last decade and harm long distance competition? To ask the question is to answer it. VIII(C) is a reasonable, commonsense test. It is the test agreed to by strong bipartisan majorities of this committee in 1992 (H.R. 5096, Antitrust Reform Act of 1992) and again last year (H.R. 3626, Antitrust and Communications Reform Act of 1994). Any weaker test would permit the kind of competitive abuse that the antitrust laws consistently prohibit—and that MCI believes this committee wants to prevent.

THE BURDEN OF PROOF SHOULD REST WITH THE RBOCS

The burden should be on the RBOCs to prove that they would not abuse their bottleneck power, not on DOJ to prove the contrary. We know from experience—both historical and current—that the RBOCs act on their incentives and ability to disadvantage their competitors. They are monopolies and behave like monopolies. This legislation should not presume that they aren't and that they don't. Again, MCI agrees with the views expressed by Professor Baxter in his recent letter:

The VIII(C) test correctly places the burden of proof where it belongs—on the party with control over the bottleneck facilities needed for the competitive services it seeks to provide. It is my understanding that Ameritech Corporation has agreed to this test in its proposal to open its local network to competition as a pre-condition to its provision on a trial basis of long distance services in Chicago and Grand Rapids. Ameritech's willingness to accept the VIII(C) test as a pre-condition to its entry into the long distance market demonstrates that the test is not unduly burdensome even to the party who bears the ultimate burden of proof on this critical issue.

Further, the bill compounds the problems with shifting the burden of proof away from the RBOCs by imposing on DOJ a "clear and convincing" evidentiary standard. This standard makes it harder for DOJ to challenge anticompetitive conduct by the RBOCs than by any other company. In an attempted monopolization case against any other company, DOJ would have to prove anticompetitive conduct only by a preponderance of the evidence—a "more likely than not" standard.

CONCLUSION

Policymakers are once again at a crossroads. Beginning with the DOJ's antitrust lawsuit against the Bell System in 1974, the federal government chose competition over monopoly. It led to the 1984 divestiture and the opening of former monopoly markets to competition. The result has been an astonishing transformation in the way we work, communicate and live in this country. In long distance, that transformation brought with it significant consumer benefits—much lower prices, unprecedented technological innovation, higher quality and numerous service choices.

Twenty-one years later, policymakers again must decide. MCI urges this committee, in considering H.R. 1528, to choose competition over monopoly. Can the substantial risk to competition and to the extraordinary consumer benefits caused by prematurely unleashing today's telephone monopolists into the long distance market be justified? Telecommunications reform legislation must open local markets and ensure that effective local competition has developed before allowing the RBOCs into adjacent competitive markets. Monopolies and free markets don't mix.

Premature Bell Company entry into long distance will benefit seven huge monopolies—to the detriment of consumers and competitors. Only when the RBOC bottleneck is broken—and the Department of Justice determines, based on a review of market facts, that there is no substantial possibility that they can impede long distance competition—will America's consumers be benefited by RBOC entry into the long distance market.

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EXHIBIT #1

MCI'S MAJOR PRODUCTS & SERVICES

CONSUMER MARKETS

- Friends & Family
- Friends & Family II
- New Friends & Family
- Friends & Family Paging
- 1-900-GET-INFO
- Friends around the World Anytime
- Premium Calling Plans
  - MCI Prime Time
  - MCI EasyRate
  - MCI Anytime
- Best Friends
- 1-800-Collect
- Personal 800 and Personal 800 Follow Me
- MCI Card
- Phone Cash
- MCI VideoPhone

BUSINESS MARKETS

- NetworkMCI Business
  - InternetMCI
  - MarketPlace MCI
  - EmailMCI
  - FaxMCI
  - ConferenetMCI
- MCI 800 Service and International 800
- HyperStream Data Products
- MCI Global Communications Service
- Direct Dispatch
- Enhanced Customer Application Service
  - MCI Perspective
  - 800 Traffic View
  - Multimanager
- Enhanced Voice Services
- Forum Conference Calling Service
- MCI Preferred
- MCI Vision
- Friends of the Firm
- Proof Postive
- CampusMCI
  - Campus Connection Card
  - CampusMCI Prepaid Card
  - MCI Masters

INTERNATIONAL

- International Direct Dial
- International Private Lines
- MCI Global Messaging Service
  MCI Mail
- MCI Mail Global Access
- MCI Fax Service
- MCI Telex Services

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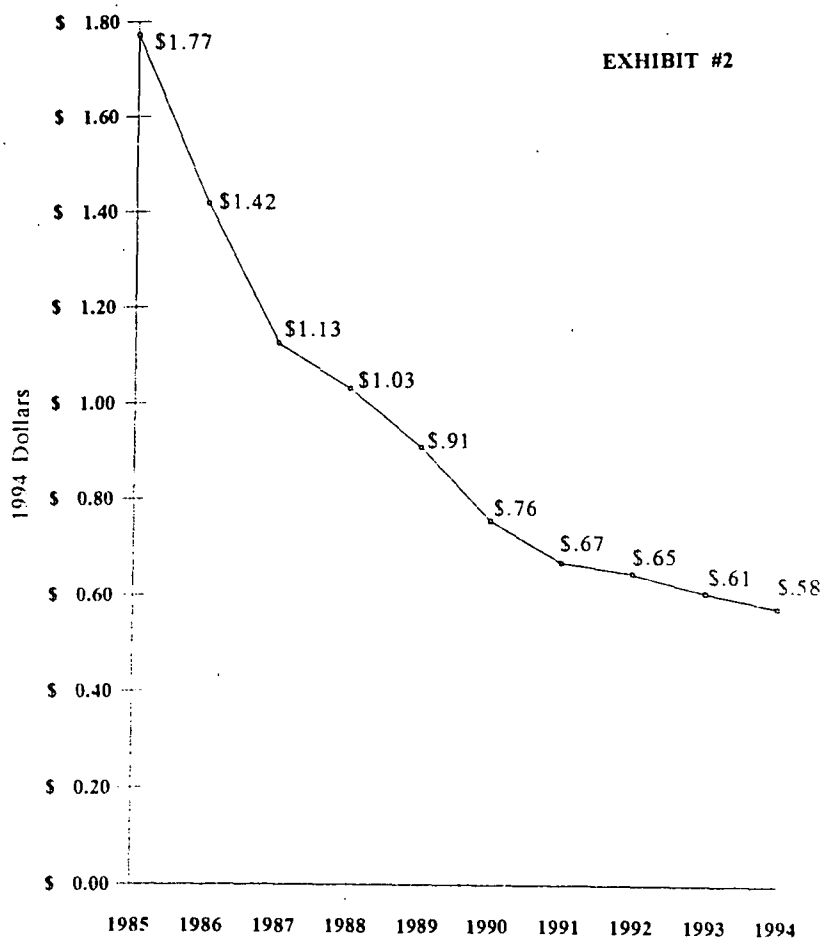
The Cost of an Average Long Distance Call



Source: Robert E. Hall, Long Distance: Public Benefits From Increased Competition, 1995 Update.

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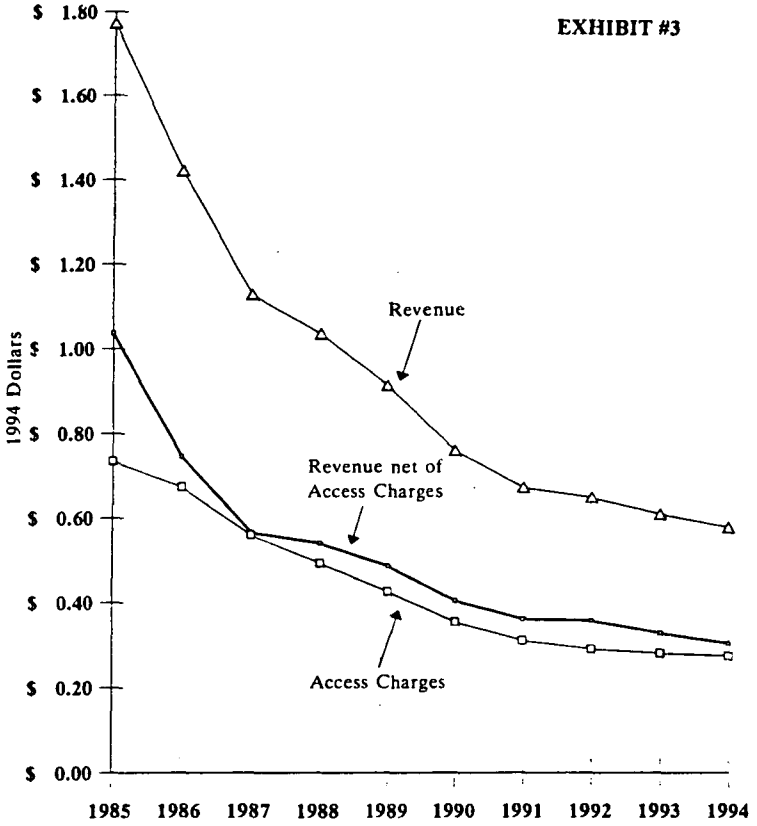
Revenue and Access Charges for an Average Long Distance Call for the Three Largest Carriers



Source: Robert E. Hall, Long Distance: Public Benefits From Increased Competition, 1995 Update.

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EXHIBIT #4

RECENT BELL COMPANY ANTICOMPETITIVE ABUSES

- **AMERITECH**

  - In 1995, the Illinois Commerce Commission (ICC) ruled in favor of Metropolitan Fiber Systems (MFS) that Ameritech proposed illegal discriminatory requirements for interconnection to Ameritech's local telephone network.

  - In 1994, the ICC ruled in favor of MCI, which had filed a complaint accusing Ameritech of violating imputation rules prescribed by Illinois statute. Ameritech did not charge itself the same access fees paid by its competitors, MCI and LDDS.

    By illegally underpricing its competitors, Ameritech was engaging in an exclusionary tactic that made it less desirable for customers to switch to more efficient competitors.

- **BELL ATLANTIC**

  - District Cablevision of Washington, DC, charged C&P Telephone Company with exercising discriminatory control over its fiber optics capacity. In 1990, District Cablevision was refused permission to install fiber in C&P's fiber optic ducts because the monopoly said "such fiber would give other companies, including District Cablevision, the ability to compete with C&P, particularly in the area of telephone users' access to long distance carriers."

  - Bell of Pennsylvania paid over $40 million in refunds in 1990 to settle charges that it used deceptive marketing techniques in selling optional services such as call waiting, call forwarding, and touch tone dialing. The Public Utilities Commission noted that the company "had committed more than 3,500 violations of residential service rules.

- **BELL SOUTH**

  - In October 1992, Southern Bell entered into an agreement with the State of Florida to settle grand jury charges that customers paid $15.2 million for calls they never made and services they never received.

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- In 1991, four Florida agencies investigated allegations that Southern Bell employees falsified customer repair records to avoid paying refunds to customers. Employees of the company testified that they routinely falsified maintenance records at the direction of company management to meet Florida Public Service Commission quality control standards. Florida's Public Counsel said that the falsification of records appears to have been widespread for years.

- In South Carolina, BellSouth in collusion with fellow local exchange carriers, charged itself a lower terminating access fee than long distance carriers. On the record, it said it was charging itself the same rate. After MCI and other long distance carriers filed a complaint, BellSouth agreed to give them the same deal.

- In 1991, the Georgia Public Service Commission found that Southern Bell had undermined its competition in the voice messaging service market. Southern Bell had favored its own service by setting up technical barriers to block competitors until Southern Bell was prepared to roll out its own service.

- **PACIFIC BELL**

  - Currently, Pacific Bell is pursuing a policy of refusing its customers' requests to program long distance company access codes (10xxx, MCI:10222) into their leased Centrex office phone systems controlled by Pacific Bell. This practice prevents competition for intraLATA or "short haul" toll calling.

  - In 1993, the California Public Utilities Commission (CPUC) rescinded its intraLATA competition order following an internal investigation revealing that a Pacific Bell employee was improperly involved editing the proposed Commission decision. The CPUC investigation found that Pacific Bell had re-written many important sections of the order, including those on Centrex, imputation and contracts in a manner adverse to the interests of competitors.

- **SBC COMMUNICATIONS (formerly Southwestern Bell)**

  - In 1990, a U.S. District Court jury in Amarillo, Texas, ruled that Southwestern Bell had engaged in anti-competitive practices, and awarded over $16.6 million in damages to Great Western Directories. The jury ruled that Southwestern Bell had used its monopoly power to control the directory

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advertising market. Southwestern Bell charged directory publishers higher prices for the use of its listing of telephone users than it charged its subsidiaries.

- In 1993, a state court in Galveston, Texas, awarded Metrolink Telecom $5.7 million in antitrust damages in a lawsuit against Southwestern Bell. Southwestern Bell tried to shut down a special service set up by Metrolink Telecom that would connect Houston to Galveston. The Metrolink service used leased lines form Southwestern Bell and allowed business customers in Houston to make calls between Houston and Galveston.

  According to Metrolink, Southwestern Bell engaged in anticompetitive practices by refusing to list Metrolink numbers in its directories and to assign it any new numbers. In addition, Southwestern Bell wanted to impose on Metrolink monthly charges that were higher than those is charged its own customers.

- In 1989, the Texas Public Utility commission (TPUC) ordered Southwestern Bell to refund $87 million and freeze basic rates for four years because it was earning more than its prescribed rate of return. The TPUC staff had recommended a $400 million reduction in rates.

- **US WEST**

  - In 1991, US WEST was fined $10 million after admitting to four major violations of the antitrust decree governing the breakup of the old Bell system. This was the largest fine ever levied by the Department of Justice's Antitrust Division against one defendant. The violations included discrimination in providing the General Services Administration (GSA) with exchange access and other servcies; violation of the decree's manufacturing restriction; and violation of the information servcies restriction.

  - In 1988, the Washington Utilities and Transportation Commisison (WUTC) cited US WEST for withholding access to local telephone customer marketing information from its intraLATA long distance competitors. A WUTC law judge ordered US WEST to release this information.

  - In 1995, US WEST was fined a record $4 million for being "woefully unprepared to handle...new customers wanting basic and advanced telephone services in 1994," according to the Rocky Mountain News.

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EXHIBIT #5

BELL COMPANY ABUSES IN THE INTRALATA TOLL MARKET

This paper summarizes the current status of intraLATA competition in the states and provides examples of Regional Bell Operation Company (RBOC) abuses which have significantly limited the growth of such competition since it was enabled by the MFJ in 1984.

RBOC OPPOSITION TO INTRALATA COMPETITION

Attachment A describes the status of state intraLATA competition today. Please note the difference between "basic" or "access code" competition and "equal access." Forty-seven states now allow basic (10XXX, 800, 950, access) competition. While basic/access code dialing provides some level of competition in these states, using such codes is confusing to consumers and has resulted in minuscule market share gains by the interexchange carriers in the intraLATA toll market. In Southwestern Bell Corporation's 1991 Annual Report, for example, the frustration associated with access code dialing was described as follows:

> Another new service -- Operator Call Completion -- turned a frequent customer frustration into a $14 million product in 1991. "We handled 68 million calls a year from customers who have forgotten their long-distance carriers' access codes."

Southwestern Bell continues to deny intraLATA equal access to interexchange carrier (IXC) customers even though it openly advertises the inferior nature of the intraLATA calling its forces on its dependent IXC competitors. In November of last year, Southwestern Bell ran the following newspaper ads in Texas.

> Making a toll call with an AT&T or MCI access code is a lot like getting lost while on vacation: you have to stop and figure out where you are, you find yourself going out of your way for No Good Reason, and the whole deal ends up costing more than you expected.

Only with intraLATA equal access can consumers fully benefit from intraLATA competition. For these purposes, "equal access" means 1+ and 0+ dialing parity and the ability of customers to presubscribe to the intraLATA carrier of their choice. *Today there is no RBOC territory in America where intraLATA equal access exists.* Thus, the RBOCs and local exchange companies (LECs) still control virtually 100 percent of the intraLATA direct dial market.

- *California* -- The most notorious contemporary example of RBOC interference with "basic" intraLATA authority is Pac Bell's improper conduct at the State Public Utility Commission (PUC). After resisting IXC entry for years, Pac Bell finally relented in 1993 and seemed prepared to allow California to move toward "1980's competition." The PUC issued an order

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in November 1993 to allow "basic" intraLATA authority for IXCs on January 1, 1994. Then, in a truly outrageous act, one of Pac Bell's senior regulatory officials engaged in a series of improper "ex parte" contacts with PUC staff members on sensitive subjects such as Pac Bell contracting authority, local network unbundling and imputation of access charges. Because this official clearly behaved improperly as to these issues, the PUC concluded that the entire intraLATA competition order was "tainted" and rescinded it late last year. Although a new order was recently issued, PacBell's improper actions in this one incident delayed intraLATA competition for an additional year.

IntraLATA competition was finally authorized effective January 1, 1995 in California. Despite that ruling, Pac Bell refused to re-program its Centrex services to allow business and government customers to use the services of other interexchange carriers. Pac Bell's refusal forced consumers to dial five digit access codes to access carriers other than Pac Bell. MCI filed a complaint against Pac Bell charging them with anticompetitive and unlawful behavior by denying California business and government Centrex customers the right to select their short haul toll call provider. Four months later, the Administrative Law Judge ruled against Pac Bell and cited them for illegal and anticompetitive practices. The ruling requires Pac Bell to allow Centrex customers to make short haul toll calls without having to dial cumbersome and unnecessary access codes

- *Kentucky* -- In its order on May 6, 1991, the State PUC found that intraLATA toll competition was in the public interest and that it "...should extend to equal access on a presubscribed basis ..with the implementation to proceed apace." It wasn't until December 1, 1994, that GTE asked its switch vendor to develop the software required for intraLATA equal access.

- *Michigan* -- The PSC has ordered intraLATA equal access effective January 1, 1996, despite heavy resistance from Ameritech, including an unfounded claim (rejected by the PSC) that 100,000 jobs could be lost if intraLATA equal access is implemented as scheduled. Michigan Bell has appealed the commission order in an attempt to block implementation.

- *Minnesota* -- The PUC ordered intraLATA equal access in November 1987; thereafter, US West mounted a lengthy and continuing legal challenge to the PUC's Order. Although the Commission recently confirmed its prior order and has ordered implementation no later than January of 1997, US West has appealed the order in yet another attempt to block implementation.

- *North Dakota* -- The PSC ordered intraLATA equal access deployed statewide by the end of 1994, but US West mounted a *massive* lobbying campaign and overturned the PSC's decision in the legislature. A major part of their argument was that 200 operator jobs would be eliminated in the State as a result of intraLATA equal access. Ironically, despite their win in the legislature, US West eliminated 250 such jobs anyway.

- *Virginia* -- One of only two states that does not allow any form of intraLATA competition.

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Access changes imposed on potential competitors are higher in Virginia than any other Bell Atlantic State and Bell Atlantic continues to fight the introduction of competition or competitive safeguards.

RBOC "COMPETITION KILLER" APPROACHES

The more insidious ways the RBOCs are fighting intraLATA competition -- beyond outright opposition to "basic" authority in some states and "equal access" everywhere -- are through:

- Great expansions of "local calling areas";
- Failure to impute access charges;
- Refusal to reprogram Centrex systems; and
- 7-digit dialing proposals.

All of these approaches are intraLATA "competition killers."

Expanding Local Calling Areas

Examples of "the incredible shrinking intraLATA toll market," brought on by RBOC efforts to remonopolize intraLATA toll traffic -- purporting to make it "local" -- include:

- *Kansas/Missouri* -- Southwestern Bell is proposing "Local Plus" in these states. Local Plus provides 7 digit dialing, and unlimited LATA-wide calling for only $30 per month for residential customers and $60 per month for business customers.
- *Illinois/Wisconsin/Indiana* -- Ameritech has turned the entire Chicago LATA (60 miles from Wisconsin to Indiana) into one big measured "extended area service (EAS)" area.
- *Louisiana* -- South Central Bell has introduced Local Optional Service, which eliminates intraLATA toll competition and replaces it with local service in a 40 mile radius. South Central Bell has also priced several of its WATS Saver options far below cost, thereby eliminating any opportunity to compete for that traffic.

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- *Mississippi* -- South Central Bell has introduced Extended Area Calling, which eliminates intraLATA toll competition and replaces it with local service in a 55 mile radius. South Central Bell does not impute costs for local service which allows them to price their service below the costs they charge their would-be competitors.

- *New Mexico* -- US West has expanded the Albuquerque local calling area to 80 miles east/west and 60 miles north/south.

- *Texas* -- Southwestern Bell has turned the entire Brownsville LATA into an "unlimited calling area," where residents pay just $25 a month and businesses $50 a month, for unlimited LATA-wide calling, while would-be competitors must still pay per-minute access charges and charge higher retail rates.

- *Vermont* – New England Tel proposed to expand the local calling area in Vermont to include half the state, although the plan was rejected.

Despite the surface "pro-consumer" appeal of such expanded local calling plans, consumer groups often oppose them because they are anti-competitive and are subsidized by other captive ratepayers. By designating an area a "local calling area," and by pricing such services below cost, competition is artificially precluded -- even for providers that would be more efficient than the incumbent RBOCs -- and consumers are denied the benefits of competition.

Failure to Impute Access Charges

Failing to impute access charges into their intraLATA toll rates, while their would-be competitors must nevertheless pay them, is another way the RBOCs have engaged in "intraLATA foul play." Here are some of the more egregious recent examples:

- *South Carolina* -- Southern Bell proposed an "Area Plus Calling Plan" in South Carolina that provided local measured service throughout most of each LATA. The rates were below 10 cents a minute, while intraLATA access charges are above 12 cents a minute. Southern Bell admits the plan loses $11.5M a year, but is paying for it with what would otherwise be excess earnings returned to ratepayers.

- *South Carolina* -- Also, Southern Bell and the independent local telephone companies (LECs) entered into a secret deal by which the LECs could offer plans similar to Southern Bell's Area Plus plan, while paying access charges to Southern Bell and each other at greatly reduced levels compared to those charged to their IXC "competitors." Southern Bell intentionally misled regulators and the public in discovery in the Area Plus case, having said the independent local telephone companies would pay the same tariffed rates for access as IXCs. The IXCs complained to the South Carolina PSC, which has now ordered that the

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IXCs be treated the same as Southern Bell.

- *Maryland* -- Bell Atlantic proposed a "Centrex Extend" service which is priced at 9 to 11 cents *per message* (not per minute). Under the Maryland imputation test agreed to by Bell Atlantic, the lowest relevant access charges are 4.5 cents *per minute*; hence the typical "five minute call" should have 22.5 cents of imputed access. The IXCs won this issue after a lengthy legal battle.

Refusal to Re-program Centrex Services

Business and government telecommunications users frequently purchase Centrex services from the RBOCs. With Centrex service, business and/or government agencies can have their own dialing systems and even abbreviated dialing plans. One of the features that Centrex provides is the automatic dialing of access codes necessary to utilize alternative carriers. RBOCs have refused to re-program their Centrex services to dial IXC access codes even though the capability exists. As discussed above, the California Administrative Law Judge found that such actions are illegal and anticompetitive. Nevertheless, refusal to re-program Centrex has forced IXCs to expend thousands of dollars to litigate the issue, during which time consumers are denied the benefits of fair competition.

