AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

107TH CONGRESS
*1st Session*
HOUSE OF REPRESENTATIVES
REPT. 107–83
Part 2

# INTERNET FREEDOM AND BROADBAND DEPLOYMENT ACT OF 2001

JUNE 18, 2001.—Ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

## ADVERSE REPORT

together with

## ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1542]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1542) to deregulate the Internet and high speed data services, and for other purposes, having considered the same, reports unfavorably thereon with amendments and recommends that the amendments be agreed to and that the bill do not pass.

CONTENTS

| | Page |
|---|---|
| The Amendment | 2 |
| Purpose and Summary | 3 |
| Background and Need for the Legislation | 3 |
| A. History of the Judiciary Committee Role in Telecommunications Legislation | 3 |
| B. The Telecommunications Act of 1996 | 7 |
| C. Telecommunications Since the 1996 Act | 8 |
| D. The Provisions of H.R. 1542 | 9 |
| E. The *Goldwasser* Case | 11 |
| F. The Referral | 12 |
| G. Chairman Sensenbrenner's Amendment | 12 |
| H. Parliamentary Issues Relating to Chairman Sensenbrenner's Amendment | 13 |
| Hearings | 14 |
| Committee Consideration | 15 |
| Vote of the Committee | 15 |
| Committee Oversight Findings | 15 |
| Performance Goals and Objectives | 15 |
| New Budget Authority and Tax Expenditures | 15 |

Congressional Budget Office Cost Estimate ..... 15
Constitutional Authority Statement ..... 20
Section-by-Section Analysis ..... 20
Changes in Existing Law Made by the Bill, as Reported ..... 22
Markup Transcript ..... 24
Additional Views ..... 69
Dissenting Views ..... 77

The amendments (stated in terms of the page and line numbers to the committee print document containing the text of the amendment as reported by the Commmittee on Energy and Commerce) are as follows:

Page 15, line 6, insert ", subject to subsection (*l*)" after "service".

Page 15, after 21, and insert the following:

(c) APPLICATION PREREQUISITE TO PROVIDING HIGH SPEED DATA SERVICE OR INTERNET BACKBONE SERVICE.—Section 271 of the Communications Act of 1934 (47 U.S.C. 271), as amended by subsection (b), is amended by adding at the end the following:

"(*l*) APPLICATION PREREQUISITE TO PROVIDING HIGH SPEED DATA SERVICE OR INTERNET BACKBONE SERVICE.—

"(1) REQUIREMENT TO FILE APPLICATION WITH ATTORNEY GENERAL OF THE UNITED STATES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may begin providing high speed data service or Internet backbone service in any in-region State under the authority of subsection (g)(7)—

"(A) unless it files with the Attorney General of the United States an application to provide such service; and

"(B) until the Attorney General —

"(i) approves such application before the expiration of the 90–day period beginning on the date such application is filed; or

"(ii) fails to approve or to disapprove such application during such 90–day period.

"(2) AUTHORITY OF ATTORNEY GENERAL.—The Attorney General of the United States—

"(A) may issue rules to establish requirements applicable to the form and contents of applications filed under paragraph (1);

"(B) may make recommendations to an applicant regarding—

"(i) withdrawal of an application filed under paragraph (1); or

"(ii) filing of an application under paragraph (1), with or without modifications, subsequent to the withdrawal of an application filed under such paragraph; and

"(C) may not approve an application filed in compliance with this subsection unless the Attorney General determines that the applicant has demonstrated that it meets the substantive requirements of subsections (c) and (d) with respect to high speed data service or Internet backbone

service in the State for which such application is filed.

"(3) WITHDRAWAL OF APPLICATION.—An application filed under paragraph (1) may be withdrawn by the applicant at any time before the Attorney General approves or disapproves such application, but may not be modified after being filed.".

Page 15, line 22, strike "(c)" and insert "(d)".

Page 16, after line 4, insert the following:

(e) CONTINUED FULL APPLICATION OF THE ANTITRUST LAWS TO MATTERS INVOLVED IN THE TELECOMMUNICATIONS INDUSTRY.—Section 601(b) of the Telecommunications Act of 1996 (47 U.S.C. 152 note) is amended by adding at the end the following:

"(4) CONTINUING OPERATION OF THE ANTITRUST LAWS.—The rights, obligations, powers, and remedies provided under the antitrust laws are in addition to, and are—

"(A) not preempted by;

"(B) not inconsistent with; and

"(C) not incompatible with;

any of the rights, obligations, powers, and remedies provided under the Communications Act of 1934 (47 U.S.C. 151 et seq.), under this Act, or under any law amended by either such Act, regardless of the progress of competition in any market.".

## PURPOSE AND SUMMARY

H.R. 1542, as amended by the Committee on the Judiciary, maintains a vital Department of Justice role in reviewing Bell entry into the long distance provision of high speed data services and Internet backbone services. In addition, it corrects an erroneous part of the decision in *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000), and clarifies the policy expressed in the antitrust savings clause (§ 601(b)(1)) of the Telecommunications Act of 1996. However, because of the limited nature of the referral, the Committee was unable to address other antitrust problems raised by the version of the bill the Committee on Energy and Commerce reported.

## BACKGROUND AND NEED FOR THE LEGISLATION

### A. HISTORY OF THE JUDICIARY COMMITTEE ROLE IN TELECOMMUNICATIONS LEGISLATION

Until 1984, America had one dominant telephone company—the American Telephone & Telegraph Company ("AT&T"). AT&T provided almost all local and long distance service throughout the United States, except that in some isolated areas independent phone companies provided local service. During the AT&T era, local service rates were kept artificially low, and the substantial differences in costs of providing local service in urban and rural areas were not reflected in local service rates. AT&T kept long distance rates, which were paid primarily by business, artificially high in order to subsidize low local rates. The policy, known as universal

service, was that all Americans should have access to a telephone at an affordable rate regardless of the cost of providing the service. Because AT&T was one company, it was relatively easy to administer this system of subsidies.

As early as 1957, the Judiciary Committee held oversight hearings to examine the monopoly power that AT&T wielded because of its control of the local exchange and the Department of Justice's efforts to limit that power through antitrust enforcement. See *The Consent Decree Program of the Department of Justice: Hearings Before the Subcommittee on Antitrust of the House Committee on the Judiciary*, 85th Cong. (1957 and 1958); *Report of the Antitrust Subcommittee on the Consent Decree Program of the Department of Justice*, 86th Cong. (1959). These hearings specifically examined the process by which the Justice Department, in 1956, had entered into a consent decree with AT&T, under which AT&T agreed to cease anticompetitive activities in the context of its manufacture and sale of telephone equipment.

The Judiciary Committee's ongoing examination of the 1956 consent decree and other Department proceedings led, in 1974, to enactment of the Tunney Act, which strengthened and codified the process through which the Justice Department could enter into consent decrees in the antitrust context. Antitrust Procedures and Penalties Act, Pub. L. No. 93–528, 88 Stat. 1708 (1974). Also in 1974, the Antitrust Division of the Department of Justice sued AT&T for violating the antitrust laws in a number of ways—most importantly, not allowing potential long distance competitors to connect to its local networks. Even as the case was going on, the Judiciary Committee began to consider the antitrust issues involved. *Proposed Antitrust Settlement of United States v. AT&T: Hearings before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 97th Cong. (1982); *H.R. 6121, the "Telecommunications Act of 1980": Hearings before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 96th Cong. (1980). The 1980 legislation was almost 150 pages long consisting of an extensive FCC regulatory scheme for the industry, and it was referred sequentially to the Committee on the Judiciary. The 1982 hearings were held jointly with the Committee on Energy and Commerce.

In 1982, the parties settled the lawsuit, and Judge Harold Greene of the United States District Court for the District of Columbia entered a consent decree known as the Modification of Final Judgment or MFJ. *United States v. American Telephone & Telegraph Company*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). This 1982 consent decree modified the consent decree entered in 1956 which the Judiciary Committee had studied in its 1957–58 hearings. In doing so, the court followed the Tunney Act procedures that the Judiciary Committee had written.

The MFJ created a new world. Beginning in 1984, it broke up AT&T into a new smaller AT&T, which was to provide long distance service in competition with other companies, and seven regional Bell operating companies ("RBOCs")—Ameritech, Bell Atlantic, BellSouth, Nynex, Pacific Telesis, Southwestern Bell (now known as SBC Communications), and US West. There was also one preexisting independent phone company, GTE Corporation, which was of a comparable size. These seven regional RBOCs and GTE

were to provide local service where AT&T had previously been doing so. Subsequent mergers have reduced these companies to four: SBC Communications, BellSouth, Verizon, and Qwest.

At the time, the general consensus was that long distance service could be provided competitively, but that local service remained a natural monopoly. Based on that assumption, the MFJ prohibited the RBOCs from entering long distance service and other lines of business without prior court approval. The court's procedures under the MFJ required companies seeking that approval to negotiate with the Department of Justice before filing for the approval. As a practical matter, DOJ approval was required to get court approval.

In addition, policymakers wanted to maintain the universal service system. To do so, they required the long distance companies to pay "access charges" to the local companies for completing long distance calls. The local companies used these access charges to maintain low local rates in all geographical areas.

The impetus for the Telecommunications Act of 1996 arose from the application and effect of the MFJ. In the years following the MFJ, the long distance industry became highly competitive with the entrance of numerous companies offering consumers greater choice and lower prices. In contrast, the local exchange market remained under monopoly control. Because that monopoly control remained, the Judiciary Committee began in 1987 to conduct hearings on the impact of the MFJ and monopoly control of the local exchange. *Competition in the Telecommunications Industry: Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary*, 100th Cong. (1987); *The AT&T Consent Decree: Hearings Before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary*, 101st Cong. (1989).

In the 102nd Congress, the Judiciary Committee continued to exercise its jurisdiction over the antitrust issues raised by monopoly control of the local exchange through the consideration of two bills—the Telecommunications Equipment Research and Manufacturing Competition Act of 1991 (H.R. 1523) and the Telecommunications Equipment Research and Manufacturing Competition Act of 1991 (H.R. 1527). Both bills were jointly referred to the Committee on the Judiciary and the Committee on Energy and Commerce. Both consisted almost entirely of amendments to the Communications Act of 1934 directing the FCC to prescribe regulations to allow the RBOCs into manufacturing. Neither Committee took formal action on these measures.

The Committee on the Judiciary then held a series of oversight hearings on these issues. *Competition Policy in the Telecommunications Industry: A Comprehensive Approach: Hearings Before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary*, 102nd Cong. (1991 and 1992). These hearings led to the introduction of H.R. 5096, the "Antitrust Reform Act of 1992," which was referred solely to the Judiciary Committee and which would have established a unified procedure and standard for the RBOCs to use in applying for authorization to engage in long distance and manufacturing. The Judiciary Committee reported H.R. 5096 favorably on August 12, 1992. H. Rep. No. 102–850 (1992). As reported by the Committee, H.R. 5096 contained an

entry test requiring the Attorney General to determine whether an RBOC applying for long distance entry had proven that "there is no substantial possibility that [it] could use monopoly power to impede competition . . ." §§ 2(b)(2)(B)(i) & 2(c)(2)(A)(i) of H.R. 5096 as reported. On October 1, 1992, the House Committee on Rules held a hearing on H.R. 5096, but it was never scheduled for floor consideration.

The Committee continued its efforts during the 103rd Congress with the introduction and consideration of the "Antitrust and Communications Reform Act of 1994" (H.R. 3626), which was referred jointly to the House Committees on the Judiciary and Energy and Commerce. H.R. 3626 sought to modify the MFJ by permitting RBOCs to compete in new lines of business, including the provision of interchange telecommunications services. Importantly, H.R. 3626 contained language similar to the provision enacted in 1996 expressly establishing a role for the Department of Justice to consult with the FCC on matters affecting competition within the telecommunications industry. § 101(b) of H.R. 3626 as introduced. Under H.R. 3626, a RBOC seeking to enter the long distance market would apply jointly to the Department of Justice and the FCC. Applications would be approved only when the Attorney General found that "there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market such company seeks to enter," and the FCC found that granting the application is "consistent with the public interest, convenience and necessity." § 101(b)(3)(D)(i) & (ii) of H.R. 3626 as introduced. It also included extensive amendments to the Communications Act of 1934 to provide for FCC regulation of manufacturing, alarm monitoring, and electronic publishing.

The Judiciary Committee held 3 days of hearings on H.R. 3626. *H.R. 3626, the "Antitrust and Communications Reform Act of 1993": Hearings Before the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary*, 103rd Cong. (1994). On June 24, 1994, the Judiciary Committee favorably reported H.R. 3626. H. Rep. No. 103–559, Part II (1994). On the same day, the Energy and Commerce Committee also filed a report on the bill. H. Rep. No. 103–559, Part I (1994). A final agreed-upon substitute version passed the House on June 28, 1994 by a vote of 423–5. 140 Cong. Rec. H 5189–5216, 5246–47 (daily ed. June 28, 1994). The bill failed to become law, however, when a companion measure stalled in the Senate.

In the 104th Congress, the Judiciary Committee continued its review of the monopoly problems in the telecommunications industry with its consideration of the Antitrust Consent Decree Reform Act of 1995 (H.R. 1528) and the Communications Act of 1995 (H.R. 1555). The Speaker referred both measures jointly to the Judiciary and Commerce Committees. H.R. 1528 was primarily referred to the Judiciary Committee with a secondary referral to the Commerce Committee. H.R. 1555 was primarily referred to the Commerce Committee with a secondary referral to the Judiciary Committee. Again, this bill contained extensive amendments to the Communications Act of 1934 designed to address monopoly power in the local exchange. On May 9, 1995, the Judiciary Committee continued its long history of hearings on this topic. *Telecommunications: the Role of the Department of Justice: Hearings before the*

*Committee on the Judiciary*, 104th Cong. (1995). On July 24, 1995, the Judiciary Committee reported H.R. 1528. H. Rep. No. 104–203, Part I (1995). On the same day, the Commerce Committee reported H.R. 1555, H. Rep. No. 104–204, Part I (1995). After modification resulting from extensive negotiations between the two Committees, the House considered and passed H.R. 1555. 141 Cong. Rec. H 8281–95, 8425–8501 (daily eds. August 3 and 4, 1995). In those negotiations, the Judiciary Committee successfully insisted that the Department of Justice have an integral role in the decision as to when RBOCs would be allowed to provide long distance service. This bill went to conference and ultimately emerged as the Telecommunications Act of 1996. Pub. L. No. 104–104.

More recently, in the 106th Congress, the Speaker referred legislation to modify existing antitrust law with respect to competition in the broadband market and to provide data relief to the RBOCs to both the Judiciary and Commerce Committees. The Internet Freedom Act (H.R. 1686), was referred primarily to the Judiciary Committee and secondarily to the Commerce Committee. The Internet Growth and Development Act of 1999 (H.R. 1685), was referred primarily to the Commerce Committee and secondarily to the Judiciary Committee. Both of these bills contained amendments to the Communications Act of 1934 that were similar in purpose to this year's H.R. 1542. Again, the Judiciary Committee held 2 days of hearings on these bills. *H.R. 1686, the "Internet Freedom Act," and H.R. 1685, the "Internet Growth and Development Act of 1999": Hearings before the Committee on the Judiciary*, 106th Cong. (1999 and 2000).

### B. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 arose from an antitrust consent decree. That consent decree, the MFJ, prevented the RBOCs from entering the long distance business because of their monopoly control over the local exchange. Congress structured the 1996 Act to offer the RBOCs a basic trade: the RBOCs were to open their local exchanges to competitors for interconnection and, in return, they were to be allowed entry into the long distance market.

In particular, it added a new § 271 to the Communications Act to provide criteria and a process for scrutinizing RBOC efforts to open their local monopolies. 47 U.S.C. § 271. Given the Justice Department's unique expertise in competitive matters, Congress expressly provided within § 271 that the Department would review RBOC compliance with the market-opening provisions of the act and that the Federal Communications Commission would give the Department's analysis substantial weight in making its decision with respect to an RBOC application to provide long distance service. 47 U.S.C. § 271(d)(2)(A). These provisions were included at the insistence of the Committee on the Judiciary. In providing this role for the Department, Congress sought to expand the Department's traditional enforcement authority in an effort to prevent anticompetitive harms.

During the 5 years since enactment of the 1996 Act, the Department has fulfilled its statutory obligations in reviewing RBOC applications for entry into long distance service. In fact, after reviewing each of the first five petitions filed by RBOCs under the 1996 Act, the Department concluded that none of the RBOCs met its ob-

ligation under the act. The FCC concurred and ultimately denied each of the first five RBOC petitions.