7-Digit Dialing Plans

Further examples of RBOC abuse which have been opposed by consumer groups and rejected by state regulators involve turning "1+" intraLATA toll calls into "7-digit" toll calls, thus confusing consumers and widening the dialing disparity faced by potential competitors (which already must use "10XXX"). Such LEC plans were rejected as anti-consumer and anti-competitive by several PUCs in the last few years, including: Massachusetts, Vermont, Connecticut, Maine, Rhode Island and West Virginia. Nevertheless, Southwestern Bell has recently proposed 7-digit dialing in Kansas.

There are many other examples where RBOCs around the country have proposed various ingenious ways to fight intraLATA equal access and "remonopolize" potentially competitive intraLATA services. Bottom line: there is no substantial direct dial intraLATA competition anywhere today, and there will not be unless Bell abuses are curbed by regulators.

The local access bottleneck is still intact and is still being used by the RBOCs to thwart competition in adjacent markets. If the RBOCs were allowed into interLATA services while retaining that bottleneck control, the problems would simply get worse for consumers and competitors.

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FCC INTERSTATE INTRALATA

The Federal Communications Commission in CC Docket No. 92-237, In the Matter of Administration of the North American Numbering Plan, has recognized that the Bell Companies and other local exchange carriers have been stripping off intraLATA interstate calls. The FCC believes that this practice may well reduce competition and defeat customer expectations that all of their interstate toll traffic would be carried by their presubscribed interexchange carrier.

Also, since there is a lack of competition for these calls, the FCC recognizes that callers are paying rates far in excess of those the caller would be able to receive from their presubscribed interexchange carrier. The FCC believes that the most harmed callers are the residential ones that do not have all the choices that business customers may have available. Therefore, the FCC is considering requiring the BOCs and all other LECs to cease their practice of stripping off interstate intraLATA calls to allow consumers to benefit from lower charges through increased competition.

CONCLUSION

The pro-consumer, pro-competition AT&T consent decree set forth guidelines to prevent monopoly abuses from recurring in the telecommunications industry and required equal access in the interLATA toll market. It is undeniable that consumers have benefitted significantly from the resulting competition. In the intraLATA market, however, equal access was not mandated, in part because of the states' rights over such traffic. The Court overseeing the consent decree did, however, expect the development of competition in the intraLATA market:

> [T]he lack of competition in this [intraLATA] market would constitute an intolerable development. The opening up of competition lies at the heart of this lawsuit and of the decree entered at its conclusion, and the significant amount of the traffic that is both intrastate and intra-LATA should not be reserved to the monopoly carrier. (United States v. Western Elec. Co., 569 F. Supp. 990, 1005 (D.D.C. 1983)

Despite the decree's intentions, the RBOCs have continued to abuse their monopoly power and to prevent the development of full competition in the intraLATA market. Now, more than ten years since divestiture, intraLATA equal access still does not exist in any RBOC territory. Moreover, even in the absence of intraLATA equal access, the RBOCs continue to shrink the intraLATA direct dial market by expanding local calling areas, pricing services below the costs they impose on potential competitors and deploying anti-competitive and anti-consumer dialing patterns. Such abuses are clear proof of the RBOC's continuing monopoly power in the intraLATA direct dial market.

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EXHIBIT #6

Notes:

1). Sources: Regional Bell Companies - FCC Preliminary Statistics of Communication Common Carriers for year ended December 31, 1993 ; Long Distance - Company Annual Reports; Electric Utilities - Disclosure, Inc.; all other industries are from The Value Line Investment Survey - 1994 editions.

2). The Long Distance industry composite is comprised of MCI, LDDS, ALC, LCI, AT&T and Sprint long distance services.

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EXHIBIT #7

Ameritech

William L. Weiss
Chairman and
Chief Executive Officer

October 20, 1993

The Honorable John C. Danforth
Ranking Minority Member
United States Senate
Committee on Commerce, Science and Transportation
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Danforth:

On behalf of the seven regional companies, I am responding to the request you put to me and Bob Allen at the hearing on September 8 to develop a definition of local exchange competition. I hope the following information is helpful to you and the Subcommittee as you continue your deliberations on S.1086.

In developing a definition of local exchange competition, we must first determine the purposes for which such a standard might be used. Tests for competition have been developed, as in the cable reregulation legislation, to determine the appropriate level of regulation, of the prices of a telecommunications provider. For example, Illinois law provides the following standard of effective competition which, when met, relieves a provider of a service of certain regulatory pricing burdens:

> "Competitive Telecommunications Service" means a telecommunications service, its functional equivalent or a substitute service, which, for some identifiable class or group of customers in an exchange, group of exchanges, or some other clearly defined geographical area, is reasonably available from more than one provider. 220 ILCS 5/13-209.

This type of test is not appropriate as a test for entry into a market. An entry test, based on antitrust principles, must focus on conditions in the market that one is seeking to enter. The Modified Final Judgment (MFJ) provides just such a test. Recognizing that excluding a competitor from a market harms consumers, the MFJ provides that the line of business restrictions, including the long distance prohibition, shall be removed when there is "no substantial possibility that a [regional company] could use its monopoly power to impede competition in the

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market it seeks to enter." This standard does not require the elimination of the local exchange monopoly. Indeed, it assumes the continuation of substantial market power, if not a *de jure* monopoly. Instead, relief is mandated if there is no substantial possibility that any existing monopoly power in the local exchange will impede competition in the market the local exchange company seeks to enter. The Court of Appeals has interpreted "impeding competition" to mean the ability to increase price or restrict output. This means, for example, that there must be a significant threat that the regional companies will dominate the long distance market.

The regional companies believe that existing conditions in today's telecommunications marketplace satisfy the test for entry set out in the MFJ. Regardless whether the Subcommittee agrees with that proposition, there can be no doubt that the unbundling requirements of S. 1086 justify the elimination of the long distance ban. It is Ameritech's position that the unbundling requirements of S. 1086 reduce barriers to entry and eliminate any remaining argument that the regional companies could act anti-competitively in the long distance business.

Predatory pricing by the regional companies in the long distance market is not feasible due to the scale economics of long distance carriers such as AT&T, MCI, and Sprint, and the fact that the regional companies would start with zero market share. Such a pricing strategy would fail because the long distance carriers could withstand any losses from matching below cost prices and could not be driven from the market. Access discrimination would be impossible to implement due to the current equal access regulations in place and the unbundling provisions of S.1086 bill which would make any attempted discrimination much easier to detect. Accordingly, the seven regional companies urge the Subcommittee to mandate long distance relief in S. 1086.

For this Subcommittee to establish a new test for long distance entry based on market metrics raises several concerns. First, local exchange competition will occur at different times for different groups of customers in different geographic areas. This has already been the experience in the development of long distance competition. To permit entry by the regional companies only to those customer groups and geographic areas for which competition exists - whether defined as the existence of a substitute service or some specified level of market share - will result in piecemeal entry that will not be in the best interests of consumers. This approach will increase customer confusion as to what carriers provide such services a at given point in time, and could cost consumers millions of dollars in

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foregone savings that would result from full regional company entry. Even worse, delaying entry until some overall metrics is satisfied will delay entry in the most contestable arena far beyond any reasonable time. Ironically, a metrics test has the effect of placing the public policy decision of competitive entry into the hands of the incumbent providers who can control the entry of competitors into their own businesses by their decision as to whether or not, and on what scale, they choose to enter the local exchange business. These effects conflict with the main objective S. 1086 - to facilitate the development of universal access to an advanced telecommunications infrastructure.

In addition, continued or piecemeal exclusion of the regional companies from the long distance market would have a serious impact on the types and quality of services offered to consumers. For example, Ameritech has developed the Wisconsin Health Information Network (WHIN), linking doctors, hospitals, and insurance carriers in a network that reduces the cost of health care services while increasing the responsiveness of the industry to the health care needs of Wisconsin. As the current debate over health care attests, this type of service is critical to our nation's ability to provide quality health care services to all Americans. Other of the regional companies are offering or are planning to offer similar services. Due to the long distance restriction, the regions are unable to serve smaller, less populated areas because of the high cost of replicating a network for each area. As a consequence, the benefits derived from WHIN will be provided only to people in the larger cities of Wisconsin, such as Madison and Milwaukee, while people in less populated areas - those in the greatest need of improved health care services - are excluded. Removal of the long distance restriction would allow the regions to serve less populated areas using facilities based in larger cities, thus extending the full benefits of the network to all consumers and reducing the costs to everyone.

In conclusion, we urge the Subcommittee to recognize that opening all markets to all competitors offers the best hope of developing the nation's telecommunications infrastructure for the benefit of all citizens and therefore, to amend S. 1086 to eliminate the long distance ban of the divestiture decree.

Sincerely,

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EXHIBIT #8

Bell Atlantic

Bell Atlantic Corporation
One Bell Atlantic Plaza
1310 North Court House Road
Arlington, Virginia 22201
703 974-3624

James G. Cullen
President

94 MAR -9 AM 11:45

March 8, 1994

The Honorable Ernest F. Hollings
United States Senate
125 Russell Senate Office Building
Washington, D. C. 20510-4002

Dear Mr. Chairman:

Thank you for the opportunity to appear before the Commerce Committee last week to discuss S. 1822. This letter is a follow up to suggest changes to your bill in three areas we discussed: the entry test, electronic publishing, and information services.

I. Entry Test

As I stated at the hearing, I agree with you that the Section VIII(C) standard is the correct test for whether a Bell company should be allowed to provide interstate long distance services. Under this test, the restrictions imposed on a Bell company "shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."

If you use the VIII(C) standard, the additional entry tests, set out from page 79, line 10 to page 81, line 2 in the bill are unnecessary. This is the core of our long distance disagreement. The additional tests will result in long distance carriers controlling which long distance markets we can enter and therefore will effectively give them the power to bar our entry for at least a decade.

RHCs believe that under existing regulations and market conditions we can qualify for some interLATA authority under this test. The FCC has developed equal access procedures, which permit consumers to choose a carrier for their long distance calls. These procedures are administered by the Bell companies, as well as by hundreds of other local telephone companies that are not bound by the decree's interLATA restriction.

These procedures work. Consumers freely select the providers of long distance service and change providers in response to more attractive competitive offers. These are the same procedures that work in areas served by United, Sprint, Rochester, Southern New England and all the other exchange carriers that are also in the long distance business.

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I would also urge Congress to return to the States the authority over intrastate communications that the MFJ took from them in 1984. State regulatory agencies should determine whether the Bell companies are allowed to provide intrastate interLATA services, just as they have control over the other telecommunications services offered by those companies. The attached Amendment 1 to S. 1822 incorporates these changes.

The long distance provisions cannot be considered in isolation. By that I mean the thrust of S. 1822 is to accelerate opening up the local telephone exchange markets to more competition, making it easier for competitors to gain more market share, particularly in our business markets, as soon as possible. Indeed, your bill contains many of the provisions from S. 1086 which was a bill to open up the local exchange. However, S. 1822 provides an important mechanism to insure that universal service is addressed before local loop competition can take place. This is a significant improvement.

Since S. 1822 creates new opportunities in the local exchange business for our competitors, I think it essential that the bill also create new and comparable competitive opportunities for the RBCs within the same timeframe. While the bill provides cable relief it is not immediate. Indeed, it is at least two years away. The information services "relief," we have already won in the courts without the restrictions the bill imposes. The one area where we receive immediate relief is in manufacturing. That is significant, but it does not offset opening up the local loop unless it is coupled with a realistic opportunity of getting into the long distance business. The additional tests in your bill that go beyond VIII(C) will preclude us from having that new, competitive opportunity. In addition, we will be saddled with a separate subsidiary requirement imposed only upon the BOCs.

As I also indicated last week, the Bell companies need immediate authority to provide interLATA services that are incidental to other permitted businesses. Amendment 2 attached to this letter would provide us with this authority.

II. Electronic Publishing

At the last hearing, I committed to providing you with the electronic publishing provisions agreed to by the Bell companies and the newspaper publishers, which both we and they believe strike the appropriate balance. This language, which has been incorporated into H.R. 3626, is also enclosed, Attachment 3.

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III. Information Services

At that same hearing, you asked how I would improve Subtitle C dealing with information services. First, I would delete the requirement that a telephone company make gateway services available concurrently to all its subscribers. This requirement will only delay the introduction of new services and slow investment in the infrastructure. Second, the obligation to provide gateways to all information providers on nondiscriminatory terms is an obligation that should be borne by the Bell telephone companies — indeed, by all telephone companies — but not by telephone company affiliates that provide unregulated services. Therefore, the RBCs propose that the bill, at page 76 line 17, read:

> "Unless expressly provided elsewhere in this Act, any common carrier that offers gateway service shall make such service available to its customers under nondiscriminatory rates, terms, and conditions, and shall offer gateway service functions to all providers of information services on nondiscriminatory rates, terms, and conditions."

IV. Other Suggestions

There are other ways in which S. 1822 can be improved. One of the most important is that telephone company entry into cable/video programming should not be further delayed. As a result of a recent court ruling, Bell Atlantic can provide cable service in its Region today. We believe that the best way to bring down the price consumers pay for cable service is through injecting immediate competition. Therefore, I urge you to delete the requirements imposed at page 87 lines 4-8 of the bill that would postpone this much needed competition.

The bill would mandate the implementation of number portability without regard to the costs or consumer benefits. It would impose highly restrictive "CPNI" rules, far more stringent than those developed by the Commission, that would make it extremely difficult for us to talk to our customers. Finally, the bill would also impose the requirement that all our services could be re-sold, including those services that are subsidized and provided below cost.

I look forward to exploring these and other matters with you in the upcoming March 10th hearing.

James G Cullen

Attachments

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Mr. HYDE. Thank you, Mr. Roberts.
Next is Mr. Tom Hester.

STATEMENT OF THOMAS P. HESTER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AMERITECH CORP.

Mr. HESTER. My name is Tom Hester, and I am executive vice president and general counsel of Ameritech Corp., which provides telecommunications services in Illinois, Michigan, Wisconsin, Indiana, Ohio, and through our cellular operations, Missouri.

I appreciate the opportunity to appear before you today. Americans are well-served by your close attention to telecommunications reform. Ameritech supports this effort. This reform effort has gained new momentum in part as a result of Ameritech's customers first proposal, our proposal to accelerate entry into the local markets in exchange for permitting Ameritech to enhance competition in long-distance markets.

Ameritech has been committed to this proposal for several years and we believe our experience will provide valuable insights to policymakers like yourself. As you know, the multilayered legal and regulatory systems that uniquely apply to our business requires that to enter the long-distance business we must file separate applications with the FCC, various State regulatory agencies, the Department of Justice and, of course, ultimately Judge Greene.

Ameritech has embraced change in this industry as a positive force. Competitive markets in both local and long distance will best serve consumers. The real question we have is whether policymakers at all levels of government and in all three branches recognize this and are prepared to remove the barriers to competition so that the consumers can receive the services they deserve. We trust that government can look forward and not back through a rearview mirror.

Ameritech decided to become an advocate of free and open markets and through that advocacy help shape telecommunications policy. Most of the legislative proposals that we have seen and heard this morning suggest that Members of Congress recognize the need for change. Mr. Chairman, your legislation in particular avoids the bureaucratic and regulatory approach of the past and will create a competitive telecommunications marketplace where consumers will reap the benefits.

Ameritech already faces competition for all of our business services and for local toll services among residence customers. Several telecommunications companies are certified to provide the full range of local exchange services. Much more competition is around the corner. Indeed, just last week AT&T filed to provide local telephone service in Chicago and Grand Rapids, MI.

In my prepared statement, I detailed the competition in the Ameritech region by competitive access providers, long-distance carriers, cable television networks, and wireless companies. I need not belabor these market facts. With customers first, we recognize these market facts and proposed a new approach. We encourage State regulators to remove barriers to local competition and sought the concurrence of the Department of Justice for our entry into long distance under the framework of a proposed order to Judge Greene.

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The underlying public policy premise is simple: consumers throughout America will benefit most through more competition in the telecommunications market including both long-distance and local service. While the customers first proposal to the FCC generated positive comment in 1993, we concluded that it was more than the existing regulatory system could digest in a timely manner. Therefore, with the support of the Department of Justice, we proposed a limited trial in Illinois and Michigan beginning in Chicago and Grand Rapids.

Our negotiations with the Department, as Assistant Attorney General Bingaman has said, were both thorough and tough. The proposal conditions our entry into long distance on concrete steps taken by Illinois and Michigan regulators to help accelerate the entry of other telecommunications providers into local service. Furthermore, we must satisfy the Department of Justice with a checklist of conditions spelled out in the draft order.

The fundamental principle of customers first is that the entire market, both local and long distance, should be competitive. This should also serve as your guiding principle for legislative reform. This reform should come sooner rather than later. It is not a template for legislation while many of the conditions and restrictions we have agreed to may be appropriate for a limited trial, they will prove unnecessary as the trial proceeds and should not be embodied in permanent national legislation.

We agree with the basic thrust of recent legislative proposals in the House and Senate that the MFJ waiver process for LATA business restrictions is outmoded and must be replaced. We agree with you, Mr. Chairman, that an important role for the Department of Justice is exercising its traditional enforcement powers under a new statutory scheme applying subtle antitrust doctrines subject to specific deadlines.

Ameritech appreciates the opportunity to share its views and we look forward to bringing the consumers the benefits that will result from full competition in the telecommunications market.

[The prepared statement of Mr. Hester follows:]

PREPARED STATEMENT OF THOMAS P. HESTER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AMERITECH CORP.

My name is Tom Hester, and I am Executive Vice President and General Counsel of Ameritech Corporation, which provides telecommunications services in Illinois, Michigan, Wisconsin, Indiana, Ohio and Missouri. In addition, we have interests in telecommunications companies in Norway, Poland, Hungary, New Zealand, and other countries around the world. I appreciate the opportunity to appear before the House Judiciary Committee today on Ameritech's behalf. The public interest is well served by the close attention that the Congress is now giving to telecommunications reform legislation. Ameritech supports this initiative and applauds the dedicated work that has gone into it.

Although legislative reform in the telecommunications field is hardly a new subject, it has taken on a new momentum following Ameritech's Customers First proposal—Ameritech's proposal to facilitate entry into the local exchange market in exchange for Ameritech's entry into the interexchange markets.

Because of the increased interest in Ameritech's proposal, my testimony today will focus on three related areas. First, I'll describe the state of competition in the two areas where our trial will take place. Second, I'll summarize the Customers First Plan. Finally, I'll share with you Ameritech's views on H.R. 1528, the Antitrust Consent Decree Reform Act of 1995, that facilitates removal of existing MFJ lines of business restrictions.

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THE STATE OF COMPETITION

For the past several years, the Customers First initiative has been a major commitment for Ameritech. Under the multi-layered regulatory and legal system that applies to our company, in order to enter a new line of business it is necessary to file separate applications before the FCC, various state regulatory agencies, the Department of Justice and, of course, Judge Greene whose court oversees the MFJ. Given this obstacle course, some have asked why we chose to pursue the Customers First project at all. The answer is that almost from the inception of Ameritech we have understood that a competitive market in both local and all long distance services would best serve consumers, and that this is the direction in which technology would move our industry—whether we liked it or not. The question was, and still is, will the policymakers recognize this and remove the barriers that stand in the way of consumers receiving the services they deserve. As a business, our option was clear: we couldn't cling to the status quo, but instead we must embrace the inevitable changes brought about by technology and the dynamics of the marketplace. Accordingly, Ameritech decided to become an advocate of free and open markets and through that advocacy help shape the telecommunications policy in the areas in which we operate.

Competition in local exchange service is a reality today. We already face competition for business access and local toll service for both business and residence, and several rivals already have been selling local exchange services. Much more competition is around the corner, including competition from AT&T. Let me give you some of the highlights:

Competitive access providers are now using state-of-the-art fiber technology to serve areas such as downtown Chicago, the Interstate 88 technology corridor in DuPage County, the Interstate 90 corridors, the O'Hare airport and surrounding area in Illinois, and Grand Rapids and Detroit, Michigan, providing long distance access alternatives to customers in our region and, increasingly, local exchange service as well. In Chicago, for instance, two leading CAPs are already certified to provide local exchange service and a third has applied. The attached maps illustrate the extent of this competition.

Long distance carriers, such as AT&T and MCI, have announced their plans to compete aggressively in local exchange markets. AT&T already is running full-page advertisements in cities like Chicago, which seek to win over our local toll customers. On Wednesday of last week, AT&T applied to regulators in Illinois and Michigan for approval to offer local telephone service in Chicago and Grand Rapids. AT&T's Chairman was quoted as characterizing this as a $90 billion dollar opportunity. AT&T has to do nothing more than file a relatively routine application to compete for *all* of Ameritech's business. Ameritech, on the other hand, has to endure a seemingly endless battle to offer customers what they want.

Cable television networks are fast installing fiber technology that permits them to carry both voice and data traffic. There are already two cable/telephony trials underway just in Chicago. Time-Warner alone plans to carry telephone service over cable systems in 25 cities. A consortium of the six largest cable companies is proposing to build equipment that would allow them to send, receive, and switch telephone signals between cable systems.

Wireless technologies, including cellular service and Personal Communications Services (PCS), also promise tremendous competition against the wireline local loop. AT&T has been authorized to provide PCS in Chicago, and other Bell Companies compete with us for cellular services. With the ongoing conversion from cellular to digital technology and new competition from PCS, wireless prices are likely to become economically competitive with wireline services. Indeed, through our cellular system in Kauai, Hawaii, Ameritech is offering local telephone services in competition with the local telephone company. These changes have led FCC Chairman Reed Hundt to predict that there may be 100 million wireless subscribers within a decade. Hundt, Chairman, FCC, Address Before the Annual Legislative Conference, National Association of Counties 5 (Mar. 5, 1995).

The defenders of the status quo argue that we have the vast number of local customers and until that changes dramatically, we should be barred from the long distance business. They are wrong in concept. Our business, like many other businesses including the long distance business, derives a disproportionate share of revenue from a relatively small number of customers.

On average, 30% of a LEC's revenues comes from 1% of the customer base. For Ameritech, our business customers comprise just 10% of accounts and 33% of subscriber lines, yet they generate about the same total revenues as all residential cus-

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tomers combined. The top 20% of Ameritech business accounts in Illinois generate 81% of business revenue; the top 2% of business accounts generate about 54% of all business revenue. Residential demand is also concentrated so the top third of Ameritech's residential customers in Illinois account for 55% of total residential revenue and 66% of non-local loop revenue. This concentration permits competitors and new entrants to easily target the most lucrative customers.

And, that is exactly what is happening. For example, we estimate that in Chicago and Grand Rapids, CAPs gained 30% of the private line and high capacity business in just three years. More significant are competitive inroads in the local toll business among medium and large businesses. In Chicago, AT&T alone receives about 40% of the revenues from these customers. In Grand Rapids, CAPs and long distance carriers have captured over 60% of large business. Recently, we have seen the impact of local competition grow to residential customers' toll calls and local services. Many of the long distance carriers have strongly marketed so-called dial-around calling. AT&T, in particular, has targeted residential customers.

Consumer demand for "one-stop shopping" for telecommunications services is leading to rapid business integration between CAPs, wireless companies, and cable systems that are all pursuing both local exchange and interexchange service in one form or another. Ameritech today has less than half of the total revenue from the average customer's total telecommunication usage, including local, long distance and cellular services. This trend toward complete end-to-end telephone service is typified by the AT&T/McCaw merger but is visible everywhere as new joint venture announcements appear in the press on almost a daily basis. The import of these changes is clear. In the very near future, the major providers of telecommunications services, interexchange carriers, cable and wireless companies, CAPs and, hopefully, LEC, will compete with each other head-to-head at every level.

AMERITECH'S CUSTOMERS FIRST PROPOSAL

As a result of these competitive developments, we chose to advocate a new approach to the MFJ competition in both local and long distance services. In March, 1993, we filed our initial Customers First proposal with the FCC. Our proposal generated positive discussion of more open telecommunications policy. Customers First also had its detractors, the same companies that oppose our entry into long distance. We realized that our plan could easily bog down in the regulatory system for years, during which time we would face increasing competition in the local exchange market but would be denied the ability to compete in the interexchange market.

Faced with the possibility of endless delay, we concluded it was time to move our proposal out of the realm of rhetoric into the marketplace of reality. Accordingly, we approached the Department of Justice to see if it would support a limited trial that could demonstrate our belief that our presence in the long distance market would be pro-competitive and decidedly in the public interest. To their credit, the Department of Justice agreed to consider such a proposal. We filed our trial waiver proposal at the end of 1993. Our discussions with the Department intensified after telecommunications reform legislation failed to pass last year. Long and hard negotiations produced a proposal that we were able to circulate for public comment in December, 1994. There were numerous responses to our proposal, many of which asked for additional detail. Between January and March of this year, we worked hard to address the concerns of third parties who provided comments. During the course of these negotiations, Ameritech agreed to a number of conditions to satisfy questions raised by these comments. Changes from Ameritech's original proposal included a change in geographic scope, inclusion of a separate subsidiary, and clarifications or enhancements addressing number portability, competitive access to poles and conduit, restrictions on use of certain customer proprietary network information and modifications to our original equal access proposal. In the end, we were able to reach agreement on the contours of a Customers First trial to take place initially in the Illinois portion of Greater Chicago and in Grand Rapids in southern Michigan.

With the filing with the decree court on April 3, the Department of Justice fully supports our proposal for a trial. Exercising its responsibility as "Prime Mover" in this field (*United States* v. *Western Elec. Co.*, 900 F.2d 283, 294 n.12 (1990)), the Department has asked Judge Greene to lift the interexchange restriction to allow the Customers First trial to proceed, subject to conditions set forth in the Proposed Order. The trial proposal, Assistant Attorney General Bingaman has stated, "is the result of thorough, tough negotiations between the Department, Ameritech, and AT&T, and immense efforts by state regulators and others," and it strikes a balance that "protects the consumer," "promotes real competition in the local telephone markets," and "will increase service and lower prices in both local and long distance

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markets."[1] Attorney General Reno also has stated that Ameritech's plan "will bring real competition to the local market for the first time and, as a result, more competition for the long distance market as well," and has acknowledged that "[c]ompetition means increased choices, decreased prices—a double victory for the American people." *Id.*. Like the Department, the Consumers Federation of America, AT&T, MCI, Sprint, and MFS, support the trial.

The heart of the Customers First trial is the lifting of entry barriers to local exchange markets through state regulatory action and the entry of Ameritech into the interexchange market under the framework of the Proposed Order submitted to Judge Greene. The Proposed Order prohibits Ameritech from providing interexchange services until Illinois and Michigan regulatory authorities have taken concrete steps to open the local exchange market to competition.

In addition, Ameritech must satisfy the Department of Justice that we have offered inter-connection to the carriers and unbundled our loops and ports in both trial LATAs, and we must allow non-facilities-based competition through resale of unbundled loops and ports. We must put non-discriminatory arrangements in place to allow competitors to share pole attachments and conduits, and provide support for 411, 511, and 911 services for those who want to connect their own facilities. We must provide technical and interconnection information on a non-discriminatory basis. We must offer to list competitors and their customers in our White Pages and allow competitors to include information in our books. We must work diligently to provide number portability. And, we must arrange for reciprocal compensation and be able to implement dialing parity. The Order strengthens Ameritech's obligation to provide interexchange carriers with equal access to its local exchange operations, and it requires operation of Ameritech's inter exchange facilities through a separate subsidiary.

We expect to satisfy all these conditions and begin the trial promptly. We have every confidence that this initiative will prove to be dramatically pro-competitive.

You may ask why would we agree to all this. Aren't we giving up a lawfully endowed monopoly? The fact is that we are giving up very little. Technology took away a good part of what was a local bottleneck and changes in public policy have taken away the rest. And, while we don't necessarily like every word of the proposed order, we accepted it because it's time to move ahead.

TELECOMMUNICATIONS REFORM LEGISLATION

The Customers First trial is not a substitute for legislation, and its features should not be replicated under a new law. Important as Ameritech's experience with Customers First has been in the formulation of our policy views, we certainly do not regard it as a template for legislation. After all, Customers First is only a trial, conducted with the goal of gaining practical experience with open competition. That trial is subject to a large number of conditions—all of which we expect will prove to be unnecessary to protect competition. In fact, the Justice Department, in its brief filed before Judge Greene last week, acknowledged that some of the safeguards in the draft order might be lifted as we gain experience even during the trial. Legislative reform, in contrast, will provide a permanent solution and look to the long-term future of telecommunications. The Customers First trial also was designed to be conducted within specified geographical areas. Congress' focus, by contrast, must necessarily be national in scope. We are confident that the trial will start as soon as our dialing parity conversions are ready.

At the heart of all of the Congressional reform initiatives has been a broad consensus of opinion that the line of business restrictions under the MFJ and the waiver process before the decree court are now obsolete. We agree. This is truly a topsy-turvy system and one that has no claim to perpetuation under any new legislation. New legislation should also create a structure in which the Department maintains its ability to act in any special circumstances where competition may be threatened, but an expeditious time schedule is obviously necessary.

As we understand it, Mr. Chairman, your recently proposed telecommunications reform Bill (H.R. 1528) would accomplish many of the objectives that I have described. You have urged your colleagues to replace the judicial waiver process with a time-sensitive, expedited antitrust review procedure that promises to resolve these issues in a pro-competitive manner. We agree with your proposal that Bell operating companies should be permitted to apply for authority to engage in the provision of long distance services and equipment manufacturing, that their requests should be reviewed expeditiously subject to a prescribed timetable, and that it is appropriate for the Department of Justice to evaluate such requests pursuant to objective, well-

[1] Press Release, Department of Justice, April 3, 1995, p. 2.

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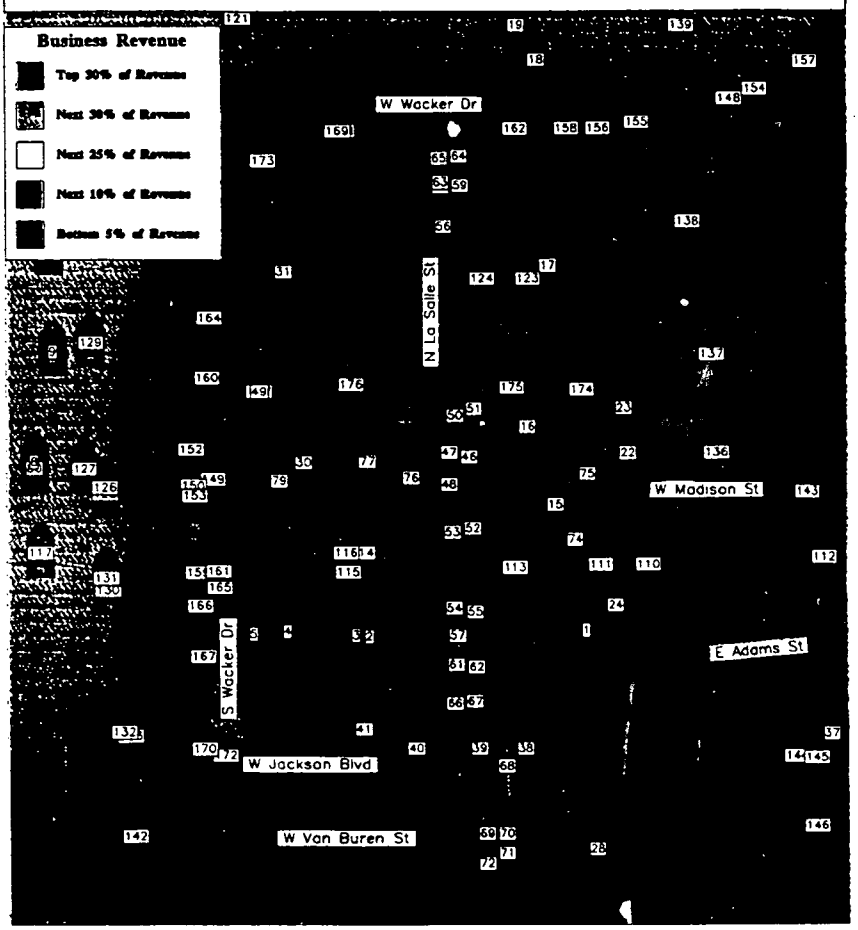
established antitrust standards, such as the concept of market power, as provided in your proposed legislation. We applaud your efforts.

Once again, Ameritech appreciates the opportunity to share its views with this Committee. We would be happy to consult further with the Committee and its staff as that may be helpful, and we look forward to your questions.

Business Telephone Revenues--Downtown Chicago

= Building hooked up to a local competitor of Ameritech



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Mr. HYDE. Thank you.

Mr. Regan, division vice president, and director of public policy, Corning, Inc.

STATEMENT OF TIMOTHY J. REGAN, DIVISION VICE PRESIDENT AND DIRECTOR OF PUBLIC POLICY, CORNING, INC.

Mr. REGAN. Thank you, Mr. Chairman.

I appreciate the opportunity to be here today to talk about an issue which is vital to the future of Corning and to the future of all independent telecommunications equipment manufacturers. I brought a little prop along to demonstrate a point. This is a piece of fiber optics that has tremendous carrying capacity, 24,000 telephone conversations at one time.

This little piece of fiber optics today has been deployed by most of the long-distance telephone companies and gradually by most of the local telephone companies, but the fact remains that it would still be on the shelf in the lab if it were not for the MFJ. The MFJ brought Corning, a company that is in the glass business, not the telecommunications business, an opportunity to bring a product that is as revolutionary as this to the marketplace and to succeed. If it were not for the MFJ, I would not be here. We began our research in fiber optics back in 1966, the same time as AT&T and other foreign companies.

By 1970, most of them had quit, on the announcement that it was impossible to break the so-called "light barrier." Our people stayed with it and in August 1970 they made the initial critical investment.

Two years later we brought it to AT&T. Their scientists were thrilled with it but their businessmen said why should we buy from Corning? Someday, we could make it ourselves. It was a vertically integrated monopoly and it was also the only customer in the United States, so we had no customers. We carried the product overseas and had some interest.

It wasn't until 1982, after the consent decree was signed when the fledgling company, MCI, represented here by Mr. Roberts, placed an order with us for 100,000 kilometers of single mode fiber. We built the plant and started the business. Also, the MFJ included, wisely, a provision that said all the Bell operating companies had to buy in a nondiscriminating fashion. When they went out to bid, we were there ready to sell the product and they bought it. And so you can see why we get concerned in Corning when we talk about changing the MFJ. It has provided the basis for a whole new business for our company.

Now, our experience with the MFJ really was only the end of a long, long, long history which we were unaware of, frankly, when we got into this business. As it turns out, in 1882, the Bell system made the initial decision to buy all its products from Western Electric. That led to three different antitrust cases over the next 100 years and over that period of time there were all kinds of abuses.

Two of those cases were totally ineffective. The third one was effective, created a market, and created an opportunity not only for Corning but an entire host of new firms. Now there are over a thousand manufacturers in this country. The number, the quantity the sales volume of equipment like this telecommunications equip-

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ment has doubled. The industry has grown faster than most industries in the United States. It is investing in R&D at a rate as high as the computer industry or the software industry. And it has turned around its trade imbalance. We had a $2 billion trade imbalance in 1982. Last year we had a $2 billion surplus; a $4 billion increase.

It has been a great success not only for my company but for a number of other companies and the country as a whole. With this wonderful history, I am not saying the MFJ is perfect. Clearly some changes have to be made and we are prepared to embrace the changes to allow the RBOC's in manufacturing, but they have to be made in a context of a set of rules designed to secure the gains of the MFJ. It hasn't been all bad.

There has been some good associated with it. Hold to the good as we move forward. We have a century of abuse that we have to deal with here. We cannot rip off some restrictions and expect everything, industries like mine, to remain unaffected.

So what should you do? We think there are two models. We tried to make this as simple as we can in terms of trying to understand it ourselves.

We think there are two models out there. One is the high hurdle model and the other is the low hurdle model. If you go with the high hurdle model, then we assume that you would require some level of real competition to exist before the RBOC's would be allowed entry. In that situation you don't need many post-entry safeguards.

The low hurdle model is one in which there would still be a significant amount of market power, but they would still be allowed into a particular business. That is, they would still have monopoly control over certain of their exchanges. With that monopoly control, you have to have safeguards, significant safeguards, in place to protect against abuses.

Now, it appears that Congress is moving toward the low hurdle model. That is the model that is clearly reflected in your bill, Mr. Chairman, and in the Commerce Committee bill. And neither one of those bills will require actual competition before the BOC's are allowed to new businesses.

Now we don't have a problem with the use of that low hurdle model. We have a problem, however, with the fact that neither one of the bills includes any significant safeguards in the manufacturing sector. So we are left with the worst of both worlds.

Mr. Chairman, we applaud your opinion of the Justice Department as having a key role in making decisions upfront before there is any movement forward into new businesses for the RBOC's. That makes a big, big difference. There also should be some sort of a regulatory role for the FCC, perhaps in the administration of the safeguards, but there again we would like to see a role for Justice.

In terms of a bill with adequate safeguards, we think you have to cover approximately six points. First you have to have separate subsidiaries for manufacturing. Those are included in your bill with respect to one area of business, the alarm business, already.

Secondly, you have to have a provision for nondiscrimination. There should be no reason why any RBOC or any other company should be in the position to engage in discrimination in favor of one

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manufacturer over another, particularly if that one manufacturer happens to be owned by it.

Next, you need to deal with the Bellcore problem. Bellcore is the standards making entity for the telephone industry. As a standards making industry, they have a significant amount of proprietary information from every manufacturer in the country now in their files. If they get into manufacturing and they have all of our information, where is that going to leave us?

Finally, we need cross-subsidy provisions and post-entry provisions for the administration in the future.

Now, I would like to close with two points, Mr. Chairman. No. 1, please don't ignore the lessons of history as we move forward. We have 100 years of experience. We know what can likely happen.

No. 2, manufacturing matters. It adds tremendous value to society. It is the highest wage sector of society. It is the area which generates all the exports. It is the area which is critical to our long-term prosperity as a country. We think can you deal with both of them in the bill.

Thank you very much, sir.

[The prepared statement of Mr. Regan follows:]

PREPARED STATEMENT OF TIMOTHY J. REGAN, DIVISION VICE PRESIDENT AND DIRECTOR OF PUBLIC POLICY, CORNING, INC.

Thank you, Mr. Chairman, for the opportunity to appear before the Committee. My name is Tim Regan, and I appear today on behalf of Corning Incorporated, the inventor of optical fiber.

I'm pleased to have this opportunity to address the need for comprehensive reform of our nation's laws governing the communications industry. For too long, the piecemeal administration of communications policy has created uncertainty in the marketplace. I'm hopeful that this will be the year that the Congress passes legislation which opens all telecommunications markets to full and fair competition. Doing so will:

Spur economic growth that will benefit all Americans;

Encourage private investment in communications-related businesses and the information infrastructure; and

Expand the market for all types of telecommunications equipment.

In addition to opening all markets to full and fair competition, legislation should:

Promote open and non-discriminatory procurement practices, similar to those developed by the Bell operating companies to comply with Section II(B) of the MFJ;

Promote open and non-discriminatory access to the standards-setting and product certification processes; and

Address the antitrust concerns raised by the Bell operating companies' ownership of Bell Communications Research.

I'm also pleased to have this opportunity because it provides me with a chance to impress upon the members of this Committee just how important the reform of our communications laws is to manufacturers. While much of the debate over telecommunications reform has focused on the carrier community, I urge you not to overlook or underestimate the importance of telecommunications manufacturing. In their book *Manufacturing Matters,* Stephen Cohen and John Zysman state this importance in a way I hope each member of this Committee will appreciate:

> Manufacturing matters mightily to the wealth and power of the United States and to our ability to sustain the kind of open society we have come to take for granted. If we want to stay on top—or even high up—we can't just shift out of manufacturing and up into services, as some would have it. American competitiveness in the international economy is critical to long-term domestic prosperity, social justice, international leadership, and world order. There is no way we can lose control and mastery of manufac-

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turing and expect to hold on to the high-wage service jobs that we are constantly told will replace manufacturing.[1]

How the manufacturing issue is dealt with in the context of telecommunications reform is critical, not just to the hundreds of thousands of Americans now engaged in telecommunications manufacturing, but to the nation as a whole.

Mr. Chairman, my purpose for appearing before the Committee is twofold. First, I want to share with you some insights on the role that antitrust law played in shaping the current structure of the telecommunications manufacturing industry. Second, I want to make some suggestions on how you might proceed in light of this history.

THE PRE-DIVESTITURE EXPERIENCE[2]

The evolution of a competitive telecommunications manufacturing industry is inextricably linked to the long history of antitrust litigation which ultimately led to the break-up of the Bell System. Entry of the Modification of Final Judgment (*United States* v. *Western Electric,* C.A. 82–0192, D.D.C.)—commonly referred to as the MFJ—in 1982 ended nearly 50 years of controversy over the competitive problems arising from AT&T's vertical integration into manufacturing, and nearly a century of efforts to limit competition in the equipment manufacturing marketplace. Until the MFJ, competition in telecommunications manufacturing was at best difficult, and at worst impossible. The earliest attempts to limit competition in the manufacturing marketplace began in 1882, when Bell Telephone designated Western Electric—in which it owned a majority interest—as the exclusive manufacturer of its patented telecommunications equipment. Bell Telephone then refused to purchase equipment from any other source. This behavior was allowed because, at that time, the United States had no antitrust laws.

As the use of, and subscription to, telephone service increased, so did the Bell System's attempts to gain competitive advantage in the manufacturing marketplace. As early as 1934—the year the Communications Act was enacted—charges were made that the Bell System was engaged in the anticompetitive cross-subsidization of equipment produced by Western Electric, the Bell System's manufacturing affiliate. The result of this cross-subsidization included both high profits on manufacturing and an inflated rate base for local exchange service. Although a lengthy investigation by the Federal Communications Commission determined that the charges were in fact true, no action was undertaken pursuant to the Communications Act or the antitrust laws, as the nation's entry into World War II turned the federal government's attention elsewhere.

In 1949, an antitrust complaint (*United States* v. *Western Electric,* No. 49–17, (D.N.J.)) brought by the Justice Department focused almost exclusively on the Bell System's effort to impede competition in the manufacture and sale of telecommunications equipment. In the 1949 litigation, the Justice Department advocated a structural remedy involving the divestiture of Western Electric. However, the Department later bowed to political pressure and agreed to a settlement which allowed the Bell System to retain its manufacturing operations. The suit ended in 1956 when the Justice Department and the Bell System entered into a consent decree that required the Bell System to license its patents—a measure which had little impact in light of the continued preferred supplier relationship between the Bell System and Western Electric. Potential competitors were forced to concentrate on developing equipment for use in microwave and independent private line networks.

Subsequent events demonstrated the inadequacy of the 1956 consent decree and the inability of state and federal regulators to prevent the continued foreclosure of competition in the telecommunications equipment marketplace. This combination of factors ultimately led to the filing, in 1974, of the antitrust complaint that resulted in the break-up of the Bell System.

During the litigation which followed the filing of the 1974 complaint (*United States* v. *AT&T* No. 74–1698), as well as in private antitrust suits and numerous proceedings conducted by the state and federal regulators, evidence was presented with respect to the Bell operating companies' participation in a broad range of anticompetitive conduct, including:

Biased equipment purchasing decisions;
Discriminatory equipment interconnection requirements;
Preferential information disclosure practices; and
The cross-subsidization of equipment prices from monopoly service revenues.

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[1] Stephen Cohen and John Zysman, *Manufacturing Matters,* page 3.

[2] A thorough review of this history can be found in H. Report 102–850, which accompanied legislation (H.R. 5096) approved by this Committee in 1992.

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The effect of these practices was to limit competition in the telecommunications manufacturing marketplace, and the history of the antitrust litigation clearly demonstrates that none of these forms of misconduct could be adequately prevented through regulation.

The 1974 litigation was terminated in 1982 when the Justice Department and the Bell System entered into the modification of the 1956 consent decree, now known as the MFJ. The MFJ separated the local exchange functions of the Bell System from its manufacturing and long-distance functions (effective January 1, 1984), and it is in that environment that the industry has operated for the past 11 years.

THE POST-DIVESTITURE EXPERIENCE

The break-up of the Bell System was a watershed event for the telecommunications manufacturing industry. The non-discrimination requirements and manufacturing restriction imposed by Sections II(B) and II(D), respectively, of the MFJ rendered it impossible for the Bell operating companies to engage in the type of anticompetitive conduct that was common under the old Bell System.

The MFJ has allowed for the development of a vibrantly competitive manufacturing marketplace in which every competitor has an equitable opportunity to prosper. New firms have entered the market, and new and old firms alike have been able to compete fairly on the basis of price and quality, secure in the knowledge that the market will reward the competitor which offers the highest-quality, lowest-priced equipment.

The benefits of this competition have been substantial. Innovation brought about by competition has increased the number of products commercially available and the number of firms offering new products. Industry revenues have doubled since divestiture, exceeding $35 billion last year.

Furthermore, as the competitive telecommunications manufacturing industry has grown and matured, it has become increasingly competitive. Our overall balance of trade in telecommunications equipment last year was a positive $2.2 billion, up from a deficit of $2 billion in the early 1980's. More impressively, our balance of trade in sophisticated "high-end" equipment, (i.e. switching and transmission equipment) was a positive $4.6 billion in 1994. Exports account for nearly 30% of domestic sales, and trends indicate that exports and the trade surplus should continue to grow.

In addition to the positive effect that competition has had on the growth of the industry and our balance of trade, the MFJ has served to prevent cross subsidization, price and access discrimination, and hence, an unforetold number of regulatory disputes and lawsuits—each of which reduces our national competitiveness and harms consumers. As we move forward with consideration of legislation to supersede the MFJ, we should take care to preserve the benefits that have accrued as a result of it.

THE COMING STORY

Corning is a living example of the benefits of the MFJ. As you may know, Corning is an old manufacturing company, rapidly approaching our 150th birthday. Our core competence is in glass and ceramic materials, technology and manufacturing. Our longevity is due in large part to our commitment to technology. We invest around 5% of sales on R&D over the long term regardless of business conditions.