In 2000, the Justice Department recommended denial of two applications based on antitrust concerns—one involving SBC, the other involving Verizon. In each instance, the applicant withdrew and resubmitted its application, in an effort to remedy the antitrust concerns raised by the Justice Department. In five cases, including the two resubmitted applications—New York, Texas, Kansas, Oklahoma, and Massachusetts—the Department did not recommend rejection, but did indicate problems that needed to be addressed before approval. In those five instances, the FCC approved the applications. Thus, the Justice Department's § 271 opinion has essentially determined the outcome of each application that the RBOCs have filed to date.

### C. TELECOMMUNICATIONS SINCE THE 1996 ACT

President Clinton signed the 1996 Act on February 8, 1996. At that time, the Internet was in its infancy. Most observers thought that the RBOCs would remain separate companies, that they would begin competing in long distance quickly, and that they might enter the cable business. By the same token, most observers thought that the long distance companies would remain separate companies, that they would begin competing in local service quickly, and that they probably would not enter the cable business. As for the cable companies, most observers thought that they would remain separate companies, that they might enter the telephone business, and that they would face substantial competition in the cable business from satellite companies and telephone companies.

In the 5 years since the 1996 Act was signed, the Internet has changed everything. At that time, it was a technological marvel that was just becoming available to ordinary people and was hardly used for commerce. Since then, it has become a means for conducting a substantial and ever growing amount of commerce.

In 1996, data traffic was not a substantial portion of the long distance business. Estimates vary as to what the percentage was, but it was probably less than 10%. Today, it is probably more than 50%. The demand keeps exploding. As a result, being a carrier of voice (i.e. traditional telephone calls) has become relatively less important and being a carrier of data has become relatively more important. Moreover, it is now possible to transmit voice telephone calls over the Internet thus blurring the distinction between voice and data.

As anyone who has used the Internet knows, it can be frustratingly slow depending on what technology one is using. Both cable companies and telephone companies are upgrading their networks in many areas. At the same time, both of these technologies are getting better and faster, and they are also becoming capable of carrying voice (i.e. telephone calls), video (i.e. cable programming), and data (i.e. Internet content) through the same pipe. This is what is referred to as "convergence" of the technologies.

Most telecommunications companies, irrespective of whether they started as RBOCs, long distance companies, cable companies, or something else, now think that their future lies in being capable of providing a package of all of the "convergent" services on a global basis. Because getting into a new part of this business from

scratch requires massive investment, many companies have decided to buy another company rather than build from scratch. That has led to a wave of mergers.

First, the RBOCs began to merge with each other. Bell Atlantic bought Nynex and GTE. SBC bought Pacific Telesis and Ameritech. Then, new competitors began to buy existing companies. WorldCom, a relatively new local competitor, bought MCI, one of the major long distance companies. WorldCom also tried to buy Sprint, but the deal failed because of antitrust concerns. Qwest, a relatively new long distance competitor, bought USWest, an RBOC.

Finally, AT&T, the biggest of the old line long distance companies, bought Tele-Communications, Inc. ("TCI") and MediaOne. TCI and MediaOne were two of the largest cable companies in the nation. These mergers gave AT&T ownership of many cable lines going into American homes. Again, estimates of the percentage vary depending on who is counting. At the same time, Microsoft has purchased a stake in AT&T as part of an effort to accelerate the deployment of broadband services across the country.

When Congress was considering the 1996 Act, most observers thought that controlling the transmission of telephone voice calls was the future. Now, most observers believe that controlling broadband communications lines, be they phone or cable, is the future. H.R. 1542 seeks to allow the RBOCs to leverage their monopoly control of the local exchange to control the broadband future.

### D. THE PROVISIONS OF H.R. 1542

Fundamentally, H.R. 1542, as reported by the Committee on Energy and Commerce, eliminates several of the most important restrictions on the monopoly power of the incumbent local exchange carriers. In addition, with respect to data, it completely undoes the basic trade that made the 1996 Act possible: the RBOCs would no longer have to open their networks in order to offer long distance data service.

Section 4(a) of H.R. 1542 creates a new § 232 of the Communications Act of 1934. Subsection (a) of that new § 232 provides for a sweeping prohibition of any Federal Communications Commission or State limits of any kind on any high speed data service, Internet backbone service, Internet access service, or network elements used to provide such services. Section 3(a) of H.R. 1542 defines the terms "high speed data service," "Internet backbone service," and "Internet access service" in very broad terms. For example, "high speed data service" is defined as any packet-switched or successor technology that transmits information at a speed generally not less than 384 kilobits per second. This definition could easily include voice transmission over the Internet. The desire to let the Internet grow unfettered is understandable. However, this sweeping language could eliminate even basic anti-fraud protections as well as many other consumer protection statutes. In addition, this sweeping language could be read to eliminate the rights of the Commission and the State attorneys general to bring antitrust suits under §§ 4, 4C, and 11 of the Clayton Act. 15 U.S.C. §§ 15, 15c, & 21.

Section 4(b) of H.R. 1542 creates a new subsection (j) of § 251 of the Communications Act. 47 U.S.C. § 251. Section 251 sets forth the basic obligations of RBOCs and other incumbent local exchange carriers to open their local exchanges for competitors to inter-

connect. The new § 251(j) contains exemptions that would generally eliminate their obligations to share the fiber optic parts of their network, to provide unbundled network elements for high speed data service, and to provide access to remote terminals as an unbundled network element. These obligations on incumbent local exchange carriers allow competitors the ability to provide competing high speed data service. In short, this provision allows the incumbents effectively to leverage their monopoly control over the local exchange and exclude competition in high speed data service. That is troublesome enough, but taken together with the broad definition of high speed data service, it could represent the potential remonopolization of the industry.

Subsection 6(a) of H.R. 1542 inserts high speed data service and Internet access service into the definition of incidental interLATA services contained in § 271(g) of the act. 47 U.S.C. § 271(g). Under § 271(b)(3), the RBOCs are allowed to provide incidental interLATA services without meeting the antimonopoly provisions of § 271. 47 U.S.C. § 271(b)(3). Thus, this provision moves high speed data service and Internet access service out of the § 271 process altogether and allows the RBOCs to start providing them immediately without any further review by the Department of Justice, the Federal Communications Commission, or the States. Given the broad definitions of these terms, this provision undoes much of the basis of the 1996 Act. More specifically, this language would eliminate the role of the Department of Justice in reviewing much activity that would currently fall within the parameters of § 271.

Subsection 6(b) of H.R. 1542 creates a new § 271(k) that would prohibit the RBOCs from offering in any in-region State any interLATA voice telecommunications service obtained by means of a high speed data access or Internet access service. This provision attempts to maintain the § 271 restrictions for voice in the face of the broad definitions for the two key terms. However, it does not provide any definition of the term "interLATA voice telecommunications service." Apparently, this would be left to the FCC. Thus, in what claims to be a deregulatory bill, the purportedly fundamental distinction between voice and data is left undefined. However, regardless of how voice or data are defined or who defines them, this provision is intended to, and will, change the parameters of what the Justice Department will review in § 271 applications.

Finally, subsection 6(c)(2) of H.R. 1542 eliminates the act's requirement that the RBOCs must conduct their interLATA information services through a separate affiliate. The act's definition of "information services" appears to include high speed data access or Internet access service. 47 U.S.C. § 153(20). The separate affiliate requirement was a key provision designed to ensure that the RBOCs could not leverage their monopoly power over the local exchange to other lines of business. The elimination of this requirement simply adds to the elimination of any restriction on that monopoly power.

In short, H.R. 1542, as reported by the Energy and Commerce Committee, reverses many of the basic antimonopoly provisions of the 1996 Act. In doing so, it eliminates potential antitrust actions by the FCC and the States and substantially limits the role of the

Department of Justice in reviewing the monopoly power of the RBOCs.

### E. THE *GOLDWASSER* CASE

One recent development in the courts particularly interests this Committee. The Telecommunications Act of 1996 included an antitrust savings clause that read as follows: "Except as provided in paragraphs (2) and (3) [which are not relevant here], nothing in this act or the amendments made by this act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." § 601(b)(1) of the Telecommunications Act of 1996. It also included a general savings clause that read as follows: "This act and the amendments made by this act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such act or amendments." § 601(c)(1) of the Telecommunications Act of 1996. Until recently, it was widely thought that this language made clear that nothing in the Telecommunications Act in any way effected any implied repeal of the antitrust laws.

Recently, however, the Seventh Circuit effectively read these savings clauses out of the law in *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). It held:

> [S]uch a conclusion [i.e., that the complaint at issue alleged a freestanding antitrust claim] would then force us to confront the question whether the procedures established under the 1996 Act for achieving competitive markets are compatible with the procedures that would be used to accomplish the same result under the antitrust laws. In our view, they are not. The elaborate system of negotiated agreements and enforcement established by the 1996 Act could be brushed aside by any unsatisfied party with the simple act of filing an antitrust action. Court orders in those cases could easily conflict with the obligations the State commissions or the FCC imposes under the sec. 252 agreements. The 1996 Act is, in short, more specific legislation that must take precedence over the general antitrust laws, where the two are covering precisely the same field.
>
> This is not the kind of question that requires further development of a factual record, either on summary judgment or at a trial. We therefore agree with the district court that it was proper for resolution under rule 12(b)(6). There are many markets within the telecommunications industry that are already open to competition and that are not subject to the detailed regulatory regime we have been discussing; as to those, the antitrust savings clause makes it clear that antitrust suits may be brought today. At some appropriate point down the road, the FCC will undoubtedly find that local markets have also become sufficiently competitive that the transitional regulatory regime can be dismantled and the background antitrust laws can move to the fore. Our holding here is simply that this is not what Congress has mandated at this time for the ILEC duties that are the subject of the *Goldwasser* complaint. The dis-

> trict court thus correctly rejected the plaintiffs' antitrust theory.

*Id.* at 401–02. The Committee believes that this holding is wrong and plainly misstates the clear intent of Congress in both savings clauses. However, for the moment at least, it is the law in the Seventh Circuit. Another case raising the same issue, *Intermedia Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, is currently pending before the Eleventh Circuit. In that case, the Department of Justice and the Federal Communications Commission have filed a joint amicus brief arguing that the Seventh Circuit wrongly decided *Goldwasser* with respect to this issue.

### F. THE REFERRAL

On May 24, 2001, Speaker Hastert referred H.R. 1542 to the Judiciary Committee "for consideration of such provisions of the bill and amendment recommended by the Committee on Energy and Commerce as propose to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934." The referral lasted through June 18, 2001. This referral was narrower than the Judiciary Committee's traditional broad jurisdiction over monopoly problems in the telecommunications industry. Thus, the Committee was unable to address some of the antitrust problems raised by the bill—in particular, those raised by § 4.

### G. CHAIRMAN SENSENBRENNER'S AMENDMENT

Chairman Sensenbrenner offered an amendment to address two of the antitrust problems in the bill while attempting to stay within the referral. First, the Sensenbrenner amendment restores current law in § 271 of the Communications Act with respect to Bell entry into long distance data service except that it makes the Justice Department the decisionmaker rather than the Federal Communications Commission. Second, it adds language clarifying the meaning of the antitrust savings clause in the Telecommunications Act of 1996 and reversing the misinterpretation of that clause in the *Goldwasser* case. The Committee adopted the Chairman's amendment by voice vote.

A great deal of confusion has arisen over the meaning of the part of the Sensenbrenner amendment that addresses the *Goldwasser* decision. In light of that confusion, the Committee wishes to clarify the following matters. First, the clarification is directed only at that part of the *Goldwasser* decision that is quoted above in section E. This clarification is not intended to disturb other parts of the decision. Second, the clarification is not limited to the local exchange context, but would apply to any case in which a party claimed that the Communications Act in some way effected an implied repeal of the antitrust laws.

Third, over the years, case law has added to antitrust law in ways that are not explicitly set out in the antitrust statutes, like the primary jurisdiction doctrine, the filed rate doctrine, the State action immunity doctrine, and other similar matters. The Committee believes these matters are part of the "rights, obligations, powers, and remedies" provided under the antitrust laws that the language in the provision intends to save. The provision is not intended to limit or eliminate these or other similar doctrines.

Fourth, parties are free to sign contracts that waive their rights to bring antitrust actions or actions under the Communications Act. This language is not intended to override any otherwise valid contract provision that makes such a waiver.

Finally, the Committee emphasizes again the general notion that the quoted portion of *Goldwasser* upset. With respect to conduct within the ambit of the Communications Act, the Act and the antitrust laws are parallel and complementary remedy systems. Conduct may violate the Act and not the antitrust laws; it may violate the antitrust laws and not the Act; it may violate both; or it may violate neither. When an action like *Goldwasser* is filed alleging conduct violating both the Act and the antitrust laws, a court should analyze the conduct to see if it violates the Act, and it should separately analyze the conduct to see if it violates the antitrust laws. The Committee understands the portion of *Goldwasser* quoted in section E, above, to hold that such conduct—at least if it relates to an incumbent local exchange carrier's obligations under § 251 of the Act before the local exchange market becomes competitive—can only be analyzed under the Act and not the antitrust laws.

That is not what Congress intended in 1996. The courts may not simply read the antitrust savings clause out of the law. Accordingly, the Committee believes this clarification is in order to make it clear to the courts that the antitrust savings clause meant what its plain language said.

Because of the narrowness of the referral, Chairman Sensenbrenner's amendment was not able to address the serious antitrust problems raised by § 4 of the bill as reported by the Committee on Energy and Commerce. Nonetheless, he believes that, as to data, the provisions of § 4 undo the basic trade made in the 1996 Act: the Bells would open their local exchanges to interconnection by competitors in return for being allowed into long distance. Section 4 allows the Bells to shed parts of that duty immediately including aspects of line sharing and the provision of remote terminals as unbundled network elements. To get this relief, they do not have to do anything in return. They do not even have to make any effort to meet the other requirements to get into long distance. These changes make it much harder for competitors to provide local telephone or Internet access service. Chairman Sensenbrenner sees no benefit to consumers in this provision and hopes that it will be addressed if the bill comes to the floor of the House.

## H. PARLIAMENTARY ISSUES RELATING TO CHAIRMAN SENSENBRENNER'S AMENDMENT

During the consideration of the Chairman's amendment, Representative Boucher raised a point of order arguing that it was outside the scope of the limited referral and that the House Parliamentarian held the same view. Chairman Sensenbrenner overruled the point of order.

With respect to the restoration of current law concerning RBOC entry into long distance data transmission, he ruled that his amendment clearly addresses the provisions referred to the Committee. Subsection 6(a) of H.R. 1542 narrows the purview of the Attorney General under § 271 of the Communications Act by taking high speed data service and Internet backbone service out of the

class of service that is subject to that section. Thus, it narrows the Attorney General's consultative role under that section.

In addressing that provision, the referral did not limit the Committee in introducing a new regulatory mechanism for approval of data, particularly because the Committee on Energy and Commerce removed the FCC from the process. If the Committee were to return to the status quo by restoring the FCC's role, it would surely be criticized for invading the Energy and Commerce Committee's jurisdiction. Given that Committee's decision to eliminate the FCC, this Committee cannot restore a consultative role for the Department of Justice because there would be no one with whom the Department could consult. Thus, if the Committee's policy choice is to maintain current law, the shape of the amendment necessarily follows from the Energy and Commerce Committee's action. Therefore, the part of the amendment dealing with the Attorney General's role in § 271 determinations is within the scope of the referral.

With respect to the *Goldwasser* clarification, the Chairman also ruled that his amendment clearly addresses the provisions referred to the Committee. In exercising the consultative role under § 271(d)(2)(a), the Attorney General may use "any standard [he] considers appropriate." Section 6(b) of H.R. 1542 specifically leaves this process in place for voice telecommunications service. The *Goldwasser* case casts doubt on whether antitrust law still applies to the telecommunications industry and thereby casts doubt on whether the Attorney General may continue to apply an antitrust standard in his evaluation of applications under § 271. Reading § 6(b) in light of *Goldwasser*, it reiterates a narrower § 271 process because of *Goldwasser*'s change of the law in the Seventh Circuit. Thus, it narrows the purview of the Attorney General under § 271.

Moreover, because *Goldwasser* is the law in only one circuit, it creates confusion as to whether the Attorney General must apply differing standards to applications from different circuits. If the Attorney General cannot apply an antitrust standard to a § 271 application from the Seventh Circuit, then again his purview under § 271—as reiterated in § 6(b)—is narrowed. The *Goldwasser* fix directly relates to the subject of the underlying text because the consistent application of the law throughout every geographic region of the country is fundamental to the bill and the pending amendment. For these reasons, he ruled that the part of the amendment having to do with reversing a part of the *Goldwasser* case is within the scope of the referral.