Our involvement with telecommunications began with our early research into optical fiber technology in the mid-1960's. Bell Labs and several foreign companies began their research at about the same time. Most were ready to give up by 1970, when a well-known scientist in the field announced at a prestigious technical conference that glass fibers were decades away.[3]

But Corning scientists persisted and made the pioneering optical fiber invention later that year. In fact, it was in August 1970, 25 years ago.

Once the breakthrough was made, the commercial fun began. Corning entrepreneurs had to convince reluctant customers to use glass fiber instead of copper wire in telephone systems.

AT&T, which owned most of the telephone lines in America at the time, said it would be 30 years before its telephone system would be ready for optical fiber. And when it was, AT&T planned to make its own fiber.[4] After all, it was a vertically integrated monopoly.

At that point, we began to think that we had a technical success, but a commercial failure.

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[3] Ira Magaziner and Mark Patinkin, *The Silent War*, Vintage Books, May 1990, page 274.
[4] Ibid., page 275.

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Then we took our technology overseas. Frankly, we had more friendly reception. We negotiated some technology-sharing arrangements and formed joint ventures to help support further research.

The research paid off technically. By 1975, Corning scientists had developed a fiber which was an 8,000 percent improvement over their original creation. But still, we had no serious customers in the United States. Nevertheless, we built a pilot manufacturing facility in 1976.

Finally, in 1982, after the MFJ was signed, the commercial breakthrough happened. MCI took the risk and placed a 100,000 kilometer order for a new generation of fiber, single-mode fiber. We took the MCI order, built a full scale plant, and started a technological revolution.

The moral of this story is that the Justice Department initiative that resulted in the MFJ created a competitive long distance market that stimulated demand for fiber optics. And, the MFJ requirement on the RBOCs to engage in nondiscriminatory procurement gave Corning a chance to compete for RBOC business which began to develop in the mid-1980s. Our scientific, manufacturing, and marketing expertise alone weren't enough to make optical fiber a technical and commercial success. It was a Justice Department move toward competition and away from discrimination that made the difference in the end. Had the MFJ not been entered, optical fiber may still be in the lab.

LESSONS LEARNED

From this 100 year experience with vertical integration between telecommunications services and manufacturing, we can draw some very important lessons for future legislation. It should be noted, however, that these lessons relate only to manufacturing. They may not necessarily apply to other areas of antitrust abuse such as interexchange service.

Our first lesson is that vertical integration between telecommunications services and manufacturing gives rise to a tendency for antitrust abuse. We have 100 years of history under the Bell System to demonstrate this point. If a monopoly both buys and manufactures a product, it has a strong tendency to favor itself and exclude other manufacturers.

Our second lesson is that regulation alone has consistently failed to address abuses that have historically arisen through vertical integration. Were it not for the failure of the regulatory system to discipline the anticompetitive activity in manufacturing, and of course, long distance, the 1974 antitrust case may never have been filed. The record of the case shows the regulatory system failed.

Our third lesson is that Justice Department action has been the most effective remedy to antitrust abuse through vertical integration in manufacturing. Three antitrust cases were filed to address abuse in manufacturing over the last 50 years—the most recent case providing the most effective remedy.

And finally, we've learned that limits on vertical integration between telecommunications services and manufacturing can yield significant benefits in terms of the growth and development of a competitive industry. Hundreds of firms have entered the telecommunications equipment business since divestiture in 1984; the industry's revenue has doubled; and the industry has reversed its trade deficit into a sizable surplus. The United States is now the world's technological leader in telecommunications equipment.

WHAT NEEDS TO BE DONE

The Congress can chose to follow one of two models for RBOC entry into manufacturing and other restricted lines of business.

The first is what I call the "high hurdle" model. Under this approach, an RBOC would be allowed entry only after it demonstrated that the source of its market power had been effectively compromised to prevent it from being able to engage in anticompetitive activity in the future. This model involves a high degree of "upfront" protection against anticompetitive practices, requiring substantially less protection once the RBOC enters.

For example, you could require that an RBOC actually have a competitor in every one of its local exchanges before it is allowed to manufacture. Under such circumstances, the RBOC's monopoly control over all its local exchanges would be nearly eliminated. The prospect for cross-subsidization or other forms of anticompetitive activity would be virtually eliminated. In this situation, the high standard upfront would make protection later on after entry in the form of safeguards less important.

Of course, there are gradations for the high hurdle, ranging from the loss of market share as extreme evidence of competition to the current test in the MFJ for a

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waiver of the line of business restrictions. But, the important point is, if you have a high hurdle, there's less need for safeguards after entry. In a sense, there is a trade off. The higher the hurdle, the lower the need for post-entry safeguards.

The second model is the "low hurdle" model. Under this approach, the statutory criteria would be established which when met would allow an RBOC into manufacturing and other restricted lines of business. But, this approach involves the use of significant post-entry safeguards. Such safeguards are necessary because there would be no evidence that actual competition exists in all the local exchanges from where the RBOC derives its market power.

With the low hurdle approach, a statutory standard must be established as a trigger for entry. The standard can range from as little as a date certain to a checklist for equal access and non-discriminatory interconnection, along with some sort of a Justice Department review, as provided for in the recent Ameritech waiver.[5]

But, the important point to remember is with the low hurdle test, comes substantial post-entry safeguards. These safeguards include separate subsidiaries, prohibitions on cross-subsidies, prohibitions on discrimination in procurement and standards-setting, just to name a few.

The obvious advantage of this approach is that RBOC entry would be rather imminent. With a high hurdle test, entry could take a decade or so. Because of this timing issue, I believe the body politic is moving toward the low hurdle approach.

For example, the Senate telecommunications bill, S. 652, uses a low hurdle model. It has statutory standards for equal access and non-discriminatory interconnection and a public interest review by the FCC. It also has substantial safeguards including separate subsidiaries and, in the case of manufacturing, limits on Bellcore and a ban on discriminatory procurement, standards-making and equipment certification.

Your bill, Mr. Chairman, H.R. 1528, also reflects the low hurdle model. Unlike the Senate bill, it includes higher "dangerous probability" standard of review by the Justice Department, but doesn't include any post-entry safeguards for manufacturing. While we support a strong role for Justice like you have in H.R. 1528, we, quite honestly, feel that post-entry safeguards for manufacturing is a must. Even under the "dangerous probability" standard for entry, the RBOCs will still have monopoly control over many local exchanges. This will enable them to cross-subsidize and self deal.

The bill introduced by the Commerce Committee last week suffers from the same deficiency. It requires equal access and non-discriminatory interconnection as a prerequisite for entry, but it has absolutely no safeguards.

Quite frankly, Mr. Chairman, we are very concerned about the impact of any bill without post-entry safeguards in manufacturing on the future of our business.

RECOMMENDATION

It appears that Congress is intent on using the "low hurdle" model in telecommunications reform legislation. This would allow entry by meeting certain statutory criteria to ensure open interconnection and an expedited review by a Federal agency, be it the FCC or Justice, along with strong safeguards. We can support this approach. Frankly, we'd prefer high hurdles and extremely tough safeguards. Any truly honest businessman would say the same thing. But, the time for change has come so we need to find a low hurdle model that works for the RBOCs and protects our legitimate interests.

We believe that such a low hurdle approach must include safeguards in manufacturing. These are necessary in light of the 100 year history of abuse under the Bell System in manufacturing. In addition, they are necessary because with this low hurdle, competition will not exist in many exchanges, giving rise to possible cross-subsidization and self-dealing.

We believe these safeguards should include:

Prohibition on discriminatory behavior in procurement, standards setting, and certification;

Limits on joint RBOC manufacturing to ensure against the reintegration of the industry;

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[5] See United States v. Western Electric et al, and AT&T, Motion of the United States for a Modification of the Decree to Permit a Trial, Supervised by the Department of Justice and the Courts, in which Ameritech Could Provide Interexchange Service for a Limited Geographic Area, with Appropriate Safeguards, When Actual Competition and Substantial Opportunities for Additional Competition in Local Exchange Service Develop, Civil Action No. 82-0192 (HHG), April 3, 1995.

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Prohibition on Bellcore entry into manufacturing unless its joint RBOC ownership is terminated and it no longer engages in standards and certification activities to protect manufacturers from misuse of proprietary information in Bellcore's possession;

Prohibition on cross-subsidization;

Separate subsidiary requirements with separate books and records, personnel, and sales and marketing activities; and

Post-entry procedures with a role for the FCC and Justice to ensure compliance with the safeguards.

These are reasonable safeguards. Their reasonableness is reflected in the fact that most are in the Senate bill which is supported by the RBOCs. Many of the them were also included in last year's House bill (H.R. 3626) which was approved by this Committee.

As far as the Justice Department's role is concerned, we believe Justice should participate at both ends of the decision to allow entry. That is, to the extent that a public interest or competition standard must be met before entry is allowed, Justice should have a role in making the determination. Similarly, Justice should be involved in post-entry procedures to ensure compliance with laws governing competition.

CONCLUSION

In conclusion, we believe a statutory mechanism can be established to allow RBOC entry into manufacturing using the "low hurdle" model as long as meaningful safeguards are adopted. The procedures for entry and the administration of the safeguards should include a Justice Department role because nearly a century of history has proven the Justice Department worthy. It has provided the effective remedy against anticompetitive practices affecting manufacturing while the regulatory agencies have faltered.

This is not a call for more regulation. Rather, it is a call for more competition with enough regulation at the margins necessary to protect competition, not stifle it.

Thank you for the opportunity to appear before you.

Mr. HYDE. Thank you, Mr. Regan.

Your excellent statement answered the questions that I had to ask you, but I have a couple for Mr. Hester.

Under this bill, the Justice Department, and not the Bell companies, has the burden of proof. How significant is the shift in the burden of proof?

Mr. HESTER. Mr. Chairman, I think it is a marked improvement in the process from what we have now that we operate under VIII(C). Here we not only have the burden of proof, but we have it under VIII(C). Under your bill, that burden shifts to the Department of Justice, and I think which is a step in the right direction, because I characterize your bill as recognizing the benefits of competition, moving the industry, telecommunications industry toward the mainstream of antitrust law. That is toward the point where we will be treated like any other industry in this country. And in that sense, the Department in exercise of its enforcement decisionmaking, has the burden of proof as you have placed it in your bill.

Mr. HYDE. Well, it is clear the big struggle, one of the big struggles, if not the major struggle, will be over the standard. How comfortable are you with the section 2 of the Sherman Act standard which we have used as against VIII(C)?

Mr. HESTER. I think it is an appropriate standard. Let me give you my views on VIII(C) in the context of that. Mr. Roberts read the comments from last year and I will acknowledge that in the context of the legislative process Bell companies have been willing to accept VIII(C) as a standard. I would suggest that was last year.

Every year that goes by we learn more and more about how this business operates. We have chosen to proceed through our proposed

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order with the Department of Justice, which ultimately we will be judged, under VIII(C), because we think we can satisfy that test.

But let me give you a little vignette. One of the things I am concerned most about is that there will be a line in my obituary that said he was one of a hundred lawyers that knew what the MFJ was. So I have a vested interest in burying it in the dust bin of history.

But more to the point, we have a waiver that we filed last year, Mr. Chairman, that directly affects the residents in Chicago. This year is the 35th anniversary of the sister city program and the first two sister cities in the world were Chicago and Warsaw program. We thought it would be a neat idea to apply for a waiver under VIII(C) to provide service from Chicago, from the Chicago LATA, directly to Warsaw so that a Chicago resident could dial an 800 number and basically get a dial tone in Warsaw.

Mr. Flanagan's congressional district, which I happen to live in, is obviously impacted directly by that, as is yours. You would not believe the opposition we got from AT&T and other long-distance carriers over how this simple little waiver to provide a circuit between Chicago and Poland was going to be the end of the universe and long-distance service and life as we know it on this planet.

I suggest to you that is a large measure a function of this VIII(C) standard. It gives standing to come in and complain about things, quote, impeding competition when no one has any idea how this will come about except through lawyer's rhetoric. That is exactly why we decided to push through the idea of a trial.

It was time to tee it up and play 18 holes and see what would happen and move this thing out of the realm of rhetoric and into the realm of reality. And we think that we will be successful and we will demonstrate that a lot of the conditions that were required in the first instance will not be required for permanent relief.

Mr. HYDE. Thank you.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you very much.

Well, I am impressed that a waiver between Chicago and Poland led you to reject VIII(C). Wasn't there anything else? I mean, what is it going to be later on this year? I mean, when do your experiences after a long line of officials support VIII(C) and now you tell me that there was a waiver dispute that led you to realize that it is not going to be so hot anymore?

Mr. HESTER. I didn't mean to imply that the Poland waiver was the one that led to that conclusion because that was actually filed after the fact. It has been this history of waivers and the interminable—the long period of time that it has taken to process. And the fact that it gives standing to the AT&T company to come in and oppose anything that we want to do, no matter how procompetitive and proconsumer, such as the waiver to Poland. It gives us frustration that it is time to move on to something else.

Mr. CONYERS. Well, I don't see—this didn't have anything to do with it, the waiver between Chicago and Poland?

Mr. HESTER. No, the waiver——

Mr. CONYERS. This is just an anecdote that you wanted to drop on us?

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Mr. HESTER. Absolutely, just to show the absurdity that is applied in some cases.

Mr. CONYERS. I can see where we might get another anecdote down the line. Where does it end? We have repeated numbers of your officials telling us, and I guess it would have included you had you been here, that VIII(C) was OK. And now this year it is not. I don't think that is a responsible way to act, even assuming this anecdote really showed you that something different had occurred.

Now, let me point out, Mr. Regan, and I really appreciated your observances about how competition meant so much because of the modified agreement. But the problem with the bill in the great Committee on Commerce is that they don't have entry safeguard. They have no antitrust role at all. This would be strictly the FCC in a regulatory process trying to determine these future questions of whether competitiveness will exist or not.

And I think that puts it on a completely different level from the bill that we have before us, which at least envisions a Department of Justice role. Would you agree that that makes a pretty big difference?

Mr. REGAN. Yes.

Mr. CONYERS. Definitely. Now, Mr. Roberts, let me just ask you, the question that we are trying to deal with here is what is the problem with RBOC's in coming around to some kind of a reasonable standard, an entry safeguard? And how are we going to make sure that there is open competition?

It seems to me that if they were to agree in those areas where there is—and where you and them could agree that there is open competition, they could go into long distance; right? It is where they have a monopoly circumstance that where the problem begins.

And whether it is going to continue to be aggravated is something that we have to look into the future for. And as I read what the Assistant Attorney General said, it is going to be very hard under the standards, even though they have a role. How do you see that?

Mr. ROBERTS. I would agree with you, Congressman, on two key points: First, where there is open competition, we believe it will stimulate the market in those areas where there is full and effective competition MCI doesn't fear competition, we welcome it. Yes, the RBOC's should then be able to get into long distance.

The second point is we think the appropriate test for that, in the context of this committee, is VIII(C). I would challenge the RBOC's, if they would support that test, which they agreed to last year, maybe we could get on with legislation in a much more pleasant fashion.

Mr. CONYERS. Well, then, maybe this committee and others in the Congress will have to fashion some compromise that may get us to the same position. Could I point out that in the bill under discussion today, the MFJ and previous legislation, the prohibition, would create affiliations with a Bell that has more than 50-percent interest.

If we read the definition of affiliate on page 33, this would be allowing a Bell with more than a 50-percent interest to qualify and it is generally understood that a Bell can control an affiliate with,

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in truth, far less than 50 percent? Is that agreed? Is that understood by you, Mr. Roberts?

Mr. ROBERTS. Yes, that is understood and that is why one of my points was the definition of affiliate needs to be radically changed.

Mr. CONYERS. What about you, Mr. Regan? Are you familiar with this part of the bill?

Mr. REGAN. I haven't focused on that issue. I will have to look into it.

Mr. CONYERS. What about you, Mr. Hester?

Mr. HESTER. I haven't focused on that. I heard Mr. Roberts refer to it in his opening remarks.

Mr. HYDE. The gentleman's time has expired, but the gentleman hasn't asked me and I am informed that is the identical definition from the bill that passed last year, both the House with only four, I think, dissenting votes and probably the same definition in the bill the gentleman filed if that is the one that was in the bill last year.

Mr. CONYERS. Well, the gentleman didn't ask me and since neither of us are witnesses, let me just point out that any legislation that would say ownership of more than 50 percent in an affiliate would be acceptable for the Bell test would be something we should review. We don't have the other bills in front of us. The only one we have is this one.

Mr. HYDE. I thank the gentleman. The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. Hester, I was very interested in Mr. Regan's analysis of the high hurdle/low hurdle model. And if the hurdle—and I hope I am using this correctly, Mr. Regan—if the hurdle were a little bit higher, would that be something that would be acceptable to you if the hurdle were higher and DOJ weren't involved?

Mr. HESTER. That is really two questions: is the hurdle higher and should the Department of Justice be involved? I have no problem, indeed, I think it is part of the activity of the Department of Justice to be involved in the enforcement of the antitrust laws and I think those laws, that hurdle, if you will, ought to be the laws as they apply to businesses in general.

I am not sure whether that as I sit here, how I would characterize that in terms of the high or lows that Mr. Regan discussed.

Mr. INGLIS. Mr. Regan, do you have any response to that? Am I using your models correctly?

Mr. REGAN. You are using the models correctly, but I guess the way one would have to analyze this is say a high hurdle model requires that there is some demonstrable evidence that competition exists before entry is allowed whereas the low hurdle would establish that you can enter the business before there is any actual evidence or demonstrable evidence of competition.

Now, are there gradations between the two? The answer is sure. I think, for example, the VIII(C) test would tend to be on the high side, a high hurdle model but it would still be kind of low on the list. It is not actual competition, but it could be considered low on the list. Whereas, on the low hurdle, the notion talked about in the Senate of just a date certain and you rip off all the restrictions, that is sort of the lowest of low.

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Mr. INGLIS. Let me ask you this. I guess I was coming in on a plane and I missed Mr. Boucher's comments earlier but it is apparent from what I heard that he is on the same wavelength that I am.

I am a little bit concerned about two different regulatory agencies overseeing one operation. And I guess what I am probing here is using your model, is there a way with a higher hurdle to have DOJ not involved in the high hurdle model that would be acceptable to you or is that not possible?

Mr. REGAN. Well, I think when you get into the high hurdle model, you also will have a role for the DOJ. And the reason why you do is that you are making a fundamental judgment about the existence of competition, and in my opinion, that really is a DOJ responsibility, not an FCC responsibility.

Mr. INGLIS. Mr. Hester, did you want to comment about that?

Mr. HESTER. Well, I believe that the Department of Justice should be the applier of the antitrust laws. And I think we need to be very careful to guard against kind of dual multiple tracks dealing with the same subject matter. Therefore, it seems to me that the Department of Justice, if it deals with the competitive track, ought to be exclusive of the FCC.

Mr. REGAN. May I make a suggestion?

What about the possibility of having the entry test be a DOJ responsibility and having the safeguards, many of which are in Mr. Hyde's bill, administered by the FCC? One is regulatory and the other clearly is competition-based. It doesn't have the agencies doing the same thing.

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

The gentlelady from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Mr. Hester, I just wanted to ask you about the Assistant Attorney General's testimony that the Justice Department worked rapidly on the customers first order. Is that your view of it, too? Did both sides have the same view?

Mr. HESTER. Yes, I give the Department of Justice all the credit in the world for the time and dedication that they spent in working on this matter. We filed it in December 1993, and met with them literally on a weekly basis almost throughout that next year. Had public meetings in December 1993. Had a draft order circulated. A revision to that, a new draft order circulated. I mean, she characterized it as thousands of hours of work, and I am sure it was because it certainly was on our side.

Mrs. SCHROEDER. But basically both of you would be in agreement with that characterization, so I appreciate that.

You know, the Justice Department has traditionally always had the antitrust role, which I think is terribly important. And you begin to wonder what is the purpose of the FCC.

I mean, we are taking away the fairness doctrine and probably the foreign ownership. All of these other things are going away. We know the Justice Department is always going to be there. So why are we, as we are looking at where we consolidate, why doesn't that make sense to start looking to see if the FCC even has a role in this day and age? And why are we maintaining an agency whose time may have come and gone as we move through deregulation?

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Are we not just struggling to find something for them to do to keep them there?

Mr. HESTER. I hesitate to advise the Congress on how to organize the FCC, but I will say this. I have been dealing with these issues for 25 or 30 years as an attorney with the Bell system and then Ameritech and I was indeed in Washington, DC, 20 years ago, so about the time that the Federal Communications Commission first got interested in issues of competition.

I mean, this was not on their agenda prior to that. And I guess now they have a bureau of competition. So it has obviously developed at the FCC and I think it is a valid question that you raise.

Mrs. SCHROEDER. Nobody else wants to look at that. While we are throwing ideas out, Mr. Chairman, I just think it is an interesting proposal, because when you really stop to think about it, what are they going to do? And I don't see giving them authority that the Justice Department certainly knows how to use and has got lawyers well steeped in; we don't need the duplication, and I don't think we need the checks and double hurdles.

Mr. HYDE. If the gentlelady would yield, only the Department of Justice is contemplated, but that is because neither of us serve on the Commerce Committee.

Mrs. SCHROEDER. I was just trying to get a few points with the chairman. I see you caught on right away, didn't you? I do think it is a very interesting proposal.

And then the final thing that I would ask, is as we have this debate about what the standard should be, I hear some saying it is a whole new universe. That we should be considered exactly the same after 10 years, as other industries. And really other people are saying no.

It is still very possible that some of the fallout from the 10 years could still come in so that the VIII(C) standard is much more appropriate. Is that basically the view of where we are now? Is that basically what we are talking about whether the 10 years has made any difference?

Mr. REGAN. I will try. Yes.

Mrs. SCHROEDER. That is good. Thank you.

Mr. HYDE. Try to shorten up your answers, Mr. Regan.

I thank the gentlelady.

The gentleman from Tennessee.

Mr. BRYANT of Tennessee. Thank you, Mr. Chairman.

Thank you, members of the panel, for coming to testify today. I have already had answers to the two questions I want to ask you from Deputy Attorney General Bingaman. And I would like to have your perspective on this as people in this industry.

The first question has to do with again those underserved—potentially underserved areas in the rural and inner-city areas that might fall by the wayside and you heard the Attorney General indicate that she had a good comfort zone that that would not occur. We don't want to be caught with rates that are high or not served at all.

But the second question would deal with the alarm industry and your feelings in terms of the possible exemption that would be created for them for a number of years that would allow them protection. But if you would first just go through each of you and answer

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the first question about the rural and inner-city areas and the possibilities there if we break up the so-called monopoly.

Mr. Roberts, you want to start?

Mr. ROBERTS. Yes, first of all we certainly believe and support that all Americans need to be served by telecommunications. It is going to have an impact on education. It is going to have an impact on the fundamental competitiveness of the country.

The second point I would make is that it is going to get a bit more complicated than it has in the past. When you look at the information highway, you look at computer services and other kinds of interactivity, we need to set up rules. I have a couple of comments on your question.

First, there needs to be some direction on Congress' part to ensure that we will continue to serve the areas that you are referring to. Whether the universal service concept that has been defined in the past is right or not or has to be expanded. There needs to be some focus on that.

The second point, we are believers that competition in itself will take you a long way toward serving areas that need to be served. Let's not lose sight of the fact that telephone companies have had the obligation under universal service to provide services to all Americans and only 94 percent have them. The rural areas are suffering today.

So whatever the ground rules were under the systems that were set up, the Bell operating companies haven't really met their obligations that exist today. I think competition will go a long way toward stimulating some of the things that need to be done, but yet there will have to be some focus.

In answer to the Congresswoman's question a minute ago, I would tell you that this committee needs jurisdiction but there are certain things, if the FCC is not going to do them, we are going to have to find some agency to do them. For the administration of the universal service fund, and frequency allocation and other things, we need to be sure that there is a place for those to reside that might not be appropriate for the Justice Department.

Mr. BRYANT of Tennessee. Mr. Regan on the first question?

Mr. REGAN. I think having gone through this debate in the Senate, I was very much impressed by the interest in this issue over there. And I think that that interest is here. I think that the last thing any of you want is to have rates for telephone service go up, number one, and number two, have your constituents unserved.

And so I think the bills—I am pretty confident the bills will include mechanisms to make sure that the rural segment of society gets certain basic telecommunications services. That being said, I think the bigger concern is whether or not you are going to get the advanced services that are going to be available in the urban sector.

Are you going to get interactive broadband capability in the rural sectors? I don't think the universal service system will necessarily provide that. I think it is going to be a long time before that happens in many of the rural areas and that is a problem. And I don't know quite how to fix it, but I don't think it has anything to do about the existence of the monopoly. Nothing at all.

Mr. BRYANT of Tennessee. Mr. Hester.

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Mr. HESTER. I believe that the universal service funds and activities in that area will go a long way toward alleviating any immediate concerns. But I think more importantly in the long run the benefits of competition will really deal with rural Americans. And let me cite one quick example. We provide cellular service in Kauai, Hawaii, which I mentioned in my testimony.

We are actually selling local service as a cellular service competing with the telephone company there in Kauai. And I know having driven across Tennessee and other States of that sort, the cellular service is available almost throughout the entire United States. So it is not inconceivable that we could be providing what we call home cellular service to rural areas as a complete substitute for land line service.

Mr. BRYANT of Tennessee. Could I interrupt you to start back on my second question, quickly? I am about out of time on the exemption that we would allow the alarm company possibly from competition?

Mr. HESTER. You picked the wrong person to ask, because we are the company that acquired an alarm company and we think it is a business that makes sense for us to be in it. One of the comments made earlier, talking about the small size of the alarm business, there are companies like Honeywell, ADT and others in that business, Wells Fargo. So it is not totally a small-company business.

We have recognized the concerns and we are willing to work with the committee. But we believe that we are in a legitimate business that we ought to be able to expand.

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

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. Before I ask some questions, primarily to Mr. Roberts, let me simply note that this is the last panel that we have for this hearing. On neither of the panels at this hearing have there been any witnesses who are questioning whether or not the Department of Justice should have this preapproval role at all with regard to Bell company entry into long distance. And there are some people who question that need.

And I would hope, Mr. Chairman, that you would have another hearing with respect to this matter before sending the bill to markup. And that at that other hearing, those who have that point of view could be represented on the panel, because I think that is very important information that the members of this committee need to have.

Mr. Roberts, let me ask a couple of questions of you and I will go through these for as long as I have time to ask them.

One of the salient provisions that is contained in Chairman Hyde's bill is an exemption from the interLATA prohibitions where the calls originate outside of the Bell company's service territory. The theory of that is that there is no potential for a bottleneck because the calls are originating in an area where someone else controls the network, not the Bell company that is involved.

What is your view of that exemption for out-of-region service? Could you tell us what you think about that?

Mr. ROBERTS. I will say, first of all, Mr. Congressman, it is about the biggest problem that we have with some of the bills that are

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floating around. But addressing that issue specifically, theoretically we would not have a problem, but I don't think it is as simple as answering that yes or no.

For example, if you were offering service outside of a territory, it is true you do not have a bottleneck for the calls that originate outside of the territory, but would there be fairness in the charges and in the ways that calls coming to your territory would, in fact, be handled?

Mr. BOUCHER. Let's explore that a little bit, because my understanding of the technology and the business arrangements that various telephone companies have among themselves is that if, in fact, there is a competitor to the Bell company in its exchange area where the call would terminate, that there really is no choice in terms of how that call gets diverted. It is going to go on the network that the subscriber who receives the call has subscribed to.

So there really is no choice with regard to that and it is going to wind up on the network of the local exchange carrier to which the recipient of the call subscribes. So how is there any potential for mistreatment of the competitor, that being the case?

Mr. ROBERTS. Very simple. Let's suppose that Ameritech and MCI are offering long-distance service here in D.C. and we are hypothetically calling your house in the Ameritech territory. I know you are not from Illinois, but let's assume the call terminates in the Ameritech territory. What do they charge for termination of that call between ourselves and themselves?

It is not a simple statement that of course they would charge the same, because what are the ground rules that govern that? How do you monitor it? Are you going to have separate subsidiaries? Are you going to be able to get into that? And that could be a competitive disadvantage in terms the way the calls are terminated.

Mr. BOUCHER. So your answer is as long as there is fairness in the charges for the termination of the call and the access charges, you would not have a problem with the exemption for the origination of long-distance traffic out of region?

Mr. ROBERTS. In isolation of the question, but it becomes a different question if they are able to do in-territory and out-of-territory, because you unwind a series of things that need to be addressed.

Mr. BOUCHER. In the Commerce Committee bill, which I will call the Bliley bill, there is a checklist of steps that the Bell companies would be required to satisfy before they could provide interLATA long-distance service. Among those things are interconnection agreements, the unbundling of network elements, the absence of any restrictions on resellers, number portability, one-plus dialing parity to give other long-distance companies fair access to the intraLATA calling market and access to rights of way among other issues.

That would then be subject to review at the Federal Communications Commission and assume that this FCC decides that all of these steps have, in fact, been taken in order to open the way for local exchange competition, the Bell company would then be authorized to offer interLATA service.

What is your problem with that? Why is that not a sufficient set of steps to protect the interests of all competitors?

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Mr. ROBERTS. I have a couple of problems with it.

First of all, I think we need to have, in addition to those steps, which is what this committee is all about, ensure that competition is, in fact, taking place. That is where the VIII(C) standard comes in.

To put that more bluntly, it is not a matter of walking up to a deadline and announcing that all the steps have been completed and now let's run. You have to give competition an opportunity to develop and you have got to ensure that the steps have been completed.

The second problem I have is that the steps are not complete. There are other things that need to be added. The biggest one of which is separate subsidiaries, so we can be sure that the playing field is, in fact, equal. It's critical to ensure that no cross-subsidies are taking place. I have sat through hearings where the Bell companies have stated that they can offer long-distance services at prices substantially below today's competitive market rates. I am sure Ameritech, has said the same thing. It is a fascinating challenge looking at the costs to be able to do that if you are not cross-subsidizing.

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

Mr. BOUCHER. Mr. Chairman, can I ask unanimous consent to ask one additional question? I have not burdened this committee with a great expenditure of time historically.

Mr. HYDE. Mr. Boucher, there are burdens and then there are burdens. But go right ahead.

Mr. BOUCHER. Thank you very much, Mr. Chairman.

Mr. Roberts, can we count on you to oppose at later stages of this process any attempts that might be made to set up dual systems of approval with regard to having both DOJ and the FCC be required to approve the entry of Bell companies into long distance?

Mr. ROBERTS. Can you count on us to——

Mr. BOUCHER. Oppose any compromises or agreements that might be attempted down the road that would establish dual requirements for approval at both the FCC and the DOJ before a Bell company is permitted to offer interLATA service?

Mr. ROBERTS. Let me answer that the opposite way. You can count on us to insist that the Department of Justice had a role in testing the competition threshold.

Mr. BOUCHER. So it would be consistent then with your stated position to have dual approval and require both agencies to have a role in this; is that correct?

Mr. ROBERTS. The problem, I would say, is what does that approval involve? Right now, Mr. Hyde's bill, as introduced, doesn't include a lot of the things that the Commerce bill includes. Answering in a vacuum, no, we are not going to agree with that. If you put a proper test in this bill, then it becomes a different statement.

Mr. BOUCHER. I think a lot of Members are going to have a great difficulty if we have both agencies involved in having to regulate the entry of Bell companies under this service.

Finally one question, has MCI ever raised any complaints about the practice of the Sprint long-distance network in utilizing its 6 million local access lines to impede competition from other long-dis-

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tance carriers? Have you ever had an opportunity to complain about that, because they have the same kind of bottleneck, potentially, that you are suggesting the Bell companies would have?

Mr. ROBERTS. The answer is we have raised complaints and the second answer is that they were part of the antitrust suit that we filed against the rest of the Bell system.

Mr. HYDE. The gentleman's time has again expired. I would take this opportunity to make mention of the fact that the bill that passed the House last year with the gentleman from Virginia's support provided for dual approval by the Department of Justice and the FCC. So the gentleman may well have changed his mind with the passage of——

Mr. BOUCHER. Would the gentleman yield? I would say to the chairman that that is true.

Mr. HYDE. I thank the gentleman.

Mr. BOUCHER. But if the gentleman would yield to me again, the long-distance industry last year effectively took a pass with regard to that question and carried the fight on to the Senate where, because of the differences that existed between the Bell operating companies and the long-distance industry, the legislation did not move forward.

But that debate, frankly, was not raised on the House floor and most Members, even those who had reservations as I did about that dual nature of regulation, supported the measure.

Now we have a fresh opportunity to do it right and I would suggest to the gentleman that doing it right would require placing this regulation in one agency and making sure that that agency has the proper instructions and powers to carry out its function.

Mr. HYDE. The gentleman's membership on the Commerce Committee is well-known. And I thank the gentleman.

Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Regan, I well appreciated your comments about the stodginess of AT&T prior to 1982. I can recall attending a speech given by former Chairman John DeButts back in the mid-1970's and in it he explained at great length the dangers of hooking telephone equipment, telephones, wiring, and so on, manufactured by other companies, other sources, into the AT&T system and the great potential for harm that had to the system. I think time has proven that the great potential for harm was to monopolies and not to the telecommunications system of the country.

And what I want to make sure we do not do is put ourselves in the same position that AT&T put itself in at that point because I, frankly, believe there is a tremendous amount of competition in all areas of telecommunications today including the local telephone service.

My cable company in Roanoke, VA, tells me that with an investment of less than a million dollars they will be offering local telephone service. And for those concerned about bottlenecks in communities like that, there is going to be a competing bottleneck, if you will, to offer you long distance. And I think the same thing is true in manufacturing.

And I guess my question to you is I welcome your comments about allowing the RBOC's into manufacturing with certain condi-

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tions. And we may not agree on those conditions. But why wouldn't it be with a great deal of enthusiasm given the number of companies you have the opportunity to deal with, and the number of manufacturers out there today, that the ability to have joint arrangements, joint ventures with these companies would enhance opportunities for companies like Corning?

Mr. REGAN. No question that we would like the opportunity to do it. That is why we are not here saying let's embrace the high hurdle and keep them out of the business. What we are here saying is let's establish some safeguards which deal reasonably with the problems that are likely to arise.

And we have special problems because of things like Bellcore, we have special concerns with respect to nondiscriminatory standard-setting and information distribution and sharing. These are things that are unique to this kind of business.

And we think that, frankly, most all of what I talked about today was approved by the RBOC's in the Senate debate. So I guess we are in a position of being on the side of the angels. We want to go ahead and put some safeguards in place, post-entry safeguards in place, and get on with it and we will be glad to do joint ventures with them.

[Additional information follows:]

The Telecommunications Industry Association's current position statement was adopted by TIA's Board of Directors. Individual companies, of course, may have their own position on the issue. However the vast majority of TIA member companies are opposed to full-scale removal of the manufacturing restriction at this time. A majority of TIA's members would be supportive of allowing RBOC entry if certain conditions (i.e., meaningful local exchange competition) were present; the TIA Board's position statement on removal of the manufacturing restriction is reflective of this view as well.

To be more specific, some small manufacturers may support the immediate lifting of the manufacturing restriction because to do so would create an environment in which their companies would be attractive as potential acquisitions. However, what may be good for an individual company may not be equally good for the equipment manufacturing industry as a whole. While certain of these firms might benefit from removal of the MFJ restriction, manufacturers that are not among those "chosen" by the BOCs for acquisition/investment, as well as those who wish to retain their independence, are likely to find it far more difficult to secure the financial support they need to survive, notwithstanding the fact that they may be as efficient or more efficient than the BOCs' manufacturing affiliates. Indeed, the mere *perception* that BOC-affiliated manufacturers have the "inside track" may be sufficient to deter other prospective investors and lenders from providing funding to manufacturers that do not have such ties.

Mr. GOODLATTE. You must be aware that nearly 200 telecommunications manufacturing companies have endorsed the immediate repeal of the MFJ restrictions on Bell operating companies getting into manufacturing.

Mr. REGAN. I was not aware that 200 companies had, but I was aware that in my community there are thousands of companies. Some people disagree.

Mr. GOODLATTE. I have a list here of more than 150, and without objection, Mr. Chairman, I would like to have that inserted in the record.

Mr. HYDE. Without objection, that will be inserted.

[The information follows:]

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Partial Listing of Small Telecommunications Manufacturing Companies Supporting the Immediate Repeal of the MFJ Provision that Bars Bell Company Participation in Telecommunications Manufacturing

Eagle Telephonics, Inc.
(Bohemia, New York)

Voice Control Systems, Inc.
(Dallas, Texas)

PairGain Technologies, Inc.
(Cerritos, California)

Summa Four, Inc.
(Manchester, New Hampshire)

International Light Inc.
(Newburyport, Massachusetts)

Integrated Network Corp.
(Bridgewater, New Jersey)

Racon, Inc.
(Seattle, Washington)

Adtran, Inc.
(Huntsville, Alabama)

Centigram Commun. Corp.
(San Jose, California)

Systematix Electronics
(Lyndhurst, New Jersey)

AVO Biddle Instruments
(Blue Bell, Pennsylvania)

Advanced Electronic Applications, Inc.
(Lynnwood, Washington)

Dianatek Corp.
(No. Sutton, New Hampshire)

Everett Sound Machine Works, Inc.
(Everett, Washington)

Applied Voice Tech. Inc.
(Kirkland, Washington)

Crert Industries, Inc.
(Bellevue, Washington)

Meteor Communications Corp.
(Kent, Washington)

ICOM America
(Bellevue, Washington)

XTP Systems Inc.
(Santa Barbara, California)

Olympic Controls Corp.
(Elgin, Illinois)

Viking Electronics, Inc.
(Hudson, Wisconsin)

TeleSciences, Inc.
(San Francisco, California)

Superior TeleTec
(Atlanta, Georgia)

Cortelco
(Memphis, Tennessee)

Technology Service Group
(Roswell, Georgia)

Teltrend Inc.
(St. Charles, Illinois)

Multipoint Networks
(Belmont, California)

Telecom Solutions, a Division of Symmetricon, Inc.
(San Jose, California)

Verilink Corp.
(San Jose, California)

Phone - TTY, Inc.
(Hackensack, New Jersey)

American Pipe & Plastics, Inc.
(Kirkwood, New York)

Communications Test Design
(West Chester, Pennsylvania)

Applied Digital Access, Inc.
(San Diego, California)

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Keptel, Inc.
(Tinton Falls, New Jersey)

Applied Innovation, Inc.
(Dublin, Ohio)

Digital Systems
International Inc.
(Redmond, Washington)

EMAR, Inc.
(Muncie, Indiana)

HealthTech Services Corp.
(Northbrook, Illinois)

LC Technologies, Inc.
(Fairfax, n)

Microwave Networks Inc.
(Houston, Texas)

EIS International, Inc.
(Stamford, Connecticut)

X-10, Inc.
(Closter, New Jersey)

Telect
(Liberty Lake, Washington)

Seiscor Technologies, Inc.
(Tulsa, Oklahoma)

Ambox Incorporated
(Houston, Texas)

Bejed, Inc.
(Portland, Oregon)

Restor Industries, Inc.
(Orlando, Florida)

Accurate Electronics, Inc.
(Beaverton, Oregon)

AmPro Corporation
(Melbourne, Florida)

Lumisys
(Sunnyvale, California)

BroadBand Technologies, Inc.
(Rsrch Triangle Park, NC)

The Triangle Tool Group, Inc.
(Orangeburg, South Carolina)

Elcotel, Inc.
(Sarasota, Florida)

BI, Inc.
(Boulder, Colorado)

Axes Technologies Inc.
(Carrollton, Texas)

Teradyne, Inc.
(Boston, Massachusetts)

XEL Communications, Inc.
(Aurora, Colorado)

Aptek Technologies, Inc.
(Deerfield Beach, Florida)

Electronic Modules, Inc.
(Garland, Texas)

Network General Corp.
(Menlo Park, California)

Brite Voice Systems, Inc.
(Wichita, Kansas)

Melita International
(Norcross, Georgia)

Intelect, Inc.
(Richardson, Texas)

Senior Technologies, Inc.
(Lincoln, Nebraska)

Young Design, Inc.
(McLean, Virginia)

Information Transfer, Inc.
(Bloomfield, New York)

International Telesystems Corp.
(Herndon, Virginia)

Accu-Com, Inc.
(Oshkosh, Wisconsin)

H & L Instruments
(North Hampton, New Hampshire)

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Inovonics, Inc.
(Santa Cruz, California)

VSI CAT Telecommunications, Int'l
(Riverside, California)

California Amplifier, Inc.
(Camarillo, California)

Pacific West Electronics
(Costa Mesa, California)

Sequoia Electronics
(San Jose, California)

Solonics, Inc.
(Napa, California)

Remarque Mfg. Corp.
(W. Babylon, New York)

Perception Technology Corporation, a Division of Brite Voice Systems
(Canton, Massachusetts)

MAR Associates
(Los Angeles, California)

Intercable
(Franklin, Massachusetts)

Artel Communications Corporation
(Hudson, Massachusetts)

OK Champion Corporation
(Hammond, Indiana)

Greenbriar Products, Inc., (Orbitron Div.)
(Spring Green, Wisconsin)

Senecom Voice Processing Systems
(St. Louis, Missouri)

Senior Industries, Inc.
(Palatine, Illinois)

Oza Communications Corp.
(Santa Barbara, California)

Larus Corporation
(San Jose, California)

AML, Inc.
(Camarillo, California)

Innovative Data Technology
(San Diego, California)

Klein Tools, Inc.
(Chicago, Illinois)

Telecommunications Techniques Corp.
(Germantown, Maryland)

Telebit Corp.
(Chelmsford, Massachusetts)

Sound Technologies Corp.
(Palisades Park, New Jersey)

DeYoung Mfg., Inc.
(Kirkland, Washington)

BekTel, Inc.
(Norcross, Georgia)

American Microwave Corporation
(Frederick, Maryland)

Lingo, Inc.
(Camden, New Jersey)

Colcom, Inc.
(Austin, Texas)

Lippincott Co. Inc.
(Seattle, Washington)

Expeditor Systems, Inc.
(Alpharetta, Georgia)

ABL Engineering Inc.
(Mentor, Ohio)

Dynamote Corp.
(Seattle, Washington)

FOCS Inc.
(Marlborough, Massachusetts)

Fore System, Inc.
(Warrendale, Pennsylvania)

Payphone Systems
(Redding, California)

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DGM&S, Inc.
(Mt. Laurel, New Jersey)

American Reliance Inc.
(Arcadia, California)

Keltronics Corp.
(Oklahoma City, Oklahoma)

Manhattan Electric Cable
(Rye, New York)

Tekelec
(Calabasas, California)

Metric Systems Corp.
(Carlsbad, California)

EIS, International, Inc.
(Stamford, Connecticut)

Mitac Industrial
(Freemont, California)

Innovative Applications, Inc.
(Roswell, Georgia)

Level One Communications, Inc.
(Folsom, California)

Puleo Electronics, Inc.
(Lynbrook, New York)

DSP Group Inc.
(Santa Clara, California)

RDL Inc.
(Conshohocken, Pennsylvania)

Metal-Flex Hosing Inc. and
RayTel, Inc.
(Philadelphia, Pennsylvania)

Riser Bond Inc.
(Lincoln, Nebraska)

Special Product Company
(Leawood, Kansas)

Signal Transformer Co., Inc.
(Inwood, New York)

TEL Electronics, Inc.
(American Fork, Utah)

T T Technologies, Inc.
(Aurora, Illinois)

Telemax Corp.
(Lisle, Illinois)

Tamaqua Cable Products Corp.
(Schuylkill Haven, PA)

Teloquent Communications Corp.
(Billerica, Massachusetts)

Microtech
(Cheshire, Connecticut)

V Band Corporation
(Elmsford, New York)

Primary Access Corp.
(San Diego, California)

Reach Electronics, Inc.
(Lexington, Nebraska)

USA Corp.
(Marina Del Ray, California)

Shore Microsystems, Inc.
(Oceanport, New Jersey)

Waveline, Inc.
(Fairfield, New Jersey)

American International
Communications
(Long Beach, California)

C. Sjoberg & Son Inc.
(CranstonRhode Island)

TouchFax Information
Systems, Inc.
(Lenexa, Kansas)

Rhetorex, Inc.
(Campbell, California)

Access Technology Association
(Falls Church, Virginia)

USA Video Corp.
(Los Angeles, California)

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Mr. GOODLATTE. Along with a copy of a brief filed in U.S. District Court this month by 25 small telecommunications manufacturing companies supporting a Bell company motion for a waiver of the MFJ so that Bell companies can provide research and development funding to telecommunications manufacturing companies.

Mr. HYDE. Without objection.

[The information follows:]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil Action No. 82-0192 (HHG)
	)	
WESTERN ELECTRIC CO., INC. and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	
	)	
Defendants.	)	

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COMMENTS OF AD HOC COALITION OF TELECOMMUNICATIONS MANUFACTURING COMPANIES IN SUPPORT OF MOTIONS BY THE SEVEN REGIONAL BELL OPERATING COMPANIES FOR WAIVER OF SECTION II(D)(2) OF THE DECREE TO ALLOW CERTAIN CONTRACTUAL ARRANGEMENTS BETWEEN MANUFACTURING COMPANIES AND BELL COMPANIES

These Comments are submitted by an ad hoc coalition of 22 telecommunications manufacturing companies in support of motions by the seven RBOCs for a waiver of Section II(D)(2) of the Decree initially requested more than eight years ago. The 22 coalition participants are named in an attachment to these Comments.

Section II(D)(2) bars RBOC involvement in telecommunications manufacturing. But the requested waiver would permit limited RBOC involvement by authorizing each RBOC to enter contracts with telecommunications manufacturers whereby the RBOC would fund the manufacturer's product R&D costs in return for royalties on sales to third parties by that manufacturer of products developed as a result of the R&D funding contract.[1/]

[1/] This matter is before the Court pursuant to an order by the D.C. Circuit remanding for further consideration a motion by Ameritech for waiver of this type. This motion was initially filed with the Justice Department on Sept. 30, 1986. See U.S. v. West. (continued...)