## HEARINGS

The Committee on the Judiciary held a hearing on H.R. 1542 on June 5, 2001. The Committee received testimony from four witnesses: Honorable Tom Tauke, Senior Vice President for Public Policy and External Affairs, Verizon, Washington, D.C.; Mr. Clark McLeod, Chairman and Co-Chief Executive Officer, McLeodUSA, Cedar Rapids, Iowa; Ms. Margaret Greene, Executive Vice President for Regulatory and External Affairs, BellSouth Corporation, Atlanta, Georgia; and Mr. Jim Glassman, Resident Fellow, American Enterprise Institute, Washington, D.C. The Committee also held a hearing on two related bills, H.R. 1698 and H.R. 1697, on May 22, 2001. The Committee received testimony from four wit-

nesses: Honorable Terry Harvill, Commissioner, Illinois Commerce Commission, Chicago, Illinois; Honorable Bill Barr, Executive Vice President and General Counsel, Verizon, Washington, D.C.; Mr. Jeff Blumenfeld, Partner, Blumenfeld & Cohen, Washington, D.C.; and Mr. John Malone, President and Chief Executive Officer, The Eastern Management Group, Bedminster, New Jersey.

## COMMITTEE CONSIDERATION

On June 13, 2001, the full Committee met in open session and, by voice vote, ordered that the Committee report the bill, H.R. 1542, to the House with an amendment and with the recommendation that the amendment be agreed to and that the bill as amended not pass, a quorum being present.

## VOTE OF THE COMMITTEE

During its consideration of H.R. 1542, the Committee took no rollcall votes. The Sensenbrenner amendment was adopted by a voice vote. The Cannon motion to report the bill, H.R. 1542, to the House with an amendment and with the recommendation that the amendment be agreed to and that the bill as amended not pass was adopted by voice vote.

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

## PERFORMANCE GOALS AND OBJECTIVES

H.R. 1542 does not authorize funding. Therefore, clause 3(c)(4) of rule XIII of the Rules of the House is inapplicable.

## NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1542, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, June 18, 2001.*

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
*Committee on the Judiciary,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson and Lanette J. Walker (for federal spending), who can be reached at 226–2860, Erin Whitaker (for revenues), who can be reached at 226–2720, Shelley Finlayson (for the state and local impact), who can be reached at 225–3220, and Philip Webre (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member

*H.R. 1542—Internet Freedom and Broadband Deployment Act of 2001.*

H.R. 1542 would prohibit the Federal Communications Commission (FCC) and state governments from regulating the provision of Internet access or high-speed data services, with certain exceptions. H.R. 1542 also would allow the FCC to impose penalties for violations of certain provisions of the bill, including requirements that certain telecommunications carriers give consumers the freedom to choose their Internet service providers. Under the bill, the FCC also could assess penalties against Bell telephone companies that offer voice telecommunication services using telephone lines for data transmission without the agency's permission.

CBO estimates that implementing H.R. 1542 would have a negligible net impact on spending by the FCC. The increase in gross spending would be about $1 million in 2002, subject to the availability of appropriated funds. Any such increase would be offset by fees collected by the FCC.

Pay-as-you-go procedures would apply to this bill, for two reasons. First, the bill would create new penalties, which are recorded in the budget as governmental receipts (revenues). CBO estimates that the bill's provisions would increase collection of FCC penalties by less than $500,000 a year. Also, enacting H.R. 1542 could affect the cash flows of the Universal Service Fund (USF). The USF seeks to provide universal access to telecommunications services by levying charges on some telephone companies (which are recorded in the budget as revenues) and making payments to others (which may be spent without further appropriation). CBO cannot estimate the bill's gross impact on the revenues and spending associated with the USF; however, the net impact would be negligible in each year.

H.R. 1542 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would pre-

empt the ability of states to regulate high-speed data services. CBO estimates that the costs of complying with this mandate would not be significant and would not exceed the threshold established by UMRA ($56 million in 2001, adjusted annually for inflation).

The bill would impose private-sector mandates as defined by UMRA on the Bell operating companies and other incumbent local exchange companies providing broadband service. CBO estimates that a strict interpretation of the mandates would result in a total mandate cost that would exceed the annual threshold established in UMRA ($113 million in 2001, adjusted annually for inflation) in at least one of the first five years that the mandates are in effect.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Based on information from the FCC, CBO estimates that implementing H.R. 1542 would cost $1 million in 2002, assuming the appropriation of the necessary amounts. These funds would pay for additional staff to develop new regulations necessary to implement the bill's provisions. Under current law, the FCC is authorized to collect fees from the telecommunications industry sufficient to offset the cost of its regulatory programs. CBO assumes that the additional costs of implementing H.R. 1542 would be offset by an increase in collections credited to the FCC's annual appropriations. Therefore, H.R. 1542 would not have a significant net impact on the cost of the FCC's operations.

H.R. 1542 would authorize the FCC to impose penalties for violations of certain provisions in H.R. 1542. These provisions include requirements that incumbent telephone carriers give consumers the freedom to choose Internet service providers, and provisions that would prevent the Bell telephone companies from offering voice telecommunication services using telephone data lines unless authorized to do so by the FCC. Violations would be subject to a maximum penalty of $1 million per incident, or $10 million for a continuing violation. H.R. 1542 also would allow the FCC to impose penalties on the Bell telephone companies for failure to provide customer access to high-speed data services on a schedule specified in the bill. Based on information from the FCC and telecommunications firms, CBO estimates that enacting the bill would increase collections of such penalties by less than $500,000 a year.

Finally, H.R. 1542 could affect the size of the USF, which was established by the Telecommunications Act of 1996 to provide universal access to telecommunications service throughout the nation. The FCC assesses charges on telecommunications services and distributes the amounts collected to telephone companies to subsidize telephone and Internet service for high-cost areas, low-income consumers, schools, libraries, and others. Because H.R. 1542 could affect the telecommunications market in non-rural, high-cost areas of the country, enacting the bill may cause the FCC to change the amount of money that would be provided from the USF to companies that serve those areas. USF outlays are mandatory and occur without appropriation action. Any change in the amount of payments from the USF would cause a commensurate change in the amount of money collected by the USF, which is considered a revenue in the budget. CBO cannot estimate the magnitude or the direction of these changes in revenues and direct spending; however, their net effect would be negligible.

PAY-AS-YOU-GO CONSIDERATIONS

The Balanced Budget and Emergency Deficit Control Act sets up pay-as-you-go procedures for legislation affecting direct spending or receipts. CBO estimates that enacting H.R. 1542 would affect penalties (receipts) by an insignificant amount each year. The bill could also affect receipts and spending associated with the Universal Service Fund. CBO cannot estimate the magnitude or direction of any change to USF receipts and spending, but in any event, such changes would have a negligible net impact in each year.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 1542 contains an intergovernmental mandate as defined in UMRA because it would preempt the ability of states to regulate high-speed data services. While data are very limited, CBO estimates that the costs of complying with this mandate would not be significant and would not exceed the threshold established by the act ($56 million in 2001, adjusted annually for inflation).

ESTIMATED IMPACT ON THE PRIVATE SECTOR

H.R. 1542 would impose private-sector mandates on local telephone companies, primarily those companies that were part of the pre-1982 telephone service monopoly—the so-called Bell operating companies—but also on other telephone companies that enjoyed a monopoly position in local telephone service—referred to as non-Bell incumbent local exchange carriers. CBO estimates that the total costs of mandates in the bill would exceed the annual threshold established in UMRA ($113 million in 2001, adjusted annually for inflation), assuming a strict interpretation of those mandates. Should the language of the mandates be interpreted less strictly, the total direct costs would not exceed the threshold.

Section 5 of H.R. 1542 would require all incumbent local exchange providers to provide their customers the ability to subscribe to the Internet service provider of their choice. This would be a new requirement for the non-Bell incumbent local exchange carriers, although it is currently a requirement for the Bell operating companies. However, providing such access is currently general industry practice. Consequently, CBO estimates that the incremental cost to the industry to comply with this mandate would be small.

Section 7 would require the Bell operating companies to deploy high-speed data services—or broadband services as they are often called—in each state in which the company or one of its affiliates is an incumbent local exchange carrier. The bill defines high-speed data service as the capability to transmit information (using certain technology) at a rate greater than or equal to 384 kilobits per second in at least one direction. The bill also specifies targets for accomplishing this goal over five years. The bill would require the Bell operating companies to upgrade 20 percent of their central offices to have high-speed data capabilities within one year of enactment, 40 percent within two years, 70 percent within three years, and 100 percent within five years.

Under the bill, a Bell operating company could meet the deployment requirements in either of two ways. First, the Bell operating company could upgrade both the equipment in a central office and the access lines of customers who request such upgrades, provided

their access line is less than 15,000 feet long. Based on engineering and industry reports, CBO estimates that the cost of upgrading is between $175,000 and $230,000 per office, and that the bill's mandate would require the Bell operating companies to upgrade between 3,300 and 5,000 central offices that would not be upgraded absent that mandate. Alternatively, the bill provides that a Bell operating company could meet the deployment requirements by providing access to high-speed data services by alternative means, for example, through a cable television line, a satellite link, or a terrestrial wireless connection.

The total cost of the mandate to deploy high-speed data services would certainly exceed the UMRA threshold if the Bell operating companies conformed to the mandate by upgrading their central offices. Alternative means could prove less expensive, and by CBO's estimate would fall below the UMRA threshold. But, none of the alternatives is currently capable of providing broadband service to "each customer" as required by section 7 of the bill.

PREVIOUS CBO ESTIMATE

On May 24, 2001, CBO transmitted a cost estimate for H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, as ordered reported by the House Committee on Energy and Commerce on May 9, 2001. The two versions of the bill and the CBO cost estimates are similar. The version ordered reported by the House Committee on the Judiciary includes a requirement that Bell telephone companies obtain approval from the Attorney General before providing high-speed data service. We estimate that enacting this provision would have a negligible effect on the federal budget and would not impose an additional intergovermental mandate.

The private-sector mandates in both bills are identical. The House Committee on the Judiciary approved an amendment that would affect potential savings to the Bell operating companies under the bill. The amendment would restore certain current-law restrictions on the Bell operating companies related to long distance data services that the previous version of the bill would have lifted. Nonetheless, CBO estimates that the mandate costs in both versions of the bill would exceed the annual threshold established by UMRA assuming a strict interpretation of the mandates.

ESTIMATE PREPARED BY:

Federal Costs: Ken Johnson and Lanette J. Walker (226–2860)
Revenue Impacts: Erin Whitaker (226–2720)
Impact on State, Local, and Tribal Governments: Shelley Finlayson (225–3220)
Impact on the Private Sector: Philip Webre (226–2940)

ESTIMATE APPROVED BY:

Peter H. Fontaine
Deputy Assistant Director for Budget Analysis

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, § 8 of the Constitution.

## SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following section by section analysis describes H.R. 1542 as reported by the Committee on Energy and Commerce.

*Section 1. Short Title.* Section 1 provides that this Act may be cited as the "Internet Freedom and Broadband Deployment Act of 2001."

*Section 2. Findings and Purpose.* Section 2 sets forth congressional findings and purposes with respect to the bill.

*Section 3. Definitions.* Section 3 defines the terms "high speed data service," "Internet," "Internet access service," "Internet backbone," and "Internet backbone service' as they are used in the bill.

*Section 4. Limitation of Authority to Regulate High Speed Data Services.* Subsection 4(a) creates a new § 232 of the Communications Act which prohibits the Federal Communications Commission or the States from regulating high speed data service, Internet backbone service, Internet access service, or unbundled network elements used to provide these services except as expressly provided in the act. It also prohibits the Commission from imposing or collecting any fees or taxes on such services. It contains a savings provision preserving the States' authority to regulate traditional telephone services and local governments' authority to regulate cable franchises. It also preserves current law on enhanced services and universal service.

Subsection 4(b) creates a new § 251(j) of the Communications Act. The net effect of this new § 251(j) is that incumbent local exchange carriers are still required to allow competitors access to the old, copper line parts of their networks as under current law. However, they are not required to allow them access to the new, fiber optic line parts of those networks that are used to provide high speed data service. In addition, they are not required to provide access to remote terminals as an unbundled network element, and they are generally not required to provide any unbundled network element for the purpose of providing high speed data service.

Subsection 4(c) provides that nothing in the act shall be construed to affect existing interconnection agreements between RBOCs and competitors.

*Section 5. Internet Consumers Freedom of Choice.* Section 5 creates a new § 233 of the Communications Act. This new § 233 requires incumbent local exchange carriers (i.e. the RBOCs and other independent incumbents) to: allow Internet users to subscribe to any Internet service provider that connects to the incumbents' high speed data service; allow any Internet service provider to acquire the facilities and services necessary to connect to the incumbents' high speed data service; allow any Internet service provider to collocate equipment for purposes of interconnection; and allow any provider access to the incumbent's facilities so that it can provide Internet access service within the same time period that the incumbent provides access for itself.

*Section 6. Incidental InterLATA Provision of High Speed Data and Internet Access Services.* Subsection 6(a) inserts high speed data service into the list of incidental long distance services contained in § 271(g) of the Communications Act. Incidental long distance services were various services which the RBOCs could provide without meeting the network opening requirements of § 271. Thus, the effect of this provision is to allow the RBOCs to provide high speed data services and Internet backbone services over long distance without meeting the market opening requirements of § 271 and without going through the DOJ and FCC approval process.

Subsection 6(b) adds a new subsection (k) to § 271 to clarify that the RBOCs must still go through the § 271 process with respect to long distance voice services. The new subsection (k) also makes clear that RBOCs may not use high speed data services or Internet backbone services to provide in-region interLATA voice telecommunications services until they meet the requirements of § 271.

Subsection 6(c) eliminates the Act's requirement that the RBOCs must conduct their interLATA information services through a separate affiliate. The Act's definition of "information services" appears to include high speed data access or Internet access service. 47 U.S.C. § 153(20). Thus, the effect appears to be to eliminate a separate subsidiary requirement for high speed data services.

*Section 7. Deployment of Broadband Services.* Section 7 creates a new § 277 of the Communications Act. Subsection (a) of the new § 277 requires the RBOCs to deploy high speed data services in each of their in-region States in accordance with this section. New § 277(b) requires the RBOCs to meet a percentage target for deployment within each State over a period of years culminating with 100% deployment within 5 years. New § 277(c) provides that the FCC may impose forfeiture penalties on the RBOCs for failure to comply with these requirements. New § 277(d) requires the FCC to report annually on deployment of high speed data services in underserved areas.

*Section 8. Commission Authorized to Prescribe Just and Reasonable Charges.* Section 8 provides for the FCC to impose civil fines of $1 million per violation for violations of sections 5, 6, or 7 of this act. For continuing violations, each day shall be considered a separate violation, and an amount of up to $10 million may be assessed.

The Sensenbrenner amendment makes two changes to H.R. 1542 as reported by the Energy and Commerce Committee.

First, it creates a new subsection (*l*) of § 271 of the Communications Act. This new subsection (*l*) essentially reinstates current law with respect to Bell entry into the provision of interLATA high speed data services and Internet backbone services. The only change is that the Department of Justice would decide whether the RBOC had met the § 271 standard for entry rather than the Federal Communications Commission. This new process maintains the same substantive standards provided in current law.

Second, it creates a new subsection (4) of § 601(b) of the Telecommunications Act of 1996. This language clarifies the meaning of the antitrust savings clause contained in § 601(b)(1) and the general savings clause contained in § 601(c)(1) of that act. This language reiterates to the courts that the rights, obligations, powers, and remedies provided in the antitrust laws are not preempted by, not inconsistent with, and not incompatible with those provided

under the Communications Act, the Telecommunications Act, or any law amended by either such act regardless of the progress of competition in any market. *See also* discussion in section E of the Background and Need for Legislation Section, above.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, except as shown below, are shown in Report 107–83 part I, filed May 24, 2001. The differences between the bill as reported by the Committee on Energy and Commerce and as reported by the Committee on the Judiciary are shown as follows:

Existing law in which no change is proposed by either committee are shown in roman.

New matter proposed to be inserted by the Committee on Energy and Commerce is printed in boldface roman. New matter proposed to be inserted by the Committee on the Judiciary is printed in italics.