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The Justice Department has urged the Court to grant the requested waiver subject to several conditions designed to ensure that any RBOC who takes advantage of the waiver does not exploit its contractual arrangement with a manufacturer to impede manufacturing competition. See "Response of the U.S. of the BOCs' Requests for Waivers to Receive Royalties From Certain Sales of Telecommun. Products" (Mar. 22, 1995). One proposed condition would require an RBOC purchasing a product manufactured pursuant to an R&D funding contract to which it is a party to pay the lowest price paid by other parties for a comparable purchase (a "most favored nation requirement"). This requirement is designed to help ensure that the RBOC does not harm competition in the manufacturing industry by intentionally overpaying for a product whose development it funded so that the manufacturer of that product can harm manufacturing competition by selling the product to others at an anticompetitively low price.

ANALYSIS

I. The Manufacturer/RBOC Contracts that Would Be Authorized by the Pending Motions Will Have the Type of Pro-Competitive Benefits that Must Be Credited When Evaluating Such Motions

Although the Justice Department has urged the Court to grant the requested waiver on the ground that a waiver would not threaten competition in telecommunications manufacturing, the Court should

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1/(...continued)
Elec. Co., 12 F.3d 225 (D.C. Cir. 1993). Pursuant to the remand order, Ameritech has submitted a Memorandum that seeks to justify a waiver. Following filing of the Ameritech Memorandum, the other six RBOCs filed a Motion asking that the Court grant all seven RBOCs the identical waiver.

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grant the requested waiver for an additional reason as well: It actually will produce pro-competitive benefits. The D.C. Circuit has held that evidence of competitive benefits helps justify a waiver of any line-of-business restriction in the Decree, including Section II(D)(2). 969 F.2d 1231, 1240 (D.C. Cir. 1992) ("[I]t can aid the BOC . . . [in seeking a waiver] by showing that the proposal will enhance . . . competition." See also 900 F.2d 283, 300 (D.C. Cir. 1990) (evidence that a proposed waiver will promote competition is "a powerful reason" to grant waiver). This Court likewise has recognized the probative value of a waiver's pro-competitive effect. For example, this Court has held that in considering whether to grant a waiver, it will evaluate "the extent to which the participation of the . . . [RBOCs] would contribute to the creation of a competitive market." 552 F. Supp. 131, 187 (D.D.C. 1982). And it has noted that it is "necessary to consider . . . [any] procompetitive effect . . . [of] entry into the particular market" for which a waiver is sought. 1982-2 Trade Cas. (CCH) ¶ 64980, 73149 (D.D.C. 1982).

The Justice Department has recognized the relevance of pro-competitive benefits to the determination of whether to grant waiver, but it has informed the Court that it has not relied on such benefits in recommending a waiver in this case for three reasons. First, it claims RBOCs have failed to show that the subject R&D funding contracts would produce such benefits. Second, it claims that the RBOCs have not shown that such contracts are the only way to produce these benefits even if they are one way to do

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so. Third, it claims that the RBOCs have not shown that small, as opposed to large, manufacturing companies would receive substantial R&D funding under these contracts. See "Response of the United States, supra. at 2 n.6.

In fact, however, this Court should conclude that grant of the requested waiver will produce the type of competitive benefits that are relevant in considering whether to waive a line-of-business restriction. As shown below, none of the Justice Department's arguments to the contrary have merit.

A. There is Substantial Evidence that Such Contracts Will Produce Pro-Competitive Benefits in Telecommunications Manufacturing

Contrary to the Justice Department's speculation, there is ample evidence that the contracts at issue here will have pro-competitive benefits. First, Judge Williams of the D.C. Circuit already has concluded that such contracts are likely to produce such benefits. He did so in reviewing this Court's earlier decision denying a waiver to authorize such contracts:

> "[Contractual arrangements like those that are the subject of the present proceeding] are likely to enhance competition in telecommunications products. . . ."

12 F.3d at 243. Importantly, the other two judges on the panel apparently agreed with Judge Williams because they referred to his discussion of the impact of such contracts on the market as an

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"excellent analysis of current realities in the field of telecommunications." 12 F.3d at 234.[2/]

Independent research provides additional evidence that such contracts will have pro-competitive benefits. Within the past few years, a substantial amount of research has documented that collaboration between a manufacturing company and its customers stimulates product development and spreads risk efficiently and that such contracts are becoming increasingly important to a manufacturer's ability to maintain a competitive market position. See, e.g., Jakki J. Mohr et al., Legal Ramifications of Strategic Alliances, 3 Marketing Mgmt. 38 (Spring 1994) ("Firms are increasingly relying on strategic alliances and other forms of cooperation to find and maintain competitive advantage."); Ken Mark, All In One Go, Canadian Bus. 39 (Spring 1994) (a manufacturer must collaborate with its customers in order to respond quickly and adeptly to changing customer needs); Antonello Zanfei, Patterns of Collaborative Innovation in the U.S. Telecommun. Industry After Divestiture, 22 Res. Pol'y 309, 310 (1993) (collaborative ventures are a prerequisite for ensuring rapid technological innovation in the telecommunications industry); Eric von Hippel, The Sources of Innovation 76-92 (1988). The need for such collaboration is particularly great in high technology industries like telecommunications. See, e.g., Zanfei, supra; Lorange and Roos, Strategic Alliances at 13-14 (1992) (finding that most manufacturer/customer collaboration

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[2/] The D.C. Circuit remanded the case to give this Court an opportunity to consider whether the proposed safeguards were sufficient to protect against certain specific abuses.

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agreements are carried out in high-tech industries and that such alliances within the telecommunications industry were the third most common).

The fact that royalty funding contractual arrangements of this sort are standard fare in high technology manufacturing industries provides another reason to conclude that such arrangements provide competitive benefits. Moreover, telecommunications equipment makers themselves sometimes use contracts of this sort to help fund the product development costs of other manufacturers. This can occur when the telecommunications manufacturer desires to incorporate a new component in a product it makes and agrees to help finance a component manufacturer's R&D costs to develop that new component.

B. The Justice Department Is Wrong When It Argues that Pro-Competitive Benefits Are Relevant to a Waiver Motion Only Upon Proof that They Cannot Be Achieved In Any Way Other than By Grant of the Specific Waiver Requested by the Petitioning RBOC

The Justice Department's apparent belief that pro-competitive benefits are relevant to the requested waiver only if such benefits could not be produced in some other way is absurd. In the first place, the proof sought by the Justice Department is impossible to provide since it requires proof of a negative (i.e., that no other type of business practice would produce the desired competitive benefits). Moreover, it would be irrational to dismiss the pro-competitive impact of the R&D contracts which would be authorized by grant of the present waiver simply because similar competitive benefits might be obtained through some other means as well. In

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fact, similar competitive benefits would result if telecommunications manufacturers had a legal right to engage in a large variety of collaborative ventures with their RBOC customers that are now barred by Section II(D)(2). But this does nothing to diminish the fact that grant of the present waiver will also result in pro-competitive benefits.

C. While the Pro-Competitive Benefits that Would Result from a Waiver Are Relevant Without Regard to Size of the Manufacturing Companies Who Are Likely to Benefit Directly, In This Case the Primary Beneficiaries Almost Certainly Will Be Small Telecommunications Manufacturers

It likewise is absurd for the Justice Department to argue that the pro-competitive benefits of the subject waiver are relevant to the waiver request only if it is shown that small manufacturers would receive a disproportionate amount of the R&D funding that RBOCs would provide under the contracts authorized by the waiver. As both the D.C. Circuit and this Court have noted, the issue is whether would waiver will have pro-competitive benefits to manufacturing generally, not whether it would benefit one particular category of manufacturer over another.

In fact, however, grant of the subject waiver almost certainly would benefit small telecommunications manufacturing companies disproportionately more than their large competitors since small manufacturers are more likely to require external financing to help fund important product development projects. Thus, even though small telecommunications manufacturers appear to spend nearly twice

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as heavily on R&D than large companies, their small size limits the absolute amount of internally available cash for that purpose.[3/]

It also is in the RBOCs' self-interest to favor small telecommunications manufacturers with a substantial percentage of the R&D funding provided by such contracts since small companies are more likely to complete product development projects successfully and quickly than large manufacturers. For example, small firms are quicker to bring innovations to the market (3.36 years v. 4.32 years for large firms. See Keith Edwards & William Wallace, Innovations by Firm Size in Studies of the Bureau of Labor Statistics, in Small Business Research Summary No. 104 (U.S.S.B.A., May 1991) (study of 132 innovative firms). In addition, small firms introduce nearly 2.5 times as many new products per $100 million in sales as do large firms (12.2 for small firms v. 5.0 for large firms), and they obtain more patents per R&D dollar (and per sales dollar) than large firms. See John A. Hansen, Utilization of New Data for the Assessment of the Level of Innovation in Small American Manufacturing Firms, in Small Business Research Summary No. 101 (U.S.S.B.A., May 1991) (study of 598 U.S. manufacturing

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3/ A typical telecommunications manufacturer with revenues of less than $500 million spent more than $17,000 per employee on R&D in 1993, while R&D expenditures of telecommunications manufacturers with more $500 million in revenues averaged $9,500 per employee. See "R&D Scorecard", Bus. Wk., June 27, 1994 at 99-100 (figures derived from chart showing R&D expenditures by 24 telecommunications manufacturing companies). The small manufacturer's disproportionately large commitment to R&D also is evident when looking at the percentage of sales revenues devoted to R&D. On average, a small manufacturer has an R&D budget equal to 10 percent of sales revenue whereas a large manufacturer's R&D budget averages 5 percent of sales. Id.

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firms). Further, small firms generate 2.4 times more innovations per employee than large firms. See Keith L. Edwards & Theodore J. Gordon, Characterization of Innovations Introduced on the U.S. Market in 1982, in Small Business Research Summary No. 62 (U.S.S.B.A., Mar. 1984) (study of 600 firms from 362 different industries). See also Zolton J. Acs, Small Business Economics: A Global Perspective, Challenge 38 (Nov.-Dec. 1992).

The fact that so many small telecommunications manufacturing companies have expressed support for an order granting a waiver to allow such contracts shows that small manufacturers believe they will benefit from these arrangements. For example, the present coalition consists entirely of small manufacturing companies. And the vast majority of manufacturers who filed comments in support of Ameritech's motion for waiver when it was previously under consideration by the Justice Department and this Court were small manufacturers.[4/]

[4/] Twelve small telecommunications manufacturing companies filed comments in support of the Ameritech motion, and two large manufacturers (Northern Telecom and Siemens) filed in support. See Comments of Summa Four, Inc. (Jun. 30, 1988); letter from SRX Corp. (Aug. 31, 1988); Comments by Silicon General, Inc. (Nov. 1, 1988); Reply Comments of David Systems, Inc. (Oct. 4, 1988); Comments of Int'l Mobile Machines Corp. (Feb. 17, 1989); Comments of Verilink Corp. and Telesciences, Inc. (Feb. 17, 1989); Comments of Teling Systems Inc. (Feb. 21, 1989); Comments of Ad Hoc Manufacturers' Coalition (Audio Info. Sciences, Inc.; Optilink Corp.; Voice Processing Corp.; and Integrated Network Corp.) (Feb. 17, 1989); Memorandum of Northern Telecom Inc. (Mar. 6, 1989); letter from Siemens Commun. Systems, Inc. (Aug. 15, 1988).

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II. The Fact that "Most Favored Nation" Provisions Are Widely Used in Business and by the Government Is Evidence that the "Most Favored Nation" Purchase Requirement Recommended Here Should Be a Useful Tool to Prevent the Type of Predatory Conduct It Is Designed to Prevent

The coalition also wishes to comment on the "most favored nation" provision that the RBOCs have asked the Court to include in the order granting waiver. As explained above, that provision would require an RBOC purchasing a product manufactured pursuant to an R&D funding contract to pay the lowest price paid to the manufacturer by other parties for a comparable purchase. This requirement is designed to help ensure that the RBOC does not harm manufacturing competition by intentionally overpaying for products whose development it funded so that the funded manufacturer can sell the same product to others at an anticompetitively low price. While the Justice Department supports inclusion of this provision in all R&D funding contracts, it nonetheless speculates that the provision may provide only limited protection against the predatory conduct it is designed to prevent.

In fact, the widespread use of such provisions helps show that including this type of provision in all R&D funding contracts entered pursuant to the subject waiver will help achieve the objective it is intended to achieve. A "most favored nation" clause is included in contracts governing a wide variety of business relationships, both inside and outside the telecommunications industry, because business has found it to be an effective tool. See, e.g., American Society of Composers v. Showtime, 912 F.2d 563, 566-67 (2d Cir. 1990) (provision in contract between copyright holder and

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licensee granting licensee a "most favored nation" license fee); Signatory Negotiating Committee v. Local 9, 447 F. Supp. 1384, 1391 (D. Colo. 1978) (provision in labor agreement granting employer right to pay "most favored nation" wage rate to certain employees); Laurel Sand and Gravel, Inc. v. CSX Transportation, Inc., 924 F.2d 539, 541 (4th Cir. 1991) (contract between railroad and shipper authorizing shipper to terminate contract if railroad contracts with a competitor of shipper to transport comparable goods at a lower price than provided for in contract with shipper). The Federal government likewise uses the "most favored nation" principle in its dealings because it has found this principle to be meaningful. See, e.g., 19 U.S.C § 3104 (instructing telecommunications trade negotiators to seek "most favored nation" status for U.S. telecommunications products sold in certain countries); 19 U.S.C. § 1671(b)(3)(ii) (imposing countervailing duty on certain subsidized imports into U.S. from certain countries in which U.S. has trade agreement providing "most favored nation" status); In re Remington Rand Corp., 836 F.2d 825, 827 (3d Cir. 1987) (contract between U.S. government and equipment supplier obligating supplier to sell certain equipment to government on a "most favored nation" basis).

CONCLUSION

This matter has been pending before the Department of Justice and the courts for more than eight years. This Court should take final action by waiving Section II(D)(2) subject to the conditions RBOCs and the Department of Justice have worked out so that RBOCs

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and manufacturers may enter the types of contractual arrangements the waiver would allow.

Respectfully submitted,

AD HOC TELECOMMUNICATIONS
MANUFACTURING COMPANY COALITION

by: _____

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April 12, 1995

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TELECOMMUNICATIONS MANUFACTURING COMPANIES PARTICIPATING IN AD HOC COALITION SUPPORTING MOTION FOR WAIVER TO ALLOW RBOCS TO FUND MANUFACTURER PRODUCT R&D IN RETURN FOR ROYALTIES ON THIRD PARTY SALES OF PRODUCTS DEVELOPED WITH SUCH R&D FUNDING ASSISTANCE

Company Name	Headquarters Location
Advanced Electronic Applications, Inc.	Lynnwood, Washington
Ambox Incorporated	Houston, Texas
AmPro Corporation	Melbourne, Florida
Axes Technologies Inc.	Carrollton, Texas
Bejed, Inc.	Portland, Oregon
Centigram Commun. Corp.	San Jose, California
Colcom, Inc.	Austin, Texas
Eagle Telephonics, Inc.	Bohemia, New York
Innovative Applications, Inc.	Roswell, Georgia
Integrated Network Corp.	Bridgewater, New Jersey
Keltronics Corp.	Oklahoma City, Oklahoma
OK Champion Corporation	Hammond, Indiana
Oza Communications Corp.	Barbara, California
Phone - TTY, Inc.	Hackensack, New Jerey
Puleo Electronics, Inc.	Lynbrook, New York
Metal-Flex Hosing Inc. and RayTel, Inc.	Philadelphia, Pennsylvania
Restor Industries, Inc.	Orlando, Florida
Technology Service Group	Roswell, Illinois
Tamaqua Cable Products Corp.	Schuylkill Haven, Pennsylvania
Telemax Corp.	Lisle, Illinois
T T Technologies, Inc.	Aurora, Illinois
XTP Systems Inc.	Santa Barbara, California

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April 14, 1995

BY HAND

Mr. William H. Ng
Clerk of the Court
U.S. District Court
for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

Re: No. 82-0192 (HHG)

Dear Mr. Ng:

On April 12, 1995, an ad hoc coalition of 22 telecommunications manufacturing companies filed comments in support of RBOC motions for a limited waiver of Section II(D)(2) of the decree to permit RBOCs to enter certain R&D funding contracts with telecommunications manufacturers. The coalition's comments showed that these contracts will produce pro-competitive benefits. The comments also showed that the Justice Department's skepticism about the value of the "most favored nation" provision proposed by the RBOCs as a condition to waiver is misplaced.

The present letter is to advise the Court that three additional telecommunications manufacturing companies are now participants in this coalition, and their names should be added to

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the list of 22 companies named on the attachment to the April 12 comments as participants in the coalition. The three additional coalition participants are as follows:

Company Name	Headquarters Location
EIS International, Inc.	Stamford, Connecticut
Elcotel, Inc.	Sarasota, Florida
Applied Digital Access, Inc.	San Diego, California

Respectfully submitted,

AD HOC TELECOMMUNICATIONS
MANUFACTURING COMPANY COALITION

by: _____

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cc: Michael K. Kellogg (Counsel for RBOCs)
James R. Young (Bell Atlantic)
Walter H. Alford (BellSouth)
John M. Clarke (NYNEX)
Richard W. Odgers (Pacific Telesis)
James L. Wurtz (Pacific Telesis)
James D. Ellis (SBC)
Martin E. Grambow (SBC)
Charles P. Russ (US West)
Thomas P. Hester (Ameritech)
Stephen M. Shapiro (Counsel for Ameritech)
Evan M. Tager (Counsel for Ameritech)
Brent E. Marshall (Justice Department)
Mark C. Rosenblum (AT&T)
David W. Carpenter (AT&T)
Mark E. Haddad (AT&T)

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Mr. HYDE. I am going to ask the gentleman from Virginia to take over the Chair. We are fairly near the windup, but I have to attend another committee meeting at 12:30.

But I want to thank the panel. I think we have had a very instructive presentation today and we have learned a lot. I certainly have. And we will have more. But I thank the gentleman.

Mr. Goodlatte.

Mr. GOODLATTE [presiding]. Thank you, Mr. Chairman. I see that my yellow light is on, but that was my time and I am on your time now. I will take the opportunity to ask one other question, if I may.

Let me ask Mr. Roberts, do you believe that State public utility commissions have the proper motivation and necessary resources to promote competition in local telephone markets?

Mr. ROBERTS. I will tell you that 2 years ago I probably would have said no, but I see a tremendous proactive effort on the part of a number of the public utility commissions to push competition, given the vacuum that we have at the Federal level with respect to passing legislation for local competition.

Would I rather see strong Federal legislation to promote local competition with the right ground rules? The answer to that is yes. But the facts are without that, State by State, we are having to deal with these issues typically with opposition from the RBOC's in those States but the PUC's are being relatively proactive now.

Mr. GOODLATTE. Mr. Hester, would you like to comment on that?

Mr. HESTER. I think Assistant Attorney General Bingaman made reference to the fact and perhaps even used the letter dealing with her and the relationship of her Department with the regulators in the Ameritech region. I think that we have had a terrific relationship. It has been procompetitive and proactive.

I think the regulators in all the States that we operate in are ready to move today and ready to see a trial start and ready to see us bring the benefits of competition to consumers. And quite frankly, just from my exposure in the industry, I think that is occurring around the country. I think we are in a real period of regulatory enlightenment at the State level.

Mr. GOODLATTE. Thank you. My time has expired. Let us continue the Virginia questions and I will recognize the other gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Roberts, I wanted to follow up on an answer you gave to the other gentleman from Virginia, Mr. Boucher. It indicated that you have made complaints about Sprint using their local access as part of your lawsuit. Could you go into a little more detail about what your complaints were and what the court concluded had been done?

Mr. ROBERTS. I cannot do that, Congressman, off my fingertips. I will be happy to provide you with the information. There is hardly a local monopoly in the country that we haven't had some complaint against, but I will provide you that.

In the case of the antitrust lawsuit we had included, at the time they were called the United Telephone Companies, as part of that lawsuit. That goes back a long way. They were dropped from our lawsuit at a point in time.

Mr. SCOTT. You will provide more details?

Mr. ROBERTS. Yes, sir.

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[The information follows:]

ANTICOMPETITIVE CONDUCT BY SPRINT AND ITS PREDECESSORS

Before it changed its name to Sprint, the holding company that owned the local telephone companies was known as United. United participated in a partnership with the Bell Operating Companies and other local telephone companies in which they shared the profits of the Bell System's long distance operation, Long Lines. During that time, United denied equal interconnections to MCI and other independent long distance carriers. MCI sued United and other members of the partnership seeking equal treatment. In re Long Distance Telephone Antitrust Litigation, MDL No. 550 (SW). After lengthy litigation, the case was settled in 1985.

When United created a long distance affiliate named UTLD, MCI complained to a number of state regulatory commissions because of the danger of cross-subsidy and discrimination.

Like United, GTE participated in the long distance partnership with the Bell Operating Companies and denied competing long distance companies the same interconnections it made available to AT&T Long Lines. MCI included GTE in its antitrust case challenging the denial of equal access. In re Long Distance Telephone Antitrust Litigation, MDL No. 550 (SW).

After GTE acquired the long distance company then known as Sprint, GTE engaged in various acts of discrimination that were the subject of MCI complaints to DOJ: (1) as DOJ's investigation confirmed, Sprint had a higher market share in GTE local territories; (2) the GTE operating companies offered a "consulting" service in which they steered customers to Sprint; (3) at the same time GTE refused to create a similar dialing system for interLATA and intraLATA toll calls, Hawaiian Telephone, a GTE local company, created a dual presubscription system for domestic and international long distance calls because the GTE decree allowed it to provide international but not domestic long distance.

Both GTE and United/Sprint have consistently refused to provide equal access for intraLATA toll calls—even though GTE has done so for Hawaiian Tel.

MCI complained to DOJ about GTE's acquisition of Sprint in the early 1980s.

When United sought to acquire a long distance company named U.S. Telephone, MCI complained to DOJ and argued that this acquisition should be subject to the same conditions that were imposed on GTE at the time it acquired Sprint.

Mr. SCOTT. Mr. Hester, could you kind of walk us through what your application for long-distance service as it is under the present law and how it would be if the Senate or House bill were to pass?

Mr. HESTER. Well, in the proposed order, we have a checklist. In fact, I don't know where the checklist came from in the other committee, but it bears striking resemblance to some of the work we did last fall. We agreed to facilitate number portability, unbundling, et cetera, et cetera; a very long series of undertakings that we agreed to do.

And the threshold for the test is, assuming that the Department finds that we have done these things, that there is actual competition, which there is, and the possibility for substantial additional competition, they are permitted to permit us to start providing long-distance service in Chicago and Grand Rapids.

Mr. SCOTT. How would that process change if the bills before us were to pass?

Mr. HESTER. I am not so sure in our case it would change anything because we are complying. I mean, we are going to satisfy the standard, albeit one that I think is not the best standard in the world in terms of facilitating competition, we are going to satisfy it. So we are, in effect, going to satisfy the VIII(C) standard in order to get into the business.

But having said that, I think that we would be better off as a country if there was a standard that was more akin to the traditional antitrust standards to facilitate open competition in telecommunications.

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Mr. SCOTT. Let me ask Mr. Regan a question. For those of us interested in technology, what elements of legislation should we be looking at to make sure that we get the most incentives toward new technology?

Mr. REGAN. Well, two things, because we have had lots of problems, frankly, we have been held back in the deployment of this technology because the marketplace has been excessively regulated in the local loop and there has been too little competition.

So I would say the first thing you want to do is drive competition in the local delivery of telecommunications services. That will really create a tremendous push forward.

The second thing I think you need to do is make sure that there is no remonopolization of the technology market. If the operating companies get into the manufacturing business, what you don't want to do is get them in a position where they start buying from themselves.

That is the same kind of behavior that AT&T did back 20 years ago that led to all these problems. It holds back technology. You want them to go to bid. If they have a manufacturing entity, you want them to go to bid on everything they buy and open it up to the world to buy from everybody.

We should be able to sell to them just like their own subsidiary should be able to sell to them. That way they will get the benefit of the best technology, the best price and the best delivery.

Mr. GOODLATTE. The gentleman from Illinois, Mr. Flanagan.

Mr. FLANAGAN. Mr. Chairman, thank you.

Mr. Hester, perhaps in regard to your previous comment, about how the Department of Justice and their role in competitiveness in the telecommunications field should more reflect the general antitrust considerations in other fields, the Department of Justice is going to enjoy some decisionmaking capacities under this legislation that are absent elsewhere in the regulatory markets.

Would it not be better or why is it not better to wait until we have seen customers first work for a while, take some lessons learned from it and have a look at the changes that need to be made, rather than giving the Department of Justice some powers right now and hoping that they work out OK?

Mr. HESTER. We filed customers first not with the intent of delaying any action that might be taken by the Congress of the United States. And we would encourage the Congress to move forward. We just, given our particular situation, felt compelled to move forward on the only track that was available to us, which was the VIII(C) track under the current MFJ.

But I would not suggest for a minute that we wait for that to do anything. I mean, as my chairman said, if Congress would pass legislation we would be doubly blessed. But I would encourage you to move forward and not wait.

Mr. FLANAGAN. Understanding that, we are giving the Department of Justice some new roles here that they haven't enjoyed before. And my question still remains and perhaps the other members of the panel would like to address it, is that if the VIII(C) test or the MFJ continue, and we grant waivers out of the ruling, perhaps we are trying to accomplish the goal of opening the markets through a process that is not quite as bad as has been described

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by some and better than others. I don't know that that is so, but that is why we are having hearings today.

Mr. ROBERTS. If I could just comment on that, I think if the question were that the kind of test that Ameritech is required to meet today could be incorporated into the bills with the Justice Department role—and I have to be careful here, there are probably one or two that I would like to see added—that kind of thing would put MCI in the position of let's get on with it.

I think the customers first plan filed by Ameritech, albeit not perfect, and we have and will make comments on a couple of things that we would like to have seen included, but directionally it is where we would like to see the Justice Department role be. It applies an VIII(C) type standard and has a checklist of ground rules to test the state of local competition and other things like that. And that supports our position with respect to this bill.

In answer to your second question, just to state it directly, if we can get the right ground rules put in place, we want Federal legislation and we would like to see it now so we can put behind us a 60-year-old law and move forward. Obviously, that is subject to the right ground rules being in place. So I would not be a proponent of waiting for this and then doing something if we can do something now with the right ground rules.

Mr. FLANAGAN. Mr. Chairman, because I have a phone call to make to Warsaw, I will defer the rest of my time and thank the Chair and thank the panel.

Mr. GOODLATTE. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I listened closely to Mr. Bryant's questions because they are the same questions I had about universal access. To me that is one of the key elements for the future of this country, whether we will have broadband access to areas that are not lucrative to serve.

And Mr. Roberts, you mentioned that you thought some additional direction from the Congress would be helpful in this regard. What specifically did you have in mind?

Mr. ROBERTS. Well, unfortunately, I don't think timing is going to allow us to play, because the legislation both here and in the Senate, is moving very fast. The administration set up an advisory council to look at the national information infrastructure issues, the leadership of the Commerce Department. And one of those things that was focused on—I happen to be on the council—is universal access as we look forward to a lot of the complexities in the future and how that might play in the future legislation or ground rules.

We haven't finished our deliberations yet. There is a lot that still needs to be done. But we are coming to some consensus that I believe would be appropriate to look at in future legislation and allows as to how things might happen. It is going to encompass a large number of opportunities.

It could be anything from requirements as the Government gives up new resources, frequency allocations, and other things that may be in the acquisition of those. There is a burden of implementation, if you will, of some aspect of universal access.

I think there is going to be a set of ground rules that focus on the competitive forces driving the process and looking at what

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doesn't happen, coming up with specific recommendations with respect to schools, K through 12, libraries and also community centers which focus on the rural areas so there is a whole series of those things that is going to cut across a lot of technology. I doubt if they will be a part of this bill.

I think what the Senate has done, or at least proposing to do, involve, but Senator Snowe's idea that there would be some obligation or some way that we could ensure that the schools get wired as a starting point. We have to be sure that there is a universal access fund set up, not administered by the RBOC's but administered by an independent agency, that can be applied to those areas that are not getting access to telephone facilities in a competitive world. And I think that, again, the Senate has focused on that.

Ms. LOFGREN. I have some—I am brandnew to the Congress, but some of the same concerns that the more intricate and studied approaches that might be used to help guarantee access may not be included because of the time frame involved.

Noting that that could be the case, what if we were to insert in any bill that was enacted, just as a baseline for regulatory freedom, full service, at least to all the K–12 schools in a given community, for a state of the art broadband technology as a condition to provide service. What would your thoughts be on that, each of you?

Mr. ROBERTS. I don't know that the Department of Justice is going to have an issue in that. In general, I believe that the business community, and this would include the RBOC's and MCI, have got to work together in terms of pushing capacities and partnerships with government and the education system into schools and into libraries.

We have got to do it on a very short and quick time frame. I think there are ways that that can be done. If you wanted to say what could government do, I think they could provide certain incentives now that would cause that to move faster. And notice I did not say taxes. I said incentives.

If you look at what is already going on out there in reality between partnerships that have been put together—National Alliance of Business, I happen to be chairman of that, the Business Roundtable—there is a tremendous effort moving forward.

So I think we are farther along than people realize. I think the problem is it has been done on an ad hoc basis and it needs to be coordinated into some kind of a cookie cutter approach that will get us moving quicker across all jurisdictions.

Mr. REGAN. Being somewhat familiar with the cost of these independent hookups, I know that it is not too expensive to hook up a school if the local carrier happens to be passing by the school. Then they could just drop a line. It is, however, very expensive if they are going to go in and drop a line specifically to that school. And I think that is what you are talking about doing.

Ms. LOFGREN. The reason that I am asking in the context of this bill and this issue is that right now we have areas, even in Silicon Valley, that are not well-served with fiber optics because of the demographics of the area. And then you have demographic areas where you have fiber optics everywhere.

And if it is market driven only, if there is no universal access requirement, the nonlucrative areas will continue not to be served.

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Kids who go to school in those areas will continue not to have full access to what is the emerging technology that will dominate the economy of this country in the next century. And so unless something is done, we will drive that wedge. And it is equally true in the rural areas?

Mr. REGAN. Yes, I think you have got a very, very legitimate concern, particularly with respect to the schools and particularly with respect to getting the kind of service which is truly 21st century, interactive broadband capability. I think Mr. Roberts is right. I know of several provisions in the Senate bill and I would be glad to get them to you, but they are there. You may want to put them in the House bill.

Mr. GOODLATTE. The gentlewoman's time has expired.

Ms. LOFGREN. Mr. Roberts, whatever is available from the task force that you are working on, I would very much like to have what you are able to send, as well as any comments Mr. Hester might like to make in writing.

Mr. GOODLATTE. Thank you. The gentlewoman from Texas, Ms. Jackson Lee is recognized.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I started out this morning trying to lay the ground work for where we would have to go for an even playing field. Part of my questions subsequently would have to be answered by the Assistant Attorney General in writing.

But I wanted to pursue that line of thought if I could and try to get you from your perspective—and I don't see AT&T at the table but I assume there may be some consensus, you might want to comment, you might not—about what you perceive the role of the Justice Department to be in the course of creating an even playing field. And where you think the standard of dangerous possibility might impede that role. If you would answer that, I would appreciate it.

Mr. ROBERTS. The answer to your first question, the role of the Department of the Justice we see as being the determiner as to whether or not there is real and effective competition in the local market, which is the thing that we are trying to open up to competition prior to the Bell operating companies being able to move into other areas of competition.

In our case, we are concerned about long distance. But I presume the same would be true with the alarm services and others. We look at the VIII(C) test as being the proper test and the Department of Justice being the proper administrator of the test.

The problem we have with the standard of dangerous probability I think is rooted in our history. The facts are we are not talking about hypothetical issues that happened in the past. We are talking about real violations of the antitrust laws. And if we had used that test in the past and we had not put in something like the MFJ and the consent decree, we simply would not have the thriving industry we have today.

We ought to learn from what was done. The long-distance industry is competitive today. It is a leader in terms of what is going on around the rest of the world, with other countries, looking to this country for how to set up ground rules. We ought to have learned from that experience. I think we can quickly learn from it.

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We can put it into the Bell operating company's local areas. They will thrive just as AT&T has thrived with competition. So to sit here and presume that something will be competitive, the gentleman from Virginia talked about the words "there is competition." His example was our cable company, they will be competition. The presumption that competition is going to happen is not a good enough test. We have to see real and effective competition in the local monopoly areas before they are allowed into the competitive areas of the day.

Ms. JACKSON LEE. In your view, of all the capabilities of the Bell companies, which I would like to make sure that I don't characterize any who are at this table as an enemy, but what do you view as the most detrimental of their capabilities to a competitive marketplace?

Mr. ROBERTS. Simply put, they are between us and every customer that we serve, for the most part at least. 99.4 percent of all calls—local and long distance—go through the local monopolies including the Bell companies. Nearly 50 percent of our revenue is paid to those companies for local access. As long as they are that bottleneck between us and our customers, there is a problem with them competing in our market until we can have choice and a competitive alternative to reach those same customers.

Ms. JACKSON LEE. So you really appeal to the simplicity of the markets component. The last voice heard. The last contact, the last face that you are familiar with really creates an enhanced opportunity in the competitive market and certainly those that are closer to the consumer in their home community bear witness, is that your point that you are making?

Mr. ROBERTS. Yes, in the sense that I believe that there must be local competition and then whether it is the last voice heard or the best voice heard to determine who the customer picks, it is an open, level playing field for all of us to try to achieve opportunity.

Ms. JACKSON LEE. Let me make a comment and I would like Mr. Hester and Mr. Roberts and lastly Mr. Regan to answer this question I have on employment.

First of all, let me just add to the cry of what I heard from cable companies, having chaired a local committee on cable franchises, but more importantly seeing large segments of my community being left out from any cable service for a long period of time under the pretense of technology and construction and whatever else. So I have a great concern about representations of competitiveness and not being made to comply with such.

But as we look to what we want to do with this country in terms of job training and employment, what impediments would not having H.R. 1528—the present—is it 1528 before us? That would impact on the employment base, if you will, for this industry? Mr. Roberts, if you want to?

Mr. ROBERTS. The first thing is I am a believer that competition will create jobs. It may create different jobs or across a different market. If you look at MCI as a case in point, we have grown from zero to 40,000 employees.

We are geographically across all parts of the country but I think more important, if you look at the jobs that have been created because this industry has become competitive, the gentleman from

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Corning has indicated that there is a whole new manufacturing effort which I am sure has created jobs because of fiber optics. Look at all the businesses that have spawned.

The fact that we buy operator services from the outside companies and other things, competition will create jobs. That will be true in the local market as well. I don't think anybody is suggesting—well, maybe some are—that we keep the local monopoly because it is going to be a job creation.

Job training and other things is another point. New technologies require different kinds of people and different resources and different kinds of training. We as a company have had to deal with that. MCI devotes considerable resources on training.

Ms. JACKSON LEE. Mr. Hester, would you also include in your answer minority participation in the industry as well?

Mr. HESTER. We have calculated that our entry in the long distance just in the test markets themselves of Chicago and southern Michigan will create hundreds of jobs. And we have also looked at numbers in the past. I can't tell you numbers right off the top of my head, dealing with manufacturing and product development that likewise created hundreds of jobs.

And I believe CWA has recognized that and has supported these kinds of legislative reforms because they do create jobs. In terms of minority employment, Ameritech has very conscious activities underway and programs to bring minority employees into our business. And my guess would be that they would be very much beneficiaries of the new jobs that were created.

Ms. JACKSON LEE. Mr. Regan.

Mr. GOODLATTE. The time of the gentlewoman has expired.

We will allow Mr. Regan to answer.

Mr. REGAN. Before the MFJ was signed in 1982, we had about 100 people in this part of Corning, Inc.'s business. Now we have got about 5,000 in this division and that is what competition brought. Right now we have $150 million expansion going on in my plant and we expect that to continue as this whole technological revolution gets carried away.

I should say, though, that the job creation will slow down if a bill doesn't pass in this Congress. All our planners have that in their models. So it is very important that we move forward. And we also have a very aggressive diversity program. We actually go out and aggressively recruit minorities and woman to work in our operations in Corning, NY, as well as down in North Carolina.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. GOODLATTE. Mr. Roberts, since my name was mentioned, let me point out that the cable companies are prohibited by regulations from getting into the local telephone system at the present time. I am just pointing out that they are ready to go.

Let me also point out that there are other ways that are already being availed by the long-distance companies and your company to avoid that bottleneck. Here in Washington, DC, there are hundreds of buildings which you offer direct long-distance service bypassing the local system.

That is occurring more and more in every city around the country and that is, quite frankly, for you to select the best opportunities for you to get in and bypass that system and bypass the bottle-

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neck while those companies are still required and continuing to offer the local service and the access to you in every building, regardless of its profitable nature, and in every household in the country. So I think the direction here has got to be to open up competition.

Let me thank all of you for your participation here today. I really appreciate your coming. I know the chairman does.

Ms. JACKSON LEE. Mr. Chairman, I just wanted to correct, if I did not recite the right legislative number, I want to make sure I was referring to the legislation that we are reviewing, H.R. 1528. I am not sure I said the correct number.

Mr. GOODLATTE. Your correction will be duly noted. And I would like to ask and remind each of you that we will be submitting some supplemental questions in writing and we appreciate the time that you have taken thus far and will take to answer those questions and without further ado this hearing is adjourned.

[Whereupon, at 1 p.m., the committee adjourned.]

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APPENDIX

STATEMENTS

STATEMENT OF JIM G. KILPATRIC, SENIOR VICE PRESIDENT, LAW, AT&T CORP.

Mr. Chairman and members of the Committee: My name is Jim G. Kilpatric. I am Senior Vice President—Law, of AT&T Corp. AT&T appreciates the opportunity to submit this statement to discuss the appropriate legislative standard for deciding whether and when the Bell Operating Companies ("BOCs") should be authorized to enter the long distance and manufacturing markets and the virtues, and serious potential vices, of the standard contained in the current version of H.R. 1528.

AT&T's testimony is divided into three parts. Part I explains that a competitive antitrust entry test administered by the Justice Department is an essential part of any effective telecommunications reform legislation—as H.R. 1528 commendably recognizes.

Part II discusses the essential elements of the appropriate competitive entry standard. While AT&T is not wed to any particular formulation, Part II demonstrates that Section VIII(C) of the MFJ is a time-tested antitrust standard that was developed to address the specific competitive dangers presented by BOC participation in long distance and manufacturing markets, that has been construed by the U.S. Court of Appeals to codify traditional antitrust standards, and that has been advocated by such antitrust scholars as Judge Robert H. Bork, Professor Phillip Areeda, Professor William Baxter, and Professor Lawrence A. Sullivan. The Section VIII(C) standard operates both to accelerate the introduction of competition in the local exchange markets which are today monopolies and to promote competition in long distance and manufacturing—which should be the objects of any legislation.

Part III discusses the entry standard in the current version of H.R. 1528. It demonstrates that, while the standard could conceivably result in consideration of the pertinent factors, it is ill-suited to achieving the Committee's goals of reducing regulation and promoting competition in telecommunications. In particular, the adoption of this standard could create confusion and litigation by permitting BOC arguments that H.R. 1528 is designed to be *less protective* of competition than any existing antitrust standard: be it that of Section 1 or Section 2 of the Sherman Act, Section 7 of the Clayton Act, or the time-tested Section VIII(C). The current H.R. 1528 would then undermine important antitrust and deregulatory policies by choking off future procompetitive initiatives like the local exchange competition trial to which AT&T, Ameritech, and the Justice Department recently agreed under the MFJ.

In this latter regard, there are other features of the current H.R. 1528 that would compound these anomalies: *e.g.*, by allowing the RBOCs to participate directly in long distance or manufacturing businesses immediately so long as they do not acquire majority equity interests.

I. THE CONTINUING NEED FOR A COMPETITIVE ENTRY TEST

First, however, AT&T commends the current H.R. 1528 insofar as it recognizes that a competitive antitrust entry standard administered by the Justice Department is an essential feature of any telecommunications reform legislation. Strict enforcement of antitrust standards by a body like the Justice Department not only is the best way to assure that consumers receive the products and services that they need at the lowest possible price, but also is the only alternative to costly regulation.

Antitrust recognizes that free markets alone can assure the most efficient possible allocation of the nation's resources and the greatest benefits for consumers. That objective is especially important in markets like telecommunications that are technologically dynamic and that produce services and products used by virtually all the nation's businesses and consumers. Consumers will be guaranteed the fullest pos-

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sible range of telecommunications services and products at the lowest possible prices only if there are open markets in which multiple firms are free to enter, to develop whatever offerings they wish, and to price them on the basis of their economic costs—secure in the knowledge that their products and services will succeed, or fail, based solely on their price and quality and that they will not lose out to less efficient firms. Conversely, consumers will suffer if individual firms can block competition on the merits by acquiring, or exercising, monopoly or market power: *i.e.*, control over entry, price, or output.

Further, telecommunications is a market where antitrust intervention has prevented those very abuses and produced great benefits for consumers—most notably in the Decree that broke up the former Bell System (the "Modification of Final Judgment" or "MFJ"). The Justice Department had instituted prior antitrust actions against the Bell System—and the MFJ was entered in 1982—to prevent the local Bell Operating Companies, or BOCs, from exercising monopoly power to harm competition in the then potentially competitive long distance and manufacturing markets. In particular, the BOCs' local telephone monopolies were (and in AT&T's view still are) "essential facilities" or "bottlenecks" to which all long distance carriers and manufacturers require access—such that the BOCs controlled entry, price, and output in long distance and manufacturing markets. For example, no long distance carrier could enter the market and provide service without connections to local monopolies. (And, even today, while certain standard connections are mandatory, innovative new long distance services often require special kinds of connections that have to be individually negotiated.) Further, because BOC access charges represent nearly half of long distance carrier revenues, the BOCs have substantial independent control over the price of long distance services as well.

The Decree was entered to prevent BOCs from exercising their monopoly power to distort, impede, or otherwise lessen long distance and manufacturing competition. Because traditional public entity regulation had been inherently ineffective in preventing BOCs from using monopolies to favor affiliates, the Decree banned all such affiliations by ordering an end to the BOCs' affiliation with AT&T (through the January 1, 1984 divestiture) and by barring the BOCs from affiliating with other long distance carriers or manufacturers (through the MFJ's line of business restrictions).

This Decree has been one of the most successful remedies in antitrust history. In the decade since divestiture, long distance has become intensely competitive and substantially deregulated. During this period, prices for long distance service, adjusted for inflation, fell 66%.[1] Nine companies now provide nationwide (or virtual nationwide) service, competing in 45 or more states,[2] and fourteen interexchange carriers reported revenues in 1993 of at least $100 million.[3] And, in perhaps the most telling testament to the reality of competition, customers exercised the ability to switch long distance carriers 27 million times in 1994 alone. Parallel developments have occurred in telecommunications manufacturing markets.

However, while there may be prospects for future changes, local telecommunications services remain in the control of highly regulated, monopoly providers. Almost no residential or business customer is free to choose among providers of local telephone service. Each is limited to one monopoly provider—the local exchange carrier—which, in most areas, is a BOC.

Against this background, the central challenge of any telecommunications reform legislation should be clear: to protect the competition that has developed in long distance and manufacturing markets and extend the benefits of competition and deregulation to another segment of the industry: the local exchange. As H.R. 1528 recognizes, a critical component of such legislation is that there be a competitive, antitrust entry test for the BOCs to meet before they can be permitted to enter the long distance or telecommunications equipment manufacturing markets and that this test be administered by bodies with demonstrated antitrust expertise: *e.g.*, the Justice Department.

H.R. 1528 is important in that it recognizes both points. However, as explained below, the entry standard that H.R. 1528 currently contains is not an appropriate one.

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[1] Robert E. Hall, "Long Distance Benefits from Increased Competition."

[2] FCC Indus. Analysis Div., *Trends in Telephone Service*, tbl. 24 (Feb. 1995). Excluding Alaska (for which data were unavailable), in every state a minimum of 6 carriers provides service. On average, 41 carriers serve each state. *See id.*, tbl. 23.

[3] FCC Indus. Analysis Div., *Trends In Telephone Service*, tbl. 30 (Feb. 1995).

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II. The Elements of an Appropriate Standard and Section VIII(C) of the MFJ

Before focusing on the particular vices of the current H.R. 1528 standard, it will be helpful to discuss what elements are appropriate in a competitive entry standard. In this regard, while there are any number of verbal formulations of entry standards that would achieve the fundamental goal of increasing telecommunications competition and allowing further deregulation, the logical place to start is the standard set forth in Section VIII(C) of the MFJ. Because the courts have previously found that BOCs would otherwise have the ability and incentive to use monopoly power to impede competition in long distance and manufacturing markets, Section VIII(C) places the burden on the BOC seeking to enter one of the restricted markets to show that there is no longer a "substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."

This standard was expressly designed to address the very question at issue here—the circumstances under which the BOCs should be permitted to enter the long distance and manufacturing markets. It is time-tested in that it has been applied by the Department and the courts for a decade—and BOCs have widely praised a recent decision under Section VIII(C) allowing them to provide wireless long distance services. Further, Section VIII(C) has the support of the nation's leading antitrust scholars, including former Judge Robert H. Bork (author of the most influential work on antitrust reform, The Antitrust Paradox, whose letter to Rep. Hyde is attached hereto), Professor William F. Baxter (who headed the Antitrust Division of the Department of Justice in the Reagan Administration when the Decree was negotiated and entered), Professor Phillip Areeda,[4] and Professor Lawrence A. Sullivan (whose recent testimony in the Senate is attached).