## COMMUNICATIONS ACT OF 1934

* * * * * * *

# TITLE II—COMMON CARRIERS

* * * * * * *

## PART III—SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

* * * * * * *

**SEC. 271. BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.**

(a) * * *

* * * * * * *

(g) DEFINITION OF INCIDENTAL INTERLATA SERVICES.—For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1) * * *

* * * * * * *

**(7) of high speed data service or Internet backbone service***, subject to subsection (l)***.**

* * * * * * *

*(l) APPLICATION PREREQUISITE TO PROVIDING HIGH SPEED DATA SERVICE OR INTERNET BACKBONE SERVICE.—*

*(1) REQUIREMENT TO FILE APPLICATION WITH ATTORNEY GENERAL OF THE UNITED STATES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may begin providing high speed data service or Internet backbone*

*service in any in-region State under the authority of subsection (g)(7)—*

*(A) unless it files with the Attorney General of the United States an application to provide such service; and*

*(B) until the Attorney General —*

*(i) approves such application before the expiration of the 90–day period beginning on the date such application is filed; or*

*(ii) fails to approve or to disapprove such application during such 90–day period.*

*(2) AUTHORITY OF ATTORNEY GENERAL.—The Attorney General of the United States—*

*(A) may issue rules to establish requirements applicable to the form and contents of applications filed under paragraph (1);*

*(B) may make recommendations to an applicant regarding—*

*(i) withdrawal of an application filed under paragraph (1); or*

*(ii) filing of an application under paragraph (1), with or without modifications, subsequent to the withdrawal of an application filed under such paragraph; and*

*(C) may not approve an application filed in compliance with this subsection unless the Attorney General determines that the applicant has demonstrated that it meets the substantive requirements of subsections (c) and (d) with respect to high speed data service or Internet backbone service in the State for which such application is filed.*

*(3) WITHDRAWAL OF APPLICATION.—An application filed under paragraph (1) may be withdrawn by the applicant at any time before the Attorney General approves or disapproves such application, but may not be modified after being filed.".*

* * * * * * *

---

## SECTION 601 OF THE TELECOMMUNICATIONS ACT OF 1996

**SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.**

(a) * * *

(b) ANTITRUST LAWS.—

(1) * * *

* * * * * * *

*(4) CONTINUING OPERATION OF THE ANTITRUST LAWS.—The rights, obligations, powers, and remedies provided under the antitrust laws are in addition to, and are—*

*(A) not preempted by;*

*(B) not inconsistent with; and*

*(C) not incompatible with;*

*any of the rights, obligations, powers, and remedies provided under the Communications Act of 1934 (47 U.S.C. 151 et seq.),*

*under this Act, or under any law amended by either such Act, regardless of the progress of competition in any market.*

* * * * * * *

MARKUP TRANSCRIPT

# BUSINESS MEETING

**WEDNESDAY, JUNE 13, 2001**

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

The Committee met, pursuant to call, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Chairman of the Committee, presiding.

Chairman SENSENBRENNER. The Committee will come to order. A working quorum being present, pursuant to notice, I now call up the Bill H.R. 1542, the "Internet Freedom and Broadband Deployment Act of 2001," also known as the Tauzin-Dingell Bill, as reported by the Committee on Energy and Commerce for purposes of markup.

Without objection, the bill will be considered as read and open for amendment at any point. Without objection, the Chair is authorized to declare recesses of the Committee today at any point.

[H.R. 1542 follows:]

# [COMMITTEE PRINT]

JUNE 8, 2001

**[Showing the text of H.R. 1542 as Reported by the Committee on Energy and Commerce]**

107TH CONGRESS
1ST SESSION

# H. R. 1542

**[Report No. 107–83, Part I]**

To deregulate the Internet and high speed data services, and for other purposes.

---

## IN THE HOUSE OF REPRESENTATIVES

APRIL 24, 2001

Mr. TAUZIN (for himself, Mr. DINGELL, Mr. GOODLATTE, Mr. BOUCHER, Mr. ENGLISH, Mr. FROST, Mr. SMITH of Washington, Mr. LUCAS of Kentucky, Mr. WHITFIELD, Mr. MURTHA, Mr. COLLINS, Mr. BLAGOJEVICH, Mr. FOSSELLA, Mr. DICKS, Mr. GILLMOR, Mr. BARTON of Texas, Mr. KIND, Mr. GREENWOOD, Mr. MEEKS of New York, Mr. CAMP, Mr. BALDACCI, Mr. RAHALL, Mr. HOLDEN, Mrs. MCCARTHY of New York, Mr. BRADY of Pennsylvania, Mr. SIMPSON, Mr. BOYD, Mrs. NORTHUP, Mr. ENGEL, Mr. SANDLIN, Mr. EVERETT, Mr. BOEHNER, Mr. REYNOLDS, Mr. WELDON of Pennsylvania, Mr. SESSIONS, Mr. BONIOR, Mr. MALONEY of Connecticut, Mr. BUYER, Mr. CUNNINGHAM, Mr. MCCRERY, Mr. BISHOP, Mr. LAMPSON, Mr. VITTER, Mr. BASS, Mr. ACKERMAN, Mr. BLUNT, Mr. MCHUGH, Mr. RYAN of Wisconsin, Mr. QUINN, Mr. BACA, Mr. GONZALEZ, Mr. BAKER, Mr. WALSH, Mr. GREEN of Texas, Mr. WEXLER, Mr. OXLEY, Mr. RADANOVICH, Mr. DIAZ-BALART, Mr. COOKSEY, Mr. CLEMENT, Mr. LARSEN of Washington, Mr. SCHROCK, Mr. PETRI, Mr. WATKINS, Ms. ROS-LEHTINEN, Mr. HILLIARD, Mr. OTTER, Mr. SHADEGG, Mr. BRYANT, Mr. PLATTS, Mr. PUTNAM, Mr. CUMMINGS, Mr. RODRIGUEZ, Mr. CONDIT, Mr. BURR of North Carolina, and Mr. WYNN) introduced the following bill; which was referred to the Committee on Energy and Commerce

MAY 24, 2001

Reported by the Committee on Energy and Commerce with an amendment.

[Strike out all after the enacting clause and insert the part printed in italic]

MAY 24, 2001

Referred to the Committee on the Judiciary for a period ending not later than June 18, 2001 for consideration of such provisions of the bill and amendment recommended by the Committee on Energy and Commerce as propose to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934.

[For text of introduced bill, see copy of bill as introduced on April 24, 2001]

---

# A BILL

To deregulate the Internet and high speed data services, 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 "Internet Freedom and Broadband Deployment Act of 2001".*

***SEC. 2. FINDINGS AND PURPOSE.***

*(a) FINDINGS.—Congress finds the following:*

*(1) Internet access services are inherently interstate and international in nature, and should therefore not be subject to regulation by the States.*

*(2) The imposition of regulations by the Federal Communications Commission and the States has impeded the rapid delivery of high speed Internet access*

*services and Internet backbone services to the public, thereby reducing consumer choice and welfare.*

*(3) The Telecommunications Act of 1996 represented a careful balance between the need to open up local telecommunications markets to competition and the need to increase competition in the provision of interLATA voice telecommunications services.*

*(4) In enacting the prohibition on Bell operating company provision of interLATA services, Congress recognized that certain telecommunications services have characteristics that render them incompatible with the prohibition on Bell operating company provision of interLATA services, and exempted such services from the interLATA prohibition.*

*(5) High speed data services and Internet backbone services constitute unique markets that are likewise incompatible with the prohibition on Bell operating company provision of interLATA services.*

*(6) Since the enactment of the Telecommunications Act of 1996, the Federal Communications Commission has construed the prohibition on Bell operating company provision of interLATA services in a manner that has impeded the development of advanced telecommunications services, thereby limiting consumer choice and welfare.*

*(7) Internet users should have choice among competing Internet service providers.*

*(8) Internet service providers should have the right to interconnect with high speed data networks in order to provide service to Internet users.*

*(b) PURPOSES.—It is therefore the purpose of this Act to provide market incentives for the rapid delivery of advanced telecommunications services—*

*(1) by deregulating high speed data services, Internet backbone services, and Internet access services;*

*(2) by clarifying that the prohibition on Bell operating company provision of interLATA services does not extend to the provision of high speed data services and Internet backbone services;*

*(3) by ensuring that consumers can choose among competing Internet service providers; and*

*(4) by ensuring that Internet service providers can interconnect with competitive high speed data networks in order to provide Internet access service to the public.*

***SEC. 3. DEFINITIONS***

*(a) AMENDMENTS.—Section 3 of the Communications Act of 1934 (47 U.S.C. 153) is amended—*

*(1) by redesignating paragraph (20) as paragraph (21);*

*(2) by redesignating paragraphs (21) through (52) as paragraphs (26) through (57), respectively;*

*(3) by inserting after paragraph (19) the following new paragraph:*

*"(20) HIGH SPEED DATA SERVICE.—The term 'high speed data service' means any service that consists of or includes the offering of a capability to transmit, using a packet-switched or successor technology, information at a rate that is generally not less than 384 kilobits per second in at least one direction. Such term does not include special access service offered through dedicated transport links between a customer's premises and an interexchange carrier's switch or point of presence.";*

*(4) by inserting after paragraph (21) the following new paragraphs:*

*"(22) INTERNET.—The term 'Internet' means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to*

*communicate information of all kinds by wire or radio.*

*"(23) INTERNET ACCESS SERVICE.—The term 'Internet access service' means a service that combines computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services.*

*"(24) INTERNET BACKBONE.—The term 'Internet backbone' means a network that carries Internet traffic over high-capacity long-haul transmission facilities and that is interconnected with other such networks via private peering relationships.*

*"(25) INTERNET BACKBONE SERVICE.—The term 'Internet backbone service' means any interLATA service that consists of or includes the transmission by means of an Internet backbone of any packets, and shall include related local connectivity.".*

*(b) CONFORMING AMENDMENTS.—*

*(1) Section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)) is amended—*

*(A) by striking paragraph (1); and*

*(B) by redesignating paragraphs (2) through (4) as paragraphs (1) through (3), respectively.*

*(2) Section 223(h)(2) of such Act (47 U.S.C. 223(h)(2)) is amended by striking "230(f)(2)" and inserting "230(f)(1)".*

***SEC. 4. LIMITATION ON AUTHORITY TO REGULATE HIGH SPEED DATA SERVICES.***

*(a) IN GENERAL.—Part I of title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:*

***"SEC. 232. PROVISION OF HIGH SPEED DATA SERVICES.***

*"(a) FREEDOM FROM REGULATION.—Except to the extent that high speed data service, Internet backbone service, and Internet access service are expressly referred to in this Act, neither the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service, or to regulate any network element to the extent it is used in the provision of any such service; nor shall the Commission impose or require the collection of any fees, taxes, charges, or tariffs upon such service.*

*"(b) SAVINGS PROVISION.—Nothing in this section shall be construed to limit or affect the authority of any State to regulate circuit-switched telephone exchange services, nor affect the rights of cable franchise authorities to*

*establish requirements that are otherwise consistent with this Act.*

*"(c) CONTINUED ENFORCEMENT OF ESP EXEMPTION, UNIVERSAL SERVICE RULES PERMITTED.—Nothing in this section shall affect the ability of the Commission to retain or modify—*

*"(1) the exemption from interstate access charges for enhanced service providers under Part 69 of the Commission's regulations, and the requirements of the MTS/WATS Market Structure Order (97 FCC 2d 682, 715 (1983)); or*

*"(2) rules issued pursuant to section 254.".*

*(b) CONFORMING AMENDMENT.—Section 251 of the Communications Act of 1934 (47 U.S.C. 251) is amended by adding at the end thereof the following new subsection:*

*"(j) EXEMPTION.—*

*"(1) ACCESS TO NETWORK ELEMENTS FOR HIGH SPEED DATA SERVICE.—*

*"(A) LIMITATION.—Subject to subparagraphs (B), (C), and (D) of this paragraph, neither the Commission nor any State shall require an incumbent local exchange carrier to provide unbundled access to any network element for the provision of any high speed data service.*

*"(B) PRESERVATION OF REGULATIONS AND LINE SHARING ORDER.—Notwithstanding subparagraph (A), the Commission shall, to the extent consistent with subsections (c)(3) and (d)(2), require the provision of unbundled access to those network elements described in section 51.319 of the Commission's regulations (47 C.F.R. 51.319), as—*

*"(i) in effect on January 1, 1999; and*

*"(ii) subject to subparagraphs (C) and (D), as modified by the Commission's Line Sharing Order.*

*"(C) EXCEPTIONS TO PRESERVATION OF LINE SHARING ORDER.—*

*"(i) UNBUNDLED ACCESS TO REMOTE TERMINAL NOT REQUIRED.—An incumbent local exchange carrier shall not be required to provide unbundled access to the high frequency portion of the loop at a remote terminal.*

*"(ii) CHARGES FOR ACCESS TO HIGH FREQUENCY PORTION.—The Commission and the States shall permit an incumbent local exchange carrier to charge requesting carriers for the high frequency portion of a*

*loop an amount equal to which such incumbent local exchange carrier imputes to its own high speed data service.*

*"(D) LIMITATIONS ON REINTERPRETATION OF LINE SHARING ORDER.—Neither the Commission nor any State Commission shall construe, interpret, or reinterpret the Commission's Line Sharing Order in such manner as would expand an incumbent local exchange carrier's obligation to provide access to any network element for the purpose of line sharing.*

*"(E) AUTHORITY TO REDUCE ELEMENTS SUBJECT TO REQUIREMENT.—This paragraph shall not prohibit the Commission from modifying the regulation referred to in subparagraph (B) to reduce the number of network elements subject to the unbundling requirement, or to forbear from enforcing any portion of that regulation in accordance with the Commission's authority under section 706 of the Telecommunications Act of 1996, notwithstanding any limitation on that authority in section 10 of this Act.*

*"(F) PROHIBITION ON DISCRIMINATORY SUBSIDIES.—Any network element used in the provision of high speed data service that is not*

*subject to the requirements of subsection (c) shall not be entitled to any subsidy, including any subsidy pursuant to section 254, that is not provided on a nondiscriminatory basis to all providers of high speed data service and Internet access service. This prohibition on discriminatory subsidies shall not be interpreted to authorize or require the extension of any subsidy to any provider of high speed data service or Internet access service.*

*"(2) RESALE.—For a period of three years after the enactment of this subsection, an incumbent local exchange carrier that provides high speed data service shall have a duty to offer for resale any such service at wholesale rates in accordance with subsection (c)(4). After such three-year period, such carrier shall offer such services for resale pursuant to subsection (b)(1).*

*"(3) DEFINITIONS.—For purposes of this subsection—*

*"(A) the 'Commission's Line Sharing Order' means the Third Report and Order in CC Docket No. 98–147 and the Fourth Report and Order in CC Docket 96–98 (FCC 99–355), as adopted November 18, 1999, and without regard*

*to any clarification or interpretation in the further notice of proposed rulemaking in such Dockets adopted January 19, 2001 (FCC 01–26); and*

*"(B) the term 'remote terminal' means an accessible terminal located outside of the central office to which analog signals are carried from customer premises, in which such signals are converted to digital, and from which such signals are carried, generally over fiber, to the central office.".*

*(c) PRESERVATION OF EXISTING INTERCONNECTION AGREEMENTS.—Nothing in the amendments made by this section—*

*(1) shall be construed to permit or require the abrogation or modification of any interconnection agreement in effect on the date of enactment of this section during the term of such agreement, except that this paragraph shall not apply to any interconnection agreement beyond the expiration date of the existing current term contained in such agreement on the date of enactment of this section, without regard to any extension or renewal of such agreement; or*

*(2) affects the implementation of any change of law provision in any such agreement.*

***SEC. 5. INTERNET CONSUMERS FREEDOM OF CHOICE.***

*Part I of title II of the Communications Act of 1934, as amended by section 4, is amended by adding at the end the following new section:*

***"SEC. 233. INTERNET CONSUMERS FREEDOM OF CHOICE.***

*"(a) PURPOSE.—It is the purpose of this section to ensure that Internet users have freedom of choice of Internet service provider.*

*"(b) OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.—Each incumbent local exchange carrier has the duty to provide—*

*"(1) Internet users with the ability to subscribe to and have access to any Internet service provider that interconnects with such carrier's high speed data service;*

*"(2) any Internet service provider with the right to acquire the facilities and services necessary to interconnect with such carrier's high speed data service for the provision of Internet access service;*

*"(3) any Internet service provider with the ability to collocate equipment in accordance with the provisions of section 251, to the extent necessary to achieve the objectives of paragraphs (1) and (2) of this subsection; and*

*"(4) any provider of high speed data services, Internet backbone service, or Internet access service*

*with special access for the provision of Internet access service within a period no longer than the period in which such incumbent local exchange carrier provides special access to itself or any affiliate for the provision of such service.*

*"(c) DEFINITIONS.—As used in this section—*

*"(1) INTERNET SERVICE PROVIDER.—The term 'Internet service provider' means any provider of Internet access service.*

*"(2) INCUMBENT LOCAL EXCHANGE CARRIER.—The term 'incumbent local exchange carrier' has the same meaning as provided in section 251(h).*

*"(3) SPECIAL ACCESS SERVICE.—The term 'special access service' means the provision of dedicated transport links between a customer's premises and the switch or point of presence of a high speed data service provider, Internet backbone service provider, or Internet service provider.".*

***SEC. 6. INCIDENTAL INTERLATA PROVISION OF HIGH SPEED DATA AND INTERNET BACKBONE SERVICES.***

*(a) INCIDENTAL INTERLATA SERVICE PERMITTED.—Section 271(g) of the Communications Act of 1934 (47 U.S.C. 271(g)) is amended—*

*(1) by striking "or" at the end of paragraph (5);*

*(2) by striking the period at the end of paragraph (6) and inserting "; or"; and*

*(3) by adding at the end thereof the following new paragraph:*

*"(7) of high speed data service or Internet backbone service.".*

*(b) PROHIBITION ON PROVISION OF VOICE TELEPHONE SERVICES.—Section 271 of such Act is amended by adding at the end thereof the following new subsection:*

*"(k) PROHIBITION ON PROVISION OF VOICE TELEPHONE SERVICES.—Until the date on which a Bell operating company is authorized to offer interLATA services originating in an in-region State in accordance with the provisions of this section, such Bell operating company offering any high speed data service or Internet backbone service pursuant to the provisions of paragraph (7) of subsection (g) may not, in such in-region State provide interLATA voice telecommunications service, regardless of whether there is a charge for such service, by means of the high speed data service or Internet backbone service provided by such company.".*

*(c) CONFORMING AMENDMENTS.—*

*(1) Section 272(a)(2)(B)(i) of such Act is amended to read as follows:*

*"(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), (6), and (7) of section 271(g);".*

*(2) Section 272(a)(2)(C) of such Act is repealed.*

***SEC. 7. DEPLOYMENT OF BROADBAND SERVICES.***

*Part III of title II of the Communications Act of 1934 is amended by inserting after section 276 (47 U.S.C. 276) the following new section:*

***"SEC. 277. DEPLOYMENT OF BROADBAND SERVICES.***

*"(a) DEPLOYMENT REQUIRED.—Each Bell operating company and its affiliates shall deploy high speed data services in each State in which such company or affiliate is an incumbent local exchange carrier (as such term is defined in section 251(h)) in accordance with the requirements of this section.*

*"(b) DEPLOYMENT REQUIREMENTS.—*

*"(1) MILEPOSTS FOR DEPLOYMENT.—A Bell operating company or its affiliate shall deploy high speed data services by attaining high speed data capability in its central offices in each State to which subsection (a) applies. Such company or affiliate shall attain such capability in accordance with the following schedule:*

*"(A) Within one year after the date of enactment of this section, such company or affiliate*

*shall attain high speed data capability in not less than 20 percent of such central offices in such State.*

*"(B) Within 2 years after the date of enactment of this section, such company or affiliate shall attain high speed data capability in not less than 40 percent of such central offices in such State.*

*"(C) Within 3 years after the date of enactment of this section, such company or affiliate shall attain high speed data capability in not less than 70 percent of such central offices in such State.*

*"(D) Within 5 years after the date of enactment of this section, such company or affiliate shall attain high speed data capability in not less than 100 percent of such central offices in such State.*

*"(2) HIGH SPEED DATA CAPABILITY.—For purposes of paragraph (1), a central office shall be considered to have attained high speed capability if—*

*"(A)(i) such central office is equipped with high speed data multiplexing capability; and*

*"(ii) each upgradeable customer loop that originates or terminates in such central office is*

*upgraded promptly upon receipt of a customer request for such upgrading, as necessary to permit transmission of high speed data service (including any conditioning of the loop);*

*"(B) each customer served by such central office (without regard to the upgradeability or length of the customer's loop) is able to obtain the provision of high speed data service from such Bell operating company or its affiliate by means of an alternative technology that does not involve the use of the customer's loop; or*

*"(C) each such customer is able to obtain the provision of high speed data service by one or the other of the means described in subparagraphs (A) and (B).*

*"(3) UPGRADEABLE LOOPS.—For purposes of paragraph (2), a customer loop is upgradeable if—*

*"(A) such loop is less than 15,000 feet in length (from the central office to the customer's premises along the line); and*

*"(B) such loop can, with or without conditioning, transmit high speed data services without such transmission on such loop causing significant degradation of voice service.*

*"(c) AVAILABILITY OF REMEDIES.—*

*"(1) FORFEITURE PENALTIES.—A Bell operating company or its affiliate that fails to comply with this section shall be subject to the penalties provided in section 503(b)(2). In determining whether to impose a forfeiture penalty, and in determining the amount of any forfeiture penalty under section 503(b)(2)(D), the Commission shall take into consideration the extent to which the requirements of this section are technically infeasible.*

*"(2) JURISDICTION.—The Commission shall have exclusive jurisdiction to enforce the requirements of this section, except that any State commission may file a complaint with the Commission seeking the imposition of penalties as provided in paragraph (1).*

*"(d) ANNUAL REPORT ON DEPLOYMENT.—*

*"(1) ANALYSIS REQUIRED.—The Commission shall include in each of its annual reports submitted no more than 18 months after the date of enactment of this section an analysis of the deployment of high speed data service to underserved areas. Such report shall include—*

*"(A) a statistical analysis of the extent to which high speed data service has been deployed to central offices and customer loops, or is available using different technologies, as compared*

*with the extent of such deployment and availability prior to such date and in prior reports under this subsection;*

*"(B) a breakdown of the delivery of high speed data service by type of technology and class or category of provider;*

*"(C) an identification of impediments to such deployment and availability, and developments in overcoming such impediments during the intervening period between such reports; and*

*"(D) recommendations of the Commission, after consultation with the National Telecommunications and Information Administration, for further extending such deployment and availability and overcoming such impediments.*

*"(2) DEFINITION OF UNDERSERVED AREA.—For purposes of paragraph (1), the term 'underserved areas' means areas that—*

*"(A) are high cost areas that are eligible for services under subpart D of part 54 of the Commission's regulations (47 C.F.R. 54.301 et seq.); or*

*"(B) are within or comprised of any census tract—*

*"(i) the poverty level of which is at least 30 percent (based on the most recent census data); or*

*"(ii) the median family income of which does not exceed—*

*"(I) in the case of a census tract located in a metropolitan statistical area, 70 percent of the greater of the metropolitan area median family income or the statewide median family income; and*

*"(II) in the case of a census tract located in a nonmetropolitan statistical area, 70 percent of the nonmetropolitan statewide median family income.*

*"(3) DESIGNATION OF CENSUS TRACTS.—The Commission shall, not later than 90 days after the date of the enactment of this section, designate and publish those census tracts meeting the criteria described in paragraph (2)(B).".*

***SEC. 8. COMMISSION AUTHORIZED TO PRESCRIBE JUST AND REASONABLE CHARGES.***

*The Federal Communications Commission may impose penalties under section 503 of the Communications Act*

22

*of 1934 not to exceed $1,000,000 for any violation of provisions contained in, or amended by, section 5, 6, or 7 (or any combination thereof) of this Act. Each distinct violation shall be a separate offense, and in the case of a continuing violation, each day shall be deemed a separate offense, except that the amount assessed for any continuing violation shall not exceed a total of $10,000,000 for any single act or failure to act described in section 5, 6, or 7 (or any combination thereof) of this Act.*

Chairman SENSENBRENNER. I will yield myself 5 minutes for an opening statement, and won't use it. I will make a more detailed statement later when I offer an amendment to this bill. I would like to thank all the Members of the Committee who have worked hard on these difficult issues over the last several weeks.

The referral we received from the Speaker directed us to move with lightening speed, and in true Judiciary Committee form, we have. However, I disagree with the scope and length of this referral. Nonetheless, we have abided by these strictures. We've had 2 days of informative hearings in which the vast majority of Members on both sides of the aisle participated. Again, thank you all for your diligent work and attention to this matter, which has allowed the Judiciary Committee to exercise its jurisdiction.

I yield back the balance of my time, ask unanimous consent that all Members may include opening statements at this point in the record, and recognize the gentleman from Michigan for 5 minutes.

Mr. CONYERS. Thank you, and good morning, Members of the Committee.

Mr. Chairman, I think you should be congratulated for holding this markup, and for your outstanding leadership in protecting the Committee's historic jurisdiction over competition in the telecommunications industry.

Under both Democratic and Republican leadership, the Judiciary Committee has always voted on an overwhelming bipartisan basis to preserve the Department of Justice's role in insuring the telecommunications marketplace is open to competitors. We cannot forget that it was the Department of Justice that brought the antitrust suit that ultimately broke up the old telephone system.

In 1996, when we considered the Telecommunications Act, the Committee again voted overwhelmingly to give the Department of Justice a co-equal role with the FCC to review the Bell monopoly's entry into both voice and data long distance service. Today, the Committee considers the Tauzin-Dingell Bill, H.R. 1542, which

would eviscerate the Department of Justice's role with respect to Bell entry into the long-distance data market. This is not a nice thing to do. And we all know that data is the market of the future, not only because data represents over half of long-distance traffic and is still growing, but also because it's impossible to distinguish between voice and data when everything is transmitted in ones and zeroes.

If the future—if the problems with the Tauzin bill were limited to the Department of Justice, no doubt we could find a way to correct them, but unfortunately, this bill—and I hate to say this—is so deeply flawed, that we cannot, within our narrow referral jurisdiction, fix this bill. So let's be frank about it. The Tauzin bill guts the market opening for pro-competitive requirements of the 1996 Telecommunications Act. It's pretty straightforward in doing that. By essentially eliminating sections 251 and 271 of the '96 Act, which require that local phone monopoly facilities be open to competitors, the Tauzin Bill gives the local Bell monopolies a license to exclude. This is not a good thing.

The bill would effectively transfer, effectively duplicate the monopoly over local telephone services into broadband DSL services. This is not—this is another not good thing. Not to mention the fact that the bill undermines important consumer protections such as rules against slamming, which prohibit companies from changing a customer's service without their consent, privacy regulations, law enforcement requirements, and protections against obscene and harassing communications. Competition should be our religion in telecommunications. It should be our credo. It is the touchstone for lower prices, better services, and for unleashing the innovative creativity that has built our new economy from the ground up. And historically, it's been the role of this Committee, Judiciary Committee, to preserve the basic rules of competition, and I think we intend to do that this morning.

I urge the Committee then to reject this deeply-flawed bill that eliminates the Department of Justice's ability to prevent the re-monopolization of the phone network.

And I thank you for the time, Mr. Chairman.

[The opening statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I want to thank the Chairman for holding this important markup and for his outstanding leadership in protecting the Committee's historic jurisdiction over competition in the telecommunications industry.

*Under both Democratic and Republican leadership, this Committee has always voted on an overwhelming bipartisan basis to preserve the Department of Justice's role in ensuring that the telecommunications marketplace is open to competitors.*

We cannot forget that it was the Department of Justice that brought the antitrust suit that ultimately broke up the old "Ma Bell" system.

In 1996, when we considered the Telecommunications Act, the Committee voted overwhelmingly to give DOJ a co-equal role with the FCC to review the Bell monopolies' entry into both voice and data long distance service.

Today, the Committee considers *the Tauzin-Dingell bill, H.R. 1542, which would eviscerate DOJ's role with respect to Bell entry into the long distance data market.*

And we all know that *data is the market of the future.* Not only because data represents over 50% of long distance traffic—and growing. But also because it's impossible to distinguish between "voice" and "data" when everything is transmitted in "ones" and "zeros."

If the problems with the Tauzin bill were limited to DOJ, we could find a way to correct them.

*Unfortunately, the Tauzin bill is so deeply flawed that we cannot—within our narrow referral—fix this bill.*

*Let's be honest: the Tauzin bill guts the market-opening, pro-competitive requirements of the 1996 Telecommunications Act.*

By essentially eliminating Sections 251 and 271 of the '96 Act—which require that local phone monopoly facilities be opened to competitors—the Tauzin bill gives the local Bell monopolies a license to exclude.

*The bill would effectively transfer—effectively duplicate—the monopoly over local telephone service, into broadband DSL services.*

Not to mention the fact that the bill *undermines important consumer protections*—such as rules against "slamming" (which prohibit companies from changing a customer's service without their consent), privacy regulations, law enforcement requirements, and protections against obscene, indecent, and harassing communications.

Competition should be our religion in telecommunications. It should be our credo. It is the touchstone for lower prices, better services, and for unleashing the innovative creativity that has built our new economy from the ground up. And historically, its been the role of this Committee to preserve those basic rules of competition.

I urge the Committee to reject this deeply flawed bill that eliminates the Department of Justice's ability to prevent the re-monopolization of the phone network.

[The opening statement of Mr. Issa follows:]

PREPARED STATEMENT OF THE HONORABLE DARRELL ISSA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, I want to thank you for bringing forward H.R. 1542, H.R. 1698 and H.R. 2120 to the full Judiciary Committee. Like many of my colleagues on the Judiciary Committee, I am frustrated that our committee received an extremely narrow referral of H.R. 1542. My frustration in particular is focused on section 4 of the H.R. 1542 bill that may inhibit efforts to prohibit spamming.

As we on the Judiciary Committee all recognize, unsolicited commercial electronic mail, or "spam," can impose significant economic burdens on Internet access services, small and large businesses, and of course, individuals. That is because the information superhighway can only handle a finite volume of email. Spam can also negatively affect the quality of service that web users receive and ultimately contributes to a loss of privacy online.

Both the Federal Communications Commission and the states have a substantial governmental interest in regulating spam. Indeed, this Committee recently addressed the spam issue—taking a measured approach to ensure that spammers do not cause further damage to our high-tech economy. To date, however, the primary burden for dealing with spam has fallen on the FCC and the states.

Section 4 of the Tauzin-Dingell bill is intended to completely deregulate the provision of high-speed data services offered by incumbent local exchange carriers. New section 232, which would be created if H.R. 1542 is enacted, would eliminate the authority for the FCC and the states to address spam. As the bipartisan, dissenting views from the Commerce Committee concerning the Tauzin-Dingell bill point out: "The sweeping evisceration of FCC and state authority raises several questions about what rules and regulations no longer apply. . . . That means that many important rules, including consumer protection rules, may inadvertently be swept away." Spam is one of those areas where FCC and state regulations would be nullified.

Given that H.R. 1542 threatens the ability of the FCC and state governments to deal with spam transmitted using the high-speed data services of Bell companies, I was prepared to offer an amendment this morning. My amendment—to be added to the end of Section 4(b) of Tauzin-Dingell—would simply have said: "Nothing in this section shall be construed to prevent the Commission or any state from adopting regulations to prohibit unsolicited commercial e-mail messages, or 'spam.'"

The impact that Tauzin-Dingell would have on consumer protection measures such as spam regulations causes me great concern. I hope that if H.R. 1542 does, in fact, reach the floor of the House, all of us who are concerned about this issue will have an opportunity rectify the situation with a floor amendment.

Again, I thank the Chairman for holding this hearing and for his leadership on these broadband bills.

[The opening statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. Chairman, I want to thank you for offering your amendment to preserve the interLATA data rules and to reverse the Goldwasser case. It is critical that we protect the jurisdiction of this Committee on issues pertaining to competition in the telecommunications marketplace. More importantly, however, there are real, substantive problems with H.R. 1542 that I would have liked to address. But given the narrow terms of the referral we received from the Parliamentarian, this Committee is not permitted to do so.

Should we have had a broader referral, I would have proposed two amendments. The first amendment would have addressed the issue of privacy and the second amendment would have preserved FCC authority to address slamming and cramming.

PRIVACY

During consideration of the 1996 Telecommunications Act, Congress recognized that new competitive market forces and technologies had the potential to threaten consumer privacy interests. Congress enacted Section 222 of the '96 Act to ensure that telecommunications carriers protected the privacy of customer proprietary network information ("CPNI") and other customer information they obtain when they provide telecommunications services.

The Federal Communications Commission has adopted rules to implement and enforce Section 222. Because Section 4 of HR 1542 can be construed to completely deregulate the high-speed data services offered by incumbent local exchange carriers ("ILECs"), it could jeopardize the Commission's ability to protect the privacy of sensitive customer information obtained by ILECs when they provide high-speed data services.

As such, I would have offered the following amendment:

"At the end of the existing text of subsection 4(b), insert the following:

'Nothing in this section shall be construed to limit or affect the authority of the Commission under Section 222 of the Communications Act, 47 U.S.C. 222 et seq.'"

This amendment would have protected consumers in the event of the passage of H.R. 1542. Specifically, it would have preserved the Commission's authority to regulate ILECs' usage of customer information, even if they obtain that information from their provision of high-speed data services.

Unfortunately, such an amendment is beyond the scope of our referral this morning, and thus, would have been ruled out of order. The fact that H.R. 1542 would potentially undermine privacy protections provided by the Federal Communications Commission can only increase my concerns about the Tauzin-Dingell legislation.

SLAMMING AND CRAMMING

In addition to privacy issues, I am also concerned about the Tauzin-Dingell legislation because it fails to preserve FCC and state authority to prevent slamming and cramming.

The FCC currently has statutory authority to regulate the practice of "slamming," where a company changes a subscriber's chosen provider of telecommunications services without the subscriber's knowledge or authorization, and "cramming," where a company places unauthorized, misleading, or deceptive charges on consumers' telephone bills. Certain states also prohibit or regulate slamming and cramming under state consumer protection statutes or regulations.

Slamming and cramming are fraudulent practices that distort the market for telecommunications services. I know of no one who supports the right of Bell companies to slam or cram consumers.

Unfortunately, Section 4 of H.R. 1542 could be construed to completely deregulate the high-speed data services offered by Bell companies; as such, it threatens the authority of the FCC and the states to prevent slamming and cramming by telecommunications companies.

I had hoped to offer an amendment to address this oversight in the Tauzin-Dingell legislation. Specifically, my amendment would have said:

"At the end of the existing text of subsection 4(b), insert the following:

'Nothing in this section shall be construed to limit or affect the authority of the Commission under 47 U.S.C. 258 to prohibit and otherwise regulate illegal changes in subscriber carrier selections ("slamming") or the authority of the Commission under 47 U.S.C. 201(b) to prohibit and otherwise regulate the imposition of charges on telephone bills for unauthorized services

("cramming"). Nothing in this section shall be construed to limit or affect the authority of any State to regulate slamming or cramming under state consumer protection statutes or regulations.'"

This amendment would have ensured that consumers remain protected by preserving FCC and state authority to prevent slamming and cramming.

Unfortunately, the Judiciary Committee's narrow referral of H.R. 1542 precludes my offering such an amendment. Since our Committee is unable to address the slamming and cramming issues within the scope of its referral, I hope the House will consider and accept such an amendment if H.R. 1542 reaches the floor.

Thank you, Mr. Chairman, for your indulgence on these issues. I yield back the balance of my time.

Chairman SENSENBRENNER. The bill is now open for amendment, and I have an amendment at the desk.

Mr. BOUCHER. Mr. Chairman, I reserve a point of order on the amendment.

Chairman SENSENBRENNER. Point of order is reserved.

Clerk will report the amendment.

The CLERK. Amendment offered by Mr. Sensenbrenner to the Committee Print, showing the text of H.R. 1542 as reported by the Committee on Energy and Commerce, dated June 8, 2001.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and I will recognize myself for 5 minutes.

[The amendment follows:]

**Amendment Offered by Mr. Sensenbrenner**

**To the Committee Print Showing the Text of H.R. 1542, As Reported by the Committee on Energy and Commerce (Dated June 8, 2001; 2:51 P.M.)**

Page 15, line 6, insert ", subject to subsection (*l*)" after "service" the last place it appears.

Page 15, after 21, and insert the following:

(c) APPLICATION PREREQUISITE TO PROVIDING HIGH SPEED DATA SERVICE OR INTERNET BACKBONE SERVICE.—Section 271 of the Communications Act of 1934 (47 U.S.C. 271), as amended by subsection (b), is amended by adding at the end the following:

"(*l*) APPLICATION PREREQUISITE TO PROVIDING HIGH SPEED DATA SERVICE OR INTERNET BACKBONE SERVICE.—

"(1) REQUIREMENT TO FILE APPLICATION WITH ATTORNEY GENERAL OF THE UNITED STATES.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may begin providing high speed data service or Internet backbone service in any in-region State under the authority of subsection (g)(7)—

"(A) unless it files with the Attorney General of the United States an application to provide such service; and

"(B) until the Attorney General —

"(i) approves such application before the expiration of the 90–day period beginning on the date such application is filed; or

"(ii) fails to approve or to disapprove such application during such 90–day period.

"(2) AUTHORITY OF ATTORNEY GENERAL.—The Attorney General of the United States—

"(A) may issue rules to establish requirements applicable to the form and contents of applications filed under paragraph (1);

"(B) may make recommendations to an applicant regarding—

"(i) withdrawal of an application filed under paragraph (1); or

"(ii) filing of an application under paragraph (1), with or without modifications, subsequent to the withdrawal of an application filed under such paragraph; and

"(C) may not approve an application filed in compliance with this subsection unless the Attorney General determines that the applicant has demonstrated that it meets the substantive requirements of subsections (c) and (d) with respect to high speed data service or Internet backbone service in the State for which such application is filed.

"(3) WITHDRAWAL OF APPLICATION.—An application filed under paragraph (1) may be withdrawn by the applicant at any time before the Attorney General approves or disapproves such application, but may not be modified after being filed.".

Page 15, line 22, strike "(c)" and insert "(d)".

Page 16, after line 4, insert the following:

(e) CONTINUED FULL APPLICATION OF THE ANTITRUST LAWS TO MATTERS INVOLVING IN THE TELECOMMUNICATIONS INDUSTRY.—Section 601(b) of the Telecommunications Act of 1996 (47 U.S.C. 152 note) is amended by adding at the end the following:

"(4) CONTINUING OPERATION OF THE ANTITRUST LAWS.—The rights, obligations, powers, and

remedies provided under the antitrust laws are in addition to, and are—

"(A) not preempted by;

"(B) not inconsistent with; and

"(C) not incompatible with;

any of the rights, obligations, powers, and remedies provided under the Communications Act of 1934 (47 U.S.C. 151 et seq.), under the Telecommunications Act of 1996 (Public Law 104–104; 110 Stat. 56), or under any law amended by either such Act, regardless of the progress of competition in any market.".

Chairman SENSENBRENNER. Let me say first that I was disappointed at the narrow referral that we have received, because I was hopeful that we would be able to address all of the antitrust issues raised by H.R. 1542. Unfortunately, however, I believe that given the limited scope of the referral, we are only able to address two of the antitrust issues raised by the bill. My amendment deals with both of them.

First, it would restore current law with respect to Bell entry into interLATA data, except that the Department of Justice would become the decisionmaker rather than the FCC. With respect to this issue, I am not ready to give up the Justice Department's role in reviewing the antitrust implications of Bell entry into long distance, even for data. I understand that the Energy and Commerce Committee has worked its will, and that it is ready to give up the role of the FCC, at least for data. That's fine. However, on this Committee, we have a longstanding bipartisan position that the Justice Department should have a role here, and this amendment vindicates that long-held position.

Second, my amendment would fix what I believe to be a part of the *Goldwasser decision* that was wrongly decided by the Seventh Circuit. In the 1996 Act, Congress expressly stated that nothing in that act in any way changed the antitrust laws. In one part of the *Goldwasser decision*, the Seventh Circuit appears to hold that Congress impliedly repealed the antitrust laws by passing the 1996 Act. I do not see how a court can imply a repeal of the antitrust laws when we expressly state that we are not repealing them. So

I believe that this fix is necessary to make it clear to the courts what Congress intended.

I believe that both parts of this amendment are important to the Committee's future jurisdictional interest, and I urge all of the Members to support this effort to maintain our jurisdiction.

And yield back the balance of my time.

[The prepared statement of Chairman Sensenbrenner follows:]

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Let me say first that I was disappointed at the narrow referral that we received because I was hopeful that we would be able to address all of the antitrust issues raised by H.R. 1542. Unfortunately, however, I believe that given the limited scope of the referral, we are only able to address two of the antitrust issues raised by the bill.

My amendment deals with both of them. First, it would restore current law with respect to Bell entry into interLATA data except that the Department of Justice would become the decisionmaker rather than the FCC. With respect to this issue, I am not ready to give up the Justice Department role in reviewing the antitrust implications of Bell entry into long distance even for data. I understand that the Energy and Commerce Committee has worked its will and that it is ready to give up the role of the FCC at least for data. That is fine. However, on this Committee, we have a longstanding bipartisan position that the Justice Department should have a role here, and this amendment vindicates that long held position.

Second, my amendment would fix what I believe to be a part of the *Goldwasser decision* that was wrongly decided. In the 1996 Act, Congress expressly stated that nothing in the Act in any way changed the antitrust laws. In one part of the *Goldwasser decision*, the Seventh Circuit appears to hold that Congress impliedly repealed the antitrust laws by passing the 1996 Act. I do not see how a court can imply a repeal of the antitrust laws when we expressly state that we are not repealing them. So, I believe that this fix is necessary to make it clear to the courts what Congress intended.

I believe that both parts of this amendment are important to the Committee's future jurisdictional interests, and I urge all of the Members to support this effort to maintain our jurisdiction.

Mr. BOUCHER. Mr. Chairman, I insist upon my point of order.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. BOUCHER. Mr. Chairman, I must insist upon this point of order because the amendment exceeds the scope of the Committee's referral of the underlying bill under rules 10 and 12 of the Rules of the House. The Speaker granted this Committee a sequential referral of H.R. 1542 under the provisions of rules 10 and 12 until the 18th of June 2001. That referral specifically and expressly limited the scope of the referral to the consideration of, quote, "such provisions of the bill and amendment recommended by the Committee on Energy and Commerce as proposed to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934," end of quote.

The amendment addresses matters outside the scope of this very limited referral for two reasons. First, the amendment fundamentally changes the consultative role of the Attorney General in section 271 proceedings, and that consultative role is the basis for this Committee's referral. Current law requires the Attorney General—I'm sorry. Current law provides to the Attorney General only a consultative role in the section 271 process. The Attorney General may submit comments in writing to the Federal Communications Commission, but the statute makes clear that the evaluation by the Attorney General, and I quote again, "shall not have any preclusive effect" on the Federal Communications Commission's determina-

tion. And that is found in section 271(d)(2)(A) of the Communications Act.

Instead of a consultative role, the Chairman's amendment gives the Attorney General a dispositive role over Bell Company provision of high-speed Internet services across LATA boundaries. That is not a role that the Attorney General exercises today. Therefore, it is not related to the proposed narrowing of the Attorney General's role as proposed by the Committee on Energy and Commerce, and it is only the proposed narrowing of the Attorney General's role that this Committee may consider under the referral to this Committee from the House.

Secondly, the balance of the amendment deals with antitrust matters that have nothing to do with the consultative role of the Attorney General under section 271. Because the operation of the antitrust laws doe not address the consultative role of the Attorney General under that section, and any narrowing of that role by the bill reported by the Energy and Commerce Committee, the second half of the amendment is clearly outside of the scope of this Committee's referral as well.

Mr. Chairman, it is my understanding that the House Parliamentarian has had the opportunity to review the amendment that is now pending, and it is also the opinion of the House Parliamentarian that this amendment exceeds the referral granted to this Committee, and I'm confident the Chairman and his staff are well aware of that fact. I must insist upon my point of order because his amendment exceeds the scope of the referral to this Committee.

Chairman SENSENBRENNER. Anybody else on the point of order? If not, the Chair is prepared to rule. The Chair overrules the point of order. The Speaker referred the bill to the Committee, quote, "for consideration of such provisions of the bill and the amendment recommended by the Committee on Energy and Commerce as proposed to narrow to purview of the Attorney General under section 271 of the Communications Act of 1934," unquote. H.R. 1542 narrows that purview by taking high-speed data service and Internet backbone service out of the class of service that is subject to section 271. Thus, it narrows the Attorney General's consultative role under that section.

In exercising his consultative role under section 271(d)(2)(A), the Attorney General may use, quote, "any standard he considers appropriate," unquote. section 6 of H.R. 1542 specifically leaves this process in place for voice communication service. The *Goldwasser case* cast doubt on whether antitrust law still applies to the telecommunications industry, then thereby cast out on whether the Attorney General may continue to apply an antitrust standard in his evaluation of applications under section 271.

Reading section 6 in light of *Goldwasser*, it reiterates a narrower section 271 process because of *Goldwasser's* change of the law in the Seventh Circuit. Thus, it narrows the purview of the Attorney General under section 271. Moreover, because *Goldwasser* is the law in only one circuit, it creates confusion as to whether the Attorney General must apply differing standards to applications from different circuits. If he cannot apply an antitrust standard to a section 271 application from the Seventh Circuit, then again his purview under section 271, as reiterated in section 6, is narrowed. The *Goldwasser* fix is directly related to the subject of the underlying

text because the consistent application of the law throughout every geographic region of the country is fundamental to the bill and the pending amendment.

For these reasons, I rule that the part of the amendment having to do with reversing a part of the *Goldwasser case* is within the scope of the referral and is germane to the bill. Moreover, the amendment is germane for an additional reason. The pending amendment reestablishes the Attorney General's role in section 271 decisions, whereas the underlying amendment removes the Attorney General from the process. The pending amendment would have to RBOCs apply to the Attorney General for authorization to provide interLATA high-speed data services and Internet backbone services. The bill says they should be able to provide that service now without any further process. If my amendment passes, there again would be confusion as to whether the Attorney General could apply an antitrust standard in evaluating applications under my amendment. Thus, I rule that the amendment is germane for that reason as well.

Also under my amendment, we reinstate the current process with respect to data, except that instead of having the FCC make the final decision, the Department of Justice will make the final determination.

The referral we received from the Speaker permits the Committee to consider such provisions of H.R. 1542, quote, "as proposed to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934," unquote. This amendment clearly addresses those provisions. We are not limited in introducing a new regulatory mechanism for approval of data, particularly because the other committee removed the FCC from the process.

This amendment is closely related to the underlying bill. It is clearly within the jurisdiction of the Committee, and as a regulatory process, similar to current law in all but one respect, and therefore, the part of the amendment dealing with the Attorney General's role in section 271 determinations is germane.

Let me say that if we were to return to the status quo by restoring the FCC's role, which was taken out of the bill by the Commerce Committee, we would surely be criticized for invading the Commerce Committee's jurisdiction, and I would never want to do that. [Laughter.]

Chairman SENSENBRENNER. We cannot restore a DOJ consultative role if there's no one to consult with, and the Tauzin-Dingell Bill took that FCC out of the business, so the DOJ can't consult with anybody under the Tauzin-Dingell Bill. Thus, if our policy choice is to maintain current law, I cannot conceive an amendment more germane and more precisely within the scope of the referral, and the point of order is overruled.

Is there further debate on the amendment?

Mr. CONYERS. Mr. Chairman, I seek recognition.

Chairman SENSENBRENNER. The gentleman from Michigan moves to strike the last word, and is recognized for 5 minutes.

Mr. CONYERS. Thank you very much. This is back on to the amendment that you have brought forward, and what it seems to me is that this amendment attempts to lay claim to the Committee on Judiciary's rightful jurisdiction over antitrust laws in the tele-

communications industry, and it reaches to the full extent of our referral in trying to improve a troubled product that we have received from the Commerce Committee.

The amendment's *Goldwasser* fix reaffirms what we thought we made clear in the 1996 Act, namely, the telecommunications industry must comply with both the '96 Act and the antitrust laws. Let's not have any fooling around in trying to limit antitrust application to the telecommunications industry. Congress and all but this one court—the unnamed number of the appellate court I will not reveal at this time—but this one—outside of this one misguided court, everybody's understood and recognized the application of the antitrust laws to the telecommunications industry. I never thought we'd have to go and make this clear to the courts. But this amendment, once again, makes our position clear, and it's totally within the scope of our referral.

Now, the amendment narrows the Tauzin measure to some extent. In its current form, the bill destroys the bargain made in the '96 Act. It permits, Tauzin does, the Bells to provide long-distance data services before meeting the competitive checklist in section 271 of the '96 Act. Can't do that, fellows. Cannot do that. You cannot modify the '96 Act on this very, very important provision.

And in addition, Tauzin eliminates the Attorney General's historic role in identifying anticompetitive behavior by the Bell companies, and that's what this amendment tries to do, merely to restore the Attorney General's role by requiring the Bells to demonstrate that they have opened their local telephone monopoly to competition before they can offer long-distance data services. What's wrong with that? It's the current law as it presently exists, and as many of you on the Committee know, that this amendment only goes a small part of the way in trying to repair the product we've got from the Commerce Committee.

Due to the narrow referral, we are unable to amend the most broken parts of the bill. The amendment—this amendment does not and can't fix section 4 of that bill, Tauzin, which rolls back the line sharing and unbundling requirements contained in section 251 of the 1996 Act, and as a result, even if this amendment is adopted, the Bells can still act in a monopolistic way and abuse their power by denying competitors access to the local loop. This is not a good situation.

Secondly, the amendment doesn't and cannot correct the fact that the Tauzin bill would severely limit Federal and State authority over the Internet to prevent spam, invasions of privacy, obscenity and pornographic materials that ought to be restricted, and other protections critical to consumers.

And, finally, the bill—this amendment doesn't and can't fix the inadequate broadband buildout requirement that does not require the Bells to deploy any new broadband facility anywhere for two solid years, which allows the Bells to escape these requirements all together, merely by selling off their rural exchanges. Bad deal.

And so I urge the Members to support the Sensenbrenner amendment and return any time.

Chairman SENSENBRENNER. Time of the gentleman has expired.

For what purpose does the gentleman from Virginia seek recognition?

Mr. GOODLATTE. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 quick minutes because there's a vote on.

Mr. GOODLATTE. Mr. Chairman, I will be very quick. I am a strong supporter of the Tauzin-Dingell legislation as it is written because I think it promotes competition and creates fairness. All of their competitors in the high-speed Internet market are not regulated. Cable and wireless and satellite, these folks are heavily regulated and they are losing this battle as a result of that.

I must reluctantly oppose the Chairman's amendment, not because of the Chairman's effort to protect the jurisdiction of the Committee and the role of the Justice Department. I think that is a very important function, but I think this amendment goes too far in that it creates an affirmative step that must be taken by the Attorney General before companies can get into competition in a business area, and that is highly unusual except in the area of mergers. This is something that effectively rolls back the situation. It eviscerates the Tauzin-Dingell Bill because it has the effect of saying that we're simply transferring all of the responsibility from the FCC that we're trying to get relief from, we're trying to deregulate from, and turns that over to the Justice Department with a big question mark as to exactly how the Attorney General and the Justice Department would apply that standard.

To me, this is a step backward, and as a result, I must reluctantly oppose the amendment.

Chairman SENSENBRENNER. The question is on the amendment.

Mr. BOUCHER. Mr. Chairman, I want to speak in opposition to the amendment. Would the gentleman consider perhaps a brief recess while we vote on the floor so that we can continue our discussion of this amendment?

Chairman SENSENBRENNER. The Committee stands in recess. Please come back right after you vote.

[Recess.]

Chairman SENSENBRENNER. When the Committee recessed for the Journal vote, pending was an amendment by the Chair to H.R. 1542. For what purpose does the gentleman from Virginia, Mr. Boucher, seek recognition?

Mr. BOUCHER. Mr. Chairman, I rise in opposition to the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BOUCHER. Mr. Chairman, this amendment goes well beyond whatever the Committee might deem to be necessary to address whatever concerns Members of the Committee might have with the recent *Goldwasser decision*.

The amendment does a number of things that I think are inappropriate. First of all, it establishes new telecommunications regulatory policy in an antitrust agency. It does that without the Department of Justice having had the opportunity to comment to this Committee on whether it wants this authority. It does that without the Department of Justice having indicated to this Committee that it has either the resources or the expertise to carry out these regulatory duties. And most importantly, I think that the amendment would eliminate the immediate relief for interLATA data services, which the Tauzin-Dingell measure provides. And that relief is essential and is much needed for three major reasons.

First of all, the provision of immediate interLATA data relief would promote competition in the offering of Internet backbone services. That competition would provide better pricing, and would affect in a favorable way the prices that all of us pay to our Internet service providers for monthly Internet access service.

Secondly, the provision of immediate interLATA data relief would provide for more rapid deployment of DSL services by the Bell operating companies. They would be able to maximize their investment from the deployment of DSL service as they would be able to carry the DSL traffic, the data traffic, from the originating user through the entire Internet backbone, and that would significantly increase the interest and the willingness of the Bell operating companies in deploying DSL services more rapidly.

Third, and from the standpoint of those of us who represent rural America, perhaps most importantly, the immediate interLATA data relief that the Tauzin-Dingell Bill provides would create a much greater willingness on the part of the Bell operating companies to deploy Internet hubs, Internet points of presence in much greater numbers in rural America. Study after study has shown a marked active investment in sufficient numbers of Internet points of presence to assure the availability of truly affordable, high-speed Internet access services, primarily for businesses in rural America. The fact is, if you're a business in a place that is served by a Bell operating company today, and it happens to be a rural area, you are probably going to pay far more for high-speed Internet access than you would if you are a business in a city or if you're a business in some rural area that is served by a local exchange carrier that is not a Bell operating company.

Now, why do we find this phenomenon? The basic reason is that the Bell operating company is required to hand off the data traffic that comes to its Internet hub when that traffic reaches the first LATA boundary. And there simply isn't a great deal of financial incentive for the Bell Company to deploy hubs if they have to hand the traffic off from that hub very quickly to some other carrier, some other provider. But that is the circumstance we face today, and that is the circumstance that would be remedied in a very effective way in the Tauzin-Dingell measure, offering immediate relief from interLATA data services.

This amendment would reverse that, and would deny that immediate relief. It would prevent these three advances that I have mentioned, which I think are very important, from being realized by the American public.

The bill would also lead to the reimposition of a range of burdensome regulations that have hampered the deployment of DSL services. The cable industry today has 70 percent of the broadband market locally, and that's because it's essentially unregulated. The Bell operating companies are burdened by legacy regulations from the previous telecommunications era, as they seek to roll out their advanced services. The Tauzin-Dingell Bill would remove those regulations, create regulatory parity, and dramatically increase the willingness of Bell companies to deploy DSL.

If you're interested in the deployment of DSL service, if you're interested in extending broadband to your constituents, a no vote on this amendment is required.

Thank you, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from Utah seek recognition?

Mr. CANNON. To strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman. I would like to voice my support for this amendment to H.R. 1542. This amendment focuses on one of the many fatal flaws of this bill, that is the anticompetitive behavior—correction—let me call that the predatory behavior of the regional Bell operating companies. If the underlying bill were to pass as is, any and all checks to insure a fair and level field of competition on communications facilities would be tossed out. By overturning the errant decision of an activist judge in the *Goldwasser case*, we will be reaffirming this Committee's belief and the belief of Congress that the established antitrust laws do in fact apply to the telecommunications industry. We do this despite the best efforts of attorneys representing the RBOCs in a number of antitrust actions pending around the country. We do this to preserve the explicit antitrust savings clause of the '96 Telecommunications Act, which this Committee and the entire Congress supported.

Proponents of this bill invoke deregulation and claim this piece of legislation is the best way to expedite the rollout of advanced services. Some form of deregulation it may be, but I fear the cost of this form of deregulation is remonopolization.

The Energy and Commerce Committee should know, especially now, given what is happening in California, that flawed deregulation will only create problems and headaches down the road. In this context, it will create blackouts in competition on the nation's information super highway.

As Northpoint, Telegint, Rhythms, Harvard Net and others can attest, the Bells cannot be trusted to preserve competition on their own accord. The '96 Telecommunications Act was quite effective at pointing the way to deregulation by conditioning interLATA data on opening of the local loop. The Tauzin-Dingell Bill moves backwards by removing all regulatory authority over all advanced services. Some Members of the Energy and Commerce Committee feel—may feel all right about unleashing the Bells in toto. I, however, believe that we should acknowledge our jurisdiction and affirm the role of the Attorney General and the Justice Department to review the actions of these companies and protect consumers from bad actors who abuse monopoly power.

While I applaud and offer my support of the amendment proposed by the Chairman, I must, however, acknowledge its limitations. Given the narrow and overly restrictive nature of the referral granted to this Committee, the Chairman has done all he can to salvage what is a very bad bill. If H.R. 1542—it does make H.R. 1542 better, but it is still—it still is a very bad bill.

Given the nature of this referral, I cannot offer any of the amendments I would, amendments to preserve the FCC's and states' authority to address such topics as CALEA, spamming, slamming, cramming, pornography, privacy, unbundling and interconnection should be added. All are and should rightly be important issues to the Members of this Committee, but our hands are tied.

I thank the Chairman and his staff for the substantial work they have done in crafting an amendment that addresses the only concern possible under this unusually narrow referral. I urge a yea vote on the Sensenbrenner amendment.

Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas, Ms. Jackson Lee, seek recognition?

Ms. JACKSON LEE. Rise to strike the last word.

Chairman SENSENBRENNER. The gentlewoman's recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Four years ago on this Committee I supported the work that we did on the Telecommunications Bill with respect to the importance of the antitrust provision, 217. Still continue to believe that the issue of competition is extremely important. My disappointment and dissatisfaction today is that we, with the limited jurisdiction of our Committee, could not frame, if you will, and could not receive support for a reasonable approach, which is to compromise and to recognize that there are monopolies on both sides.

There are monopolies on the side of the larger, long distance company with respect to their ability to garner the market on cable companies which are not regulated. And there are likewise monopolies, as it relates to local service and local jurisdictions.

I believe that we need to solve this, not by a sledge hammer, but by a compromise, and I'm going to be looking at some of the legislative compromises that have been offered.

I do want to applaud the Ranking Member and Chairman for the commitment to the competitive necessities of this particular market, but I am concerned as to whether or not the amendment before us is too harsh and too stringent, and cannot be handled more with the frame of amendment that I had, which is to monitor and potentially intercede the Attorney General of the Department of Justice Antitrust Division when the monopolies are determined. I am concerned that the amendment before us does exceed its present—or the necessities of reform, and am concerned as well that we are going too much in the direction of an existing entity that has as much a monopoly as anyone else, of anyone who's trying to get cable service and get any improvement in the cable service, they will be waiting in line for ages and ages and ages, and most likely it's poor service, and I have experienced that as much as my constituents have.

So I believe that what we should be trying to do between the committees of jurisdiction is to find a reasonable approach to resolving these concerns as opposed to taking lock-step positions on one side or the other, because there are no clean hands in this room.

I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentleman from California rise?

Mr. SCHIFF. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, Members, the 1996 Act provided that nothing in that act shall be construed to modify, impair or supersede the applicability of the antitrust laws. If that wasn't enough,

it goes on to provide that nothing in the act shall be construed to modify, impair or supersede Federal, State or local law unless expressly so provided. Nothing expressly so provided with respect to the antitrust laws. In fact, exactly the opposite. And therefore, I think that *Goldwasser* was wrongly decided.

Part of the amendment would overturn *Goldwasser*, and I think that would be good law. That would provide that the antitrust laws continue to apply and are not superseded, if there was any question about that fact.

But the amendment goes well beyond overturning *Goldwasser*, and in doing so, provides that the Attorney General will play an unprecedented role in this area. I would like to see an amendment that was confined to overturning *Goldwasser*, but does not establish a new regulatory mechanism which may prove more flawed than the one that we've been through.

For that reason, I must reluctantly oppose the amendment.

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California.

Ms. LOFGREN. Strike the last word.

Chairman SENSENBRENNER. Recognized for 5 minutes.

Ms. LOFGREN. Mr. Chairman, I understand the reluctance being expressed by some of my colleagues relative to the amendment, and my colleague from California is correct, this is—the amendment would not actually establish the status quo that we, I think, many of us seek. *Goldwasser* was wrongly decided. We do need to overturn that.

But I guess I come down on the other side of the issue, because we do have very limited jurisdiction here. And since the Commerce Committee has essentially removed the FCC from its important role, the only thing that we can do to more or less essentially protect the status quo, is what the Chairman has suggested in his amendment. So in an ideal world, without the narrow jurisdiction that this Committee has been saddled with, we might do something slightly different. But given the referral, I really am at a loss to see how we could do anything other than what the Chairman has suggested in his amendment, and therefore, I think we really are constrained to support this amendment, even though we might, had we had a freer hand, come up with something slightly different.

And I thank the Chairman for his amendment, and I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. To strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. I was one of the 16 Members of the House, who, 5 years ago, voted against the Telecommunications Act of 1996. And one of the reasons I voted against the act was that I feared that it would lead to further concentration of ownership in the media and that it might lead to further concentration of ownership in telecommunications.

I certainly think that the basic bargain that was struck in the bill, that the baby Bells, the RBOCs, cannot go in to compete with long distance until they open up their local monopolistic markets

to competition from others, from the long-distance carriers and from others, is the basic minimum we ought to expect. And the Tauzin-Dingell Bill goes in exactly the wrong direction, and would lead to what has become, in a number of different fields, a pretty standard course for deregulation. You start with a regulated monopoly. You break it up. You have then competition. The consumers benefit. Then the mergers and acquisitions start, and eventually you come to an unregulated cartel. And especially if Tauzin-Dingell passes, I think that that will just accelerate that process, and that the present long-distance carriers will probably be eaten up by the RBOCs and we'll probably end up with one or two RBOCs running all the telecommunications in the country. And then we'll wait and hope that the cable companies can compete with them.

I don't think that's what we want, and therefore, I would oppose Tauzin-Dingell, and I think that the Chairman's amendment goes in the right direction. I wish we had a broader referral, but given the limited nature of the referral, the Chairman's amendment goes in the right direction, and I would support it, and urge my colleagues to vote for it, not only to protect the jurisdiction of the Committee and to protect the existence of antitrust law in this area, but to protect the existence of competition if we hope to see any competition remain in this field at all.

Just one further observation. We're told by the supporters of Tauzin-Dingell that, well, in 1996, it wasn't anticipated that—you know that there be all this data transmission. Well, we're going into a digital era. Everything is going to be data, including voice. And if Tauzin-Dingell passes without this amendment, what you're going to end up with is the RBOCs, the baby Bells, having carte blanche to compete in everything without opening up—on everything nationally without opening up anything locally, and that's a situation for going very swiftly to a very limited cartel running everything in the country on telecommunications.

So I support the Chairman's amendment, and I thank him for it. I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from Arkansas seek recognition?

Mr. HUTCHINSON. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. HUTCHINSON. Thank you, Mr. Chairman. And I do support the Chairman's amendment. I think it preserves a tradition of the Justice Department in antitrust review. I probably could have drafted it a little bit differently if I was doing it myself, but I think it makes an important statement as to the importance of antitrust review by the Justice Department.

I also want to take this opportunity to raise a concern that hopefully will be addressed down the road, in reference to the underlying Tauzin-Dingell Bill, and that is in reference to the implications that it will have for CALEA, which is the Communications Assistance for Law Enforcement Act of 1994. And that was enacted in order to insure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. CALEA requires all telecommunications carriers to build into their networks the technical capabilities that are nec-

essary to assist law enforcement with authorized interception of communications and call identifying information. The technologies used to provide the high-speed data services are deregulated under section 4 of H.R. 1542, and they are the ones that Congress, this Committee, were concerned were posing problems for law enforcement officials. Because section 4 could be construed to completely deregulate these facilities, the bill threatens the FCC's authority to implement and enforce CALEA, and therefore, also threatens the ability of law enforcement officials to conduct electronic surveillance of communications transmitted using high-speed data services.

This amendment insures the commissions—well, the bill, I hope will be considered in terms of correcting this possible problem, and I raise this for the Committee's consideration on the underlying bill, and I hope that that can be remedied, because I do believe that the Tauzin-Dingell Bill does enhance competition, which is very important, but I hope that we can address the concerns of the law enforcement community on how it would apply to enforcing CALEA.

And with that, Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired. The question is on the amendment offered by the Chairman to H.R. 1542. Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment is agreed to. Are there further amendments to H.R. 1542?

Ms. WATERS. Mr. Chairman, I do have an amendment to the——

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Mr. Chairman, I don't have the amendment.

Ms. WATERS. The amendment should be at the desk.

Mr. BOUCHER. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. A point of order is reserved by the gentleman from Virginia. The clerk will report the amendment, which is Waters 002.

The CLERK. Amendment offered by Ms. Waters to the Committee Print, showing the text of H.R. 1542 as reported by the Committee on Energy and Commerce, dated June 8, 2001, 2:51 p.m.

Beginning on page 7, strike line 4 and all that follows through the end of page 12, and insert the following:

Section 4. Clarification Regarding Requirements——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentlewoman from California is recognized for 5 minutes. A point of order has been reserved.

[The amendment follows:]

**Amendment Offered by Ms. Waters**

**To the Committee Print Showing the Text of H.R. 1542, As Reported by the Committee on Energy and Commerce (Dated June 8, 2001; 2:51 P.M.)**

Beginning on page 7, strike line 4 and all that follows through the end of page 12, and insert the following:

**SEC. 4. CLARIFICATION REGARDING REQUIREMENTS TO OPEN MARKETS.**

Section 251(b)(4) of the Communications Act of 1934 (47 U.S.C. 251(b)(4)) is amended by inserting "(including the duty to ensure that no unreasonable impediment is imposed to restrict access)" after "access".

Ms. WATERS. Thank you very much, Mr. Chairman.

I am introducing this amendment to address a serious problem the competitive local exchange carriers have encountered when they try to enter the local telephone markets under the Telecommunications Act of 1996. As we all know, the Telecommunications Act was enacted as a way to insure competition in local telephone service areas. After its—well, basically in local telephone service.

After its enactment, hundreds of CLECs entered the market. I think we were all optimistic that the 1996 Act was going to have the necessary effect we had intended. Unfortunately, more and more of these CLECs have now filed for bankruptcy. The remaining ones are by and large in severe financial straits. There are several reasons for this, but the most pervasive is the fact that the Bell companies have successfully impeded the entry of CLECs into the local telephone market.

For example, some CLECs have gone out of business while they instigate lawsuits, lawsuit after lawsuit, in an attempt to get the Bell companies to comply with the 1996 Act. Other CLECs have fi-

nancially—been financially handicapped by long delays on the part of the Bell companies.

I want to talk about one problem that I kind of monitor, that I know something about, and I've heard about, where the Bell companies follow the letter of the law, but not the spirit of it, as they did, for example, when one CLEC attempted to share a tower. The Bell company in that case did give the CLEC access to the tower, but refused to share the entrance and the stairway into the tower. The CLEC was forced to create its own entrance and stairway at considerable time and expense. What we have here is a group of monopolistic companies who have essentially thumbed their noses at the legislation we passed 5 years ago.

I see no reason why those same companies should be rewarded for their anticompetitive actions at this time. Instead, we need to address these problems. And I think my amendment would do just that, by prohibiting the Bell companies from using any unreasonable impediments with regard to line sharing and unbundling. This does not impose an unattainable standard. It merely says that they must behave in a reasonable fashion when responding to requests to line share or to unbundle or to resell.

Mr. Chairman and Members, we talk a lot about small business in this Congress, and some of us talk a lot about minority business in this Congress. Those of us who are sent here by our constituents to just open up opportunities, to see that they get a little break, just a fair share, ask us to do what we can when we're making public policy, to give them an opportunity to do what America says they can do.

Well, I am disgusted with the kinds of actions that have taken place since 1996, where on the one hand, we have people that we have supported time and time again, who are always willing to come to our dinners and buy a table, but will do nothing to open up opportunity to small and minority business. I'm sick and tired of it, and I may be ruled out of order. I may be ruled out of order, and it may be clear, or it may be some question about whether or not we have jurisdiction. I don't think this interferes at all with the jurisdictional questions. But I want all of those Bell companies to know that I know what has been happening. I'm not pleased about it. You have done nothing to open up and share opportunities. You have done nothing substantial for minority business, and you have closed out small businesses from being able to share in this opportunity that we all sat here and voted for in 1996. And I don't like it. And if I don't get you today, I'll get you eventually. [Laughter.]

Mr. BOUCHER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman insist upon his point of order?

Mr. BOUCHER. Mr. Chairman, I do insist upon the point of order. Very briefly, I would say that this amendment deals with regulation only. It has nothing to do with the Attorney General's consultative role under section 271, and it is the consultative role that provides the basis of the referral to this Committee.

Chairman SENSENBRENNER. Anybody else on the point of order, because the Chair's already made up his mind? [Laughter.]

Mr. DELAHUNT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Massachusetts.

Mr. DELAHUNT. Just for a moment. I want to add something to the statement by the gentlelady from California.

Chairman SENSENBRENNER. The question is on the point of order raised by the gentleman from Virginia.

Mr. DELAHUNT. On the point of order—— [Laughter.]

Mr. DELAHUNT. I mean there has been testimony before this Committee which has not been refuted, that the mere introduction of Tauzin-Dingell had a devastating impact on new entrants by drying up access to capital. And there's a recent out by AEI and MIT that reports an 84 percent decline in capitalization over the last 14 months, among the largest CLECs, from 242 billion to 38 billion. And I think that emphasizes the point made by Ms. Waters.

Chairman SENSENBRENNER. The Chair is prepared to rule. The gentleman from Virginia, Mr. Boucher, raises a point of order that the amendment is not germane to the bill. The referral that has been given to us by the Speaker relates to the Attorney General's consultative power under section 271. The amendment proposed by the gentlewoman from California proposes to amend section 251 of the Telecommunications Act. It is outside the scope of the sequential referral that the Speaker has given this Committee. Therefore, it is not germane, and the Chair sustains the point of order by the gentleman from Virginia.

Are there further amendments to the bill?

If not, the Chair recognizes the gentleman from Utah, Mr. Cannon, for a motion.

Mr. CANNON. Thank you, Mr. Chairman. I move that the Committee report the bill, H.R. 1542, to the House with amendments and with the recommendation that the amendments be agreed to, and that the bill, as amended, not pass.

Chairman SENSENBRENNER. The question is on the motion. Those in favor will signify by saying aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the motion to report the bill as amended, unfavorably, is agreed to.

Without objection, the Chairman is authorized to move to go to conference pursuant to House rules, and without objection, the staff is directed to make any technical and conforming changes. All Members will be given 2 days, as provided by House rules, in which to submit additional dissenting supplemental or minority views.

I'll let the Chair state at this point in time that the sequential expires on June 18th. So if you wish to insert your prose in the Committee Report, that is a deadline that is established by the Speaker, and please meet it.

## ADDITIONAL VIEWS

We concur with the Committee's views and strongly endorse the Committee's unfavorable recommendation of H.R. 1542. To our knowledge, the Committee's last adverse report on a telecommunications-related bill was over twenty years ago on H.R. 6121,[1] the "Telecommunications Act of 1980," which would have severely undermined the Government's antitrust litigation that was then pending against AT&T, and which would have lifted critical portions of the 1956 judicial consent decree against AT&T. Now, as in 1980, this Committee must vigorously protect against legislation designed to benefit monopolists, impede competition, and hurt consumers. In 1980, the Committee's adverse report stopped H.R. 6121 dead in its tracks, and we envision history repeating itself here. No stronger message could have been sent to the House—H.R. 1542 is bad policy and bad for the people of the United States.

In its current form, H.R. 1542 destroys the bargain made in the Telecommunications Act of 1996 (the "1996 Act") by permitting the Bells to provide long distance data services before meeting the competitive checklist in section 271 of the 1996 Act. In doing so, the bill also eliminates the Attorney General's historic role in identifying anti-competitive behavior by the Bell companies. We support the Sensenbrenner Amendment because it restores the Attorney General's role by requiring the Bells to demonstrate that they have opened their local telephone monopoly to competition before they can offer long distance data services.[2] In effect, the market opening requirements of section 271 of the 1996 Act which were taken out of H.R. 1542, were re-imposed by the Sensenbrenner Amendment.

However, the Judiciary Committee's referral on H.R. 1542 was extremely limited, relating only to provisions that "propose[d] to narrow the purview of the Attorney General under section 271 of the Communications Act of 1934."[3] As a result, the Committee was unable to amend section 4 of the bill—arguably the most offensive portion of the bill.

We take this opportunity to put into context the historic role that the Judiciary Committee has played in ensuring that antitrust considerations are taken into account when setting telecommunications policy. We also expand on the two most egregious portions

---

[1] H.R. 6121, the "Telecommunications Act of 1980," H.Rept. 96–1252, pt. 2, 96th Cong. 2d Sess. (Oct. 8, 1980) (adversely reporting H.R. 6121 out of the Committee on the Judiciary).

[2] Under both Democratic and Republican leadership, this Committee has always voted on an overwhelmingly bipartisan basis to preserve the Department of Justice's role in ensuring that the telecommunications marketplace is open to competitors. We must not forget that it was the Department of Justice that brought the antitrust suit that ultimately broke up the old "Ma Bell" system. The Department of Justice, through Republican and Democratic Administrations alike, has applied its antitrust and telecommunications industry expertise to these markets, to foster competition and deter and redress anti-competitive activity. In 1996, when we considered the Telecommunications Act, the Committee voted overwhelmingly to give the Department of Justice a co-equal role with the FCC to review the Bell monopolies' entry into both voice and data long distance service.

[3] Cong. Rec. H2709, (daily ed. May 24, 2001).

of H.R. 1542 that were deemed to be outside the Committee's referral. First, section 4 of H.R. 1542 rolls back key portions of the 1996 Act regarding unbundling and line sharing, which likely will have a negative impact on competition in the telecommunications industry. Second, section 4 completely deregulates high speed data services offered by the Bell operating companies, which would deregulate two areas over which the Committee has repeatedly exercised jurisdiction: "spamming" and law enforcement in telecommunications. We therefore strongly oppose H.R. 1542 and urge the House, based upon our adverse recommendation, not to consider this bill.

## I. HISTORICAL BACKGROUND

From the late 19th century until the historic 1982 antitrust consent decree was entered, the American Telephone & Telegraph Company ("AT&T") dominated the American telecommunications market. The government made several efforts to control AT&T's monopoly power—a Department of Justice antitrust suit brought in 1913, the passage of the Communications Act of 1934, and a second Department of Justice antitrust suit brought in 1949. None of these efforts succeeded in opening the telecommunications market to effective competition.

Because AT&T continued to take advantage of its monopoly power to the detriment of consumers, DOJ brought a third antitrust action against AT&T in 1974. In the 1974 case brought by Republican Attorney General William Saxbe, the government sought, in part, to prevent AT&T from using its local telephone monopoly to discriminate against its competitors in long distance and equipment manufacturing and to use revenues from its regulated monopoly in local telephone service to subsidize its other non-regulated business ventures, a practice known as cross-subsidization. That action led to a settlement and consent decree entered in 1982 during the Reagan Administration.[4] This consent decree is commonly known as the Modification of Final Judgment or the "MFJ."

Under the terms of the MFJ, AT&T retained its long distance and manufacturing businesses, but divested itself of its local telephone exchange monopoly. Effective January 1, 1984, the local telephone exchange monopolies were taken over by seven regional Bell operating companies ("RBOCs")—NYNEX, Bell Atlantic, BellSouth, Ameritech, SBC Communications, Inc. (formerly known as Southwestern Bell), U.S. West, and Pacific Telesis.

The MFJ required an RBOC to demonstrate that there was "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter"[5] before it could enter four lines of business: (1) providing long distance service; (2) manufacturing or providing communications equipment and manufacturing customer premises equipment; (3) providing information services; and (4) entering into any other non-telecommunications

[4] *United States* v. *American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982) *aff'd*, 460 U.S. 1001 (1983)

[5] AT&T, 522 F. Supp. at 231.

business. The courts subsequently removed the restrictions on information services and non-telecommunications businesses.[6]

In the years following the MFJ, the long distance industry became highly competitive with the entrance of numerous companies offering consumers greater choices and lower prices. In contrast, the RBOCs resisted opening their networks to competitive providers of local telecommunications services, despite some Federal and State regulatory initiatives to require them to do so. As a result, the local telephone exchange market remained under monopoly control by the RBOCs.

The impetus for 1996 Act arose from the application and effect of the MFJ. The MFJ prevented the RBOCs from entering the long distance business because of their monopoly control over the local exchange. Congress structured the 1996 Act to offer the RBOCs a basic trade: the RBOCs were to open their exchanges to local competitors and, in return, they were to be allowed entry into the long distance market. The 1996 Act sought to accomplish this largely by two interrelated provisions. The first is section 251, which empowers the FCC to impose access and interconnection obligations on Incumbent Local Exchange Carriers ("ILECs," the largest of which were the RBOCs and GTE, before GTE merged with Bell Atlantic to form Verizon) to ensure competition in local exchange and exchange access carriers.[7]

The second "pro-competitive" provision of the 1996 Act is section 271, which presents the formal test by which the RBOCs can obtain authority to provide in-region long distance service. Elements of the test include: (1) compliance with a competitive checklist based in significant part on section 251's interconnection and unbundling requirements, which is designed to assure that the RBOC local exchange market is open to competition;[8] (2) existence of a "facilities based" competitor, or in the absence of such a competitor, a State-approved statement of generally available terms to interconnection and access;[9] (3) compliance with a separate affiliate requirement and non-discrimination safeguards described in section 272 of the Act;[10] and (4) a finding by the FCC that authorization is consistent with the "public interest, convenience and necessity." The 1996 Act requires the FCC to give "substantial

---

[6] *United States* v. *Western Electric Co.*, 767 F. Supp. 308, 327 32 (D.D.C. 1991) (removing information services bar), *aff'd*, 993 F. 2d 1572 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993); *United States* v. *Western Electric Co.*, 673 F. Supp. 525, 602–03 (D.D.C. 1987) (removing non-telecommunications business bar), *aff'd in relevant part*, 900 F. 2d 283 (D.C. Cir.), *cert. denied*, 498 911 (1990).

[7] Upon passage of the 1996 Act, section 251 was immediately tied up in litigation. Not until January 1999—nearly three years after enactment of the 1996 Act—did the U.S. Supreme Court rule that the FCC had the authority to prescribe crucial rules to implement section 251. *Iowa Utilities Board* v. *FCC*, 119 S. Ct. 721 (1999). Still pending before the Supreme Court is a separate challenge to the FCC's principles for pricing interconnection and network elements. *Verizon Communications, Inc., et al.* v. *FCC, et al.*, 219 F.3d 744 (8th Cir. 2000), *cert. granted*, Jan. 22, 2001. The uncertainty resulting from these lawsuits has delayed implementation of the market-opening requirements of the 1996 Act. Adding further to this delay and uncertainty, the RBOCs also challenged the constitutionality of section 271 as an unlawful bill of attainder, despite their support for the legislation at the time of enactment. These challenges were unsuccessful. *SBC Communications, Inc.* v. *FCC*, 154 F.3d 226 (5th Cir. 1998); *BellSouth Corp.* v. *FCC*, 162 F.3d 678 (D.C. Cir. 1998).

[8] See sections 271(c)(2)(B), 271(d)(3)(a)(ii).

[9] See sections 271(c)(1)(A) and (B).

[10] See section 271(d)(3)(b).

weight" to the Department of Justice's opinion in the ultimate determination regarding Bell entry.[11]

When the 1996 Act was enacted, many observers predicted that the RBOCs would quickly comply with the competitive checklist so that they could begin competing in long distance. The RBOCs also indicated that they planned to enter the cable television business. Observers also believed that the long distance companies would be able to obtain the interconnection and access to the incumbents' network elements necessary for the provision of local service. As for the cable companies, most observers hoped that some or all of them would enter the telephone business, and that they would face substantial competition in the cable business from satellite companies and telephone companies. Unfortunately, these developments largely have not come to pass.

Believing in the promise of the 1996 Act, companies who compete with the Bells to provide broadband service, called competitive local exchange carriers ("CLECs"), invested tens of billions of dollars, created 100,000 jobs, and began the enormously difficult work of providing choice to consumers and businesses. But today, most of those companies have been devastated by the anti-competitive behavior and procrastination of the Bell monopolies. Tens of thousands of newly created jobs disappeared, billions of dollars of value are gone, many CLECs are bankrupt, and the capital markets are nearly closed to many of the competitors.

The limited development of competition in the past five years is not an indication that the 1996 Act has failed. We continue to believe that the principles and procedures embodied in that statute, properly implemented and enforced, offer a foundation for a competitive telecommunications marketplace. Rather, what the past five years have shown is that legislating the removal of the legal barriers to entry does not by itself bring competition into being. Instead of seeing the RBOCs eager to enter each others' businesses, there has been a general reluctance to compete. While the RBOCs could have entered the long distance business by opening their local markets, they have largely chosen not to do so.

Consumer groups and CLECs have seen the Bells slow to open up their networks to competition, as is evidenced by the fact that more than 90% of long distance calls still go through some component of the Bells' network. While innovation has flourished and prices have been slashed in the area of long distance, the reverse has occurred in the local network. In addition, in the past five years, we have seen unprecedented industry consolidation. Instead of seven RBOCs and GTE, we now have only four: Verizon, BellSouth, SBC, and Qwest. This consolidation has also reduced the prospects for competition.

Now, some want to bring the same competition problems we have seen in the local loop to the broadband market. Broadband is the critical condition to bringing the promise of the Internet home to millions of American consumers and businesses through streaming audio and video and other high end uses. The last thing we need to do is bring the same high prices, shoddy service and stifling of

[11] *Id.*

innovation we have seen in the local telephone market to the high speed Internet market.

II. SECTION 4 OF H.R. 1542 SEVERELY HARMS COMPETITION BY ROLLING BACK THE UNBUNDLING AND LINE-SHARING REQUIREMENTS OF SECTION 251 AND BY PREEMPTING FCC AND STATE REGULATIONS

The Sensenbrenner Amendment greatly improved H.R. 1542 by restoring the Attorney General's role in the section 271 application process, thereby ensuring that the RBOCs open their networks to competition before being permitted to offer long distance data services. Unfortunately, due to the Committee's narrow referral on H.R. 1542, we were unable to address section 4 of the bill, which contains some of the most anti-competitive provisions.

First and foremost, the Sensenbrenner Amendment could not fix the portions of the bill that roll back the line-sharing and unbundling requirements contained in section 251 of the 1996 Act. Even as amended, H.R. 1542 would allow the Bells to continue to act as monopolists and abuse their power by denying competitors access to the local loop.

Second, the amendment could not correct the fact that H.R. 1542 would severely limit Federal and State authority to prevent "spamming" over high speed Internet services and to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. The remainder of this section discusses these problematic portions of H.R. 1542 that were unamendable due to the referral, yet clearly fall within the Committee's jurisdiction.

*H.R. 1542 Eviscerates the Market-Opening Requirements of Section 251 of the 1996 Act*

The Committee was unable to amend some of the most offensive portions of H.R. 1542 that dismantle the market-opening requirements of section 251 of the 1996 Act. section 251's "unbundling" and "line-sharing" requirements are the principal bases upon which many competitors (predominantly CLECs) are currently able to provide voice and data services that compete with the local phone companies (ILECs). H