It is not surprising, therefore, that Section VIII(C) has been construed by the courts to codify traditional antitrust principles. For example, the Court of Appeals for the D.C. Circuit has repeatedly held that the ultimate question under Section VIII(C) is the same as in any antitrust case: whether there is a substantial probability that entry by RBOCs will result in the exercise of "market power"—*i.e.*, increased price or reduced output—in the market they seek to enter.[5] In this regard, courts have held that each BOC has the ability and incentive to use monopoly power to impede competition in the provision of services used by its ratepayers—and raise their prices—and that this constitutes the exercise of market power that the antitrust laws exist to prevent. *United States* v. *Western Electric*, 900 F.2d at 300–05.

The courts have recognized that those adverse effects on competition would be probable unless some combination of three changes had occurred: (1) "technological developments which eliminate [the RBOCs] local exchange monopol[ies]," *United States* v. *Western Electric*, 552 F. Supp. 131, 194 (D.D.C. 1982) (Decree Opinion), (2) changes in the "structure" of the competitive long distance or manufacturing market such that BOCs no longer had control over price or entry by participants in these markets, or (3) radical changes in the nature and intensity of public regulation such that BOCs could no longer realistically exercise the monopoly power they possess to distort competition. *United States* v. *Western Electric*, 552 F. Supp. 194–95; *id.*, 673 F. Supp. 525, 536–40, 567–71 (D.D.C. 1987) (Triennial Review Opinion); *id.* 900 F.2d at 295–96, 298–99.

Any entry standard that focuses on these criteria—and places the burden of proof on the BOC—will achieve the objective of antitrust. It (1) will protect competition in the long distance and manufacturing markets that have since become competitive, and (2) will further—as the AT&T–Ameritech agreement starkly confirms—give BOCs incentives to do what is necessary to allow competition to emerge in their local exchanges.

Protecting Long Distance and Manufacturing Competition. First, a standard that focuses on these factors is essential because it addresses the bedrock issue under the Decree: whether BOCs have lost the previously found ability and incentive to use monopoly power to distort competition in adjacent markets. That this is the critical inquiry follows from the reasons for the Decree—the BOCs' control over facilities that are essential to the provision of long distance services and the evidence (developed in *U.S.* v. *AT&T*) that the BOCs had in the past and likely would in the future abuse that control to harm competition in adjacent markets.

For example, long distance companies simply cannot reach the customers at either end of a telephone call except by going through local exchange carriers. More than 99 percent of the calls AT&T carries depend on local exchange carriers for origina-

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[4] *See* Submission of Phillip Areeda, appended to Statement of Robert E. Allen before the House Judiciary Committee (Feb. 19, 1992).

[5] *United States* v. *Western Electric*, 900 F.2d 283, 296 (D.C. Cir. 1990); *id.*, 907 F.2d 1205, 1209 (D.C. Cir. 1990); *id.*, 12 F.3d 225, 233–34 (D.C. Cir. 1993).

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tion and termination. This dependence is reflected in the price of long distance calls today. A substantial percentage (40–45%) of long distance revenues are paid over to the local exchange carriers in the form of "access charges," which the Bell companies levy in return for use of their essential facilities. Thus, by virtue of its monopoly over access, each Bell company has control over the price and output of interexchange services in its region.

It is the Bell Companies' control of essential facilities, moreover, that gives rise to the anticompetitive dangers that the line-of-business restrictions currently guard against. If the Bell Companies were allowed to offer long distance service, they would have the ability and incentive to discriminate against their long-distance affiliate's competitors in the pricing and provisioning of access to their monopoly facilities. For example, they could discriminate by delaying the delivery of facilities, connections, or repairs ordered by a competitor to meet its customer needs, or by selectively providing superior service (*e.g.*, shortening provisioning intervals, forgiving oversights, etc.) to their affiliates. They could discriminate in the use of competitively sensitive information that long distance carriers must provide to them. They could favor their affiliates by giving them preferred prices or advance knowledge of price changes. They could refuse to provide access modifications needed by competitors to provide new services, or delay those modifications until their affiliate had caught up.

Equally important, by setting access charges at artificially high levels well above their costs, the Bell companies could effect a classic price squeeze that would grossly impede competition in the interexchange market. While such access charges would be nominally non-discriminatory, the Bell companies would not feel the effects of the scheme because any imputed access charge is merely a right-pocket to left-pocket accounting entry. And by mischaracterizing the costs of providing long distance services as local exchange costs, the Bell companies could recover those costs from monopoly ratepayers and thus price their long distance service below cost. All of this conduct would tend to raise the price, reduce the quality and volume, and distort the efficient production of long distance service.

Similarly, with regard to manufacturing, the Bell companies' continuing monopoly in the local exchange means that they face none of the constraints that competition would impose on their purchases of telecommunications equipment. The Bell companies would therefore have the ability and incentive to discriminate in favor of their manufacturing affiliates, such as by giving them advance notice of their generic needs for products. The Bell companies also could misallocate the costs of designing equipment to the (ratepayer-funded) engineering of exchange networks, thereby cross-subsidizing manufacturing operations with monopoly revenues and allowing their affiliates' equipment to appear to be sold at market-based prices when in fact monopoly ratepayers are subsidizing them. And the Bell companies would have both the incentive and ability to discriminate in the evaluation of network products and purchases from their affiliates, which they could always argue were superior even if, in reality, their ratepayers were being forced to pay for a more expensive, lower quality product than what a company facing market competition would have selected.

Premature BOC entry into the long distance and manufacturing markets would also raise barriers to entry into those markets. New entrants are deterred from entering markets in which their market success would be vulnerable to the potential anticompetitive conduct of a powerful incumbent firm. The Department of Justice submitted evidence in the case against the Bell System that, quite apart from any misconduct, the mere existence of the Bell System had harmed consumers by inhibiting other independent firms from entering the markets, thereby reducing competition and innovation.

Promoting Local Competition. Further, an entry standard that focuses on those factors that are pertinent under Section VIII(C) will promote what should be the most pressing public agenda: introducing competition in the local exchanges. For when it is clear that a standard like Section VIII(C) applies to entry, the RBOCs' incentives will be to *cooperate* in steps to foster that competition.

The recent agreement between Ameritech, AT&T, and the Justice Department is a stark illustration of the point. Because it realized that the only realistic path to removal of the Decree restrictions is an end to the local exchange monopoly, Ameritech has agreed to take a number of steps to permit a test of the possibility of exchange competition: *e.g.*, make resale commercially reasonable; unbundle loops, ports, and other network components; and implement number portability. If that leads to actual viable resale competition, some facilities competition, and the immediate potential for more local competition, Ameritech will then be allowed to enter long distance on a trial basis in two LATAs. More fundamentally, if the exchanges have ceased to be natural monopolies, this Ameritech trial could conceivably eventu-

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ally lead to a general end of the local exchange monopoly and deregulation of it as well—which should be the paramount public policy goals.

In sum, Section VIII(C) is a standard that is tailored to the competitive dangers in telecommunications that is now time-tested and familiar to all in the industry. It promotes competition—and deregulation—in both long distance and manufacturing *and* in monopoly exchange markets. Other verbal formulations could achieve the same objects but only if they, too, require consideration of whether BOCs have lost the ability to lever their monopoly power through (1) development of effective exchange competition, (2) changes in structure of the competitive long distance and manufacturing markets, and (3) radical changes in the nature and intensity of regulation.

III. The Entry Standard Currently Set Forth in H.R. 1528

The entry standard that is currently contained in H.R. 1528 appears peculiarly ill-suited to addressing the antitrust and competitive problems in telecommunications. Indeed, while the standard could conceivably be applied to focus on the three factors that are critical to the competitive inquiry, the current formulation would be a source of confusion and litigation, for it will be claimed that the standard provides substantially less protection for consumers than do any of the principal antitrust law standards: Section 1 or 2 of the Sherman Act, Section 7 of the Clayton Act, as well as Section VIII(C) of the MFJ.

As currently drafted, the entry standard in H.R. 1528 provides as follows:

> (B) The Attorney General shall approve the granting of the authorization requested in the application unless the Attorney General finds by clear and convincing evidence that there is a dangerous probability that such company or its affiliates would successfully use market power to achieve monopoly power in the market such company seeks to enter. The Attorney General may approve all or part of the requested authorization.

This standard appears to have been created by combining phrases from judicial opinions that were discussing particular antitrust standards in entirely different contexts—and engrafting upon it presumptions and standards of proof that are unprecedented in antitrust and inappropriate in this context. Five aspects of this test are anomalous in the telecommunications field.

First, the standard misconceives the problem by asking if a BOC would "successfully use *market* power to *achieve monopoly power* in the market it seeks to enter." Their control over essential facilities bottlenecks means BOCs *already have* monopoly power (and market power) in long distance and manufacturing markets. The exercise of that monopoly or market power harms competition and consumers. The pertinent antitrust question, therefore, is whether they have lost the ability to exercise monopoly power in these competitive markets due to elimination of the exchange monopoly, changes in the structure of the competitive markets, or radical changes in regulation.

Second, the requirement of a finding that a BOC would "achieve monopoly power" is otherwise misguided. This monopolization standard is at best confusing and at worst less protective of consumer welfare than the "attempt[ed]" monopoly standard under Section 2—or the Rule of Reason standard of Section 1 or the merger standard of Section 7 of the Clayton Act. Under Section 2, attempts to monopolize are analyzed with regard to the defendant's ability "to lessen or destroy competition" in the relevant market. *Spectrum Sports, Inc.* v. *McQuillan,* 113 S. Ct. 884, 891 (1993). Similarly, under Section 7 of the Clayton Act, entry via merger into a new market is prohibited if the consequence "may be substantially to lessen competition." 15 U.S.C. § 18; *see Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 (1962). Finally, the question under Section 1 of the Sherman Act's Rule of Reason is whether the combination will suppress, rather than promote, competition by allowing the exercise of market power. *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 691 (1978).

Third, the standard would shift the burden of proof from the RBOC to the Department. Placing the burden on the Department would be appropriate if Congress were writing on a blank slate. But it is not. In acting to supplant the Decree, Congress is acting in the wake of substantial evidence and judicial findings that BOC entry into the restricted markets would impede competition and is not in the public interest. The BOCs are in the posture of admitted monopolists, and the burden of proof should therefore remain on the Bell companies to show that a change significant enough to warrant removal of the restrictions has occurred.

Fourth, in all events, the quantum of proof required by the proposed standard is completely unwarranted. Section 2, which prohibits attempts to monopolize, does

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not require proof by "clear and convincing evidence" but simply by a preponderance of the evidence. Thus, even in the absence of legislation and any prior judicial findings, Section 15 of the Clayton Act would have allowed the Justice Department to obtain an injunction against RBOC entry into manufacturing and long distance by showing by a preponderance of the evidence that anticompetitive consequences were reasonably probable. 15 U.S.C. §25. So the instant proposed standard could be claimed to cut back on existing law.

Further, the "clear and convincing evidence" standard is typically reserved for exceptional cases involving threats to personal liberty. *Addington* v. *Texas*, 441 U.S. 418 (1979). Its use here is thus doubly anomalous; it is inappropriate in a statute regulating business conduct and should be reserved, if employed at all, to bolster protection against the known risk to competition from the leveraging of essential facilities rather than operating, as it would here, to increase the likelihood of such anticompetitive harm.

Fifth, there are other related anomalies in the current version of H.R. 1528: most notably its definition of "affiliate." It would mean that BOCs could immediately invest in and participate in long distance and manufacturing businesses without meeting an entry standard so long as they do not have equity interests of over 50%. In short, while an entry test would have to be met to acquire 51% of a firm, RBOCs could acquire 49% interests, acquire other effective controlling interests, or acquire other direct financial stakes in a prohibited business' success (and incentives to discriminate in its favor) without making any competitive showing whatsoever.

Section VIII(C) is not the only test that could avoid these anomalies and advance the goals of promoting competition and permitting deregulation. Other tests, grounded in antitrust law principles established under the Sherman and Clayton Acts, could be devised and would be appropriate as long as they focused the Justice Department's inquiry on the critical question: whether the Bell companies' entry would suppress or promote telecommunications competition.

It is elementary that competition is enhanced—and consumer welfare improved—if everyone with an interest in participating in a particular market is free to offer services without artificial constraints. As owners of essential facilities, the Bell companies are unique among all telecommunications industry members. By controlling the facilities that interexchange carriers must use if they are to reach their customers, the Bell companies are uniquely positioned to discriminate against those carriers in favor of their own affiliates. The necessary consequences of such discrimination will be to raise prices for consumers and reduce the breadth and availability of services—precisely the opposite of what the antitrust laws and Section VIII(C) are intended to achieve.

Thus, as Judge Bork explains in the attached letter, "[a]s long as the Bell Companies retain their monopolies over local exchange service—as they do today -they should not be permitted entry into adjacent competitive markets." By crafting an entry standard consistent with this principle, the Committee will ensure that the benefits of competition and deregulation, already evident in the long distance telecommunications market, will be preserved, strengthened, and expanded throughout *all* telecommunications markets at the earliest possible time.

AT&T thanks the Committee for this opportunity to present its views, and it would be pleased to provide any additional information that would be helpful to the Committee.

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ROBERT H. BORK

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May 8, 1995

The Honorable Henry J. Hyde
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Henry:

I was interested to learn that you introduced H.R. 1528 this week to address the issues surrounding the Modification of Final Judgment that broke up the old Bell System. As you may know, this is a matter I have followed for some time, and I recently authored a paper explaining why, in my view, the MFJ represents a sound and pro-competitive application of the antitrust laws.

I was pleased to see that your bill, unlike many of the others that have been introduced, retains a role for the Department of Justice in determining whether and when the Bell Companies should be permitted to enter the long-distance and manufacturing markets. The relevant questions to be investigated involve antitrust inquiries into the state of competition, and those are the types of determinations that the Department is particularly suited to make.

I would recommend, however, that you carefully reconsider the standard the bill would have the Department apply. As currently drafted, it provides that the Bell Companies would be permitted entry unless the Department finds "by clear and convincing evidence" that there is a "dangerous probability" that the Bell Company would "achieve monopoly power" in the market it seeks to enter. That standard, which I gather was drawn from Section 2 of the Sherman Act, would be extraordinarily lenient. It would require the Department to disregard the very real dangers of anticompetitive abuses that, while not creating a dangerous probability of a Bell Company monopoly over long-distance or manufacturing, would likely reverse the progress that has been made since the AT&T divestiture in making those markets competitive.

As long as the Bell Companies retain their monopolies over local exchange service -- as they do today -- they should not be permitted entry into adjacent competitive markets. The Department of Justice's "Ameritech plan" represents the most promising approach to date both in creating incentives for the Bell Companies to open their markets to real competition and in establishing the

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most appropriate test for Bell Company entry into other markets. A bill that incorporated elements of that approach, it seems to me, would provide the best hope for fostering competitive markets.

Sincerely,

Robert H. Bork

RHB:lh

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STATEMENT OF HON. HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, the broad challenge before us as we develop telecommunications policy is to advance the longstanding and interrelated goals of competition and diversity in the provision of services. As we go about this task, we must necessarily *balance certain interests;* but whatever balance is struck, it must be in favor of the American consumer who is the ultimate judge of what constitutes a reasonable price for a particular service.

While our challenge is difficult, it can be made much easier with the assistance of the Department of Justice serving as a referee among the participants in long distance and other formerly restricted markets.

The Department of Justice has gained valuable experience policing the telecommunications industry since the breakup of the old Bell system more than 10 years ago. During that time, the Antitrust Division at the Department worked with Judge Greene to enforce the terms of the Consent Decree under which much of the telecommunications industry has been ape rating.

The past decade has witnessed an increase in competition in long distance service and telecommunications equipment manufacturing. This has led to lower prices and diverse product and service offerings for the American public. Given this record of accomplishment, it only makes sense to grant the Department of Justice a decision-making role in determining whether and how individual companies may enter long distance and other services.

Mr. Chairman, government regulations raise consumer prices, but proper enforcement of antitrust law results in competitive markets that reduce these prices. Participation by the Department of Justice in the entry process will further the goal of ensuring that every company is free to compete in every market for every customer. For this reason, I applaud the Chairman for convening this hearing to ensure that the Department will play a role in shaping our telecommunications future.

I anticipate a very informative hearing and I look forward to the testimony.

STATEMENT OF HON. MICHAEL PATRICK FLANAGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I am glad to be here today for our first hearing this Congress on telecommunications legislation and you, sir, should be commended for your good work in this area. There is little question about the importance of this issue or the need to modernize the complex web of outdated regulations that now dominate this industry. I am interested in hearing all of our witnesses on the many issues involved in this debate, but I am especially interested to hear from Ms. Bingaman about the Department of Justice's recent agreement to permit a limited trial of long distance service by Ameritech in Chicago. This Ameritech trial is important because it contains in miniature all the elements and the issues that our Committee is being asked to consider to apply on a national basis.

Mr. Chairman, I believe your bill, H.R. 1528, represents an important contribution to the telecommunications debate. It makes much needed changes to the current system of lengthy judicial waivers with a new, stream-lined DOJ review procedure for allowing Regional Bell Operating Companies to enter into the long distance and equipment manufacturing markets.

Despite support for these reforms, H.R. 1528 does have its critics. The main criticism of the bill deals with the replacement of the VIII(C) test—ensuring that there is no substantial possibility that Bell entry into long distance will impede completion—with the "dangerous probability" test, which shifts the burden of proof from the RBOCs to the DOJ. Further, the long distance companies strongly believe that before Congress attempts to remove the existing legal and regulatory barriers in long distance, the RBOCs should be forced to open their local telephone markets. With a history of discrimination and cross-subsidization in this industry, these are, therefore, legitimate concerns.

Today, Mr. Chairman, I look forward to today's testimony. It should be very instructive for our future deliberations and what actions Congress should eventually take in this area. Thank you, Mr. Chairman.

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STATEMENT OF HON. STEPHEN E. BUYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman, today our Committee begins its consideration for the several initiatives in this Congress that aim to reform our federal telecommunications laws. I believe that any reform package must promote the one key ingredient we have relied on to make our telecommunications industry the best in the world—robust competition. While telecommunications competition can be traced to many sources—good old American ingenuity, a strong national entrepreneurial spirit, and the long ago decision by policymakers to refrain from making the telephone company a government-run enterprise—we have to admit that the real explosion in the competition to provide new products and services and long distance calling has occurred since the breakup of Ma Bell in the early 1980's. In short, once the monopoly on all telecommunications services ended, American consumers immediately began to experience the many benefits of competition, as well as realize the technological possibility of the industry.

This points up the key question for the Committee, and indeed this Congress--how do we create a telecommunications environment in which we would realize the intense competition which would cultivate both lower costs to consumers through efficiency and greater innovation in the communications industry. I am interested in hearing from our witnesses today as they provide answers to this question.

While I remain open as to the best way to cultivate such a competitive environment, I think we have to recognize the Department of Justice and the antitrust laws that ensure competition exists in this country. I am hopeful that these hearings will provide the information we need to determine what role and what tests should be applied in this new telecommunications era.

Mr. Chairman, I thank you for convening today's hearing and I look forward to our witnesses' testimony.

STATEMENT OF HON. CARLOS J. MOORHEAD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you Mr. Chairman. I have been dealing with telecommunications issues in both the Judiciary and Commerce Committees for nearly two decades.

I have learned that the only constant within the telecommunications industry, or the so-called telecommunications revolution, is change.

As a result there is always something to learn and hearings are, therefore, always useful and informative.

This is especially true today as the Judiciary and Commerce Committees begin to review comprehensive pieces of legislation which should in the near future allow the big players into all areas of the telecommunications revolution.

It should also allow smaller businesses to flourish and compete because it is the smaller operations which bring much of the innovation and entrepreneurial spirit to the marketplace.

Today, we begin to draft the master plan for the information superhighway, which we hope will bring to all Americans a wide variety of entertaining and useful services at rational prices.

Mr. Chairman, I believe history will view this period as highly significant. If the Congress will play its important role with common sense and foresight, I believe this period will also be highly beneficial for the nation and its citizens.

STATEMENT OF HON. ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

I want to thank the Chairman for holding this important hearing as we continue the process of shaping the telecommunications landscape for the Twenty-first century. I also appreciate the time that the witnesses have taken to share their views and the benefit of their experience with us.

I support a central role for the Department of Justice in determining proper conditions for entry of the Regional Bell Operating Companies (RBOCs) into new markets. As the antitrust "cop" in our country, the Justice Department clearly has the unique expertise to evaluate the complexities involved with RBOC expansion.

As Congress regulates the expansion of the various telecommunications businesses into each other's markets, our biggest concern should be affordable, universal service for all Americans for the new and existing services. It is critical that as we supervise the construction of the "Information Superhighway," that the highway has

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on-ramps into urban and rural America. If we do not do this, the gulf between the haves and the have-nots in our country will only become wider than it already is.

Because residential service to many areas is not profitable, these areas will not be served unless we implement effective incentives or requirements to ensure service. This phenomenon has been demonstrated in the poor urban and rural communities across the United States that were the last to be wired for cable television. Many still are not.

If these circumstances repeat themselves with the coming interactive broadband technologies that will be entering homes, offices, and schools all over our country in the next few years, the effects will be far more severe. If children in East San Jose or in rural Tennessee do not have the same access to technology and information as their counterparts in wealthier communities, then they will have almost no chance to compete in the modern, high-tech labor market. We need every child to be part of our economic future, so we cannot afford to handicap any child, or anyone for that matter, by not providing equal access to the Internet, the World Wide Web, and other gateways to cyberspace.

Schools present a special problem, since many are located in areas that are some distance from the nearest fiber optic communications line. However, schools also present a special opportunity because they are probably the most important link to telecommunications for many children. Many homes will not be able to afford the hardware or services necessary to obtain all of the benefits of being "on line." So classroom hookups can serve children who otherwise would be deprived of this opportunity. I believe that those profiting from the telecommunications wiring should allocate some of their profits to the cost of wiring our nation's schools. This same approach was used to accomplish universal telephone service in our country.

Although universal service is not directly involved with the Justice Department's participation in market entry, I believe that as we allow new market entry, we must consider this issue. I am aware of proposals in some of the telecommunications bills that would seek to guarantee "universal access" to service. I look forward to working with my colleagues to make sure that any bill that passes this Committee or the House includes sufficient incentives and requirements for service providers to ensure access to all Americans. The debate on this matter will not be whether we should do this, but how do we do it.

STATEMENT OF HON. BOB BARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

I wish to thank Chairman Hyde for his leadership and for holding these hearings. In large measure, we will focus today on what role the Department of Justice (DOJ) will play in telecommunications reform. With H.R. 1528, the "Antitrust Consent Decree Reform Act," the Chairman has clearly put forward a strong proposal that could contribute substantially to the larger telecommunications reform debate currently underway in Congress. In particular, H.R. 1528 contains a number of interesting elements.

First, there is a reasonable and important change in the burden of proof. Previously Regional Bell Operating Companies, under the "VIII(C)" test, were required to prove to the Department of Justice a proposed activity was not anticompetitive. The Chairman's bill says that it is the Department of Justice that must show there is a dangerous probability (clear and convincing evidence) that a proposed activity will result in anticompetitive behavior.

Secondly, H.R. 1528 puts other clear, yet responsible, limits on the Department of Justice, by requiring it to resolve waiver dispute within fair and clearly established time limits.

I believe these are fair proposals. Again, I commend the Chairman for holding this hearing, and I look forward to today's testimony.

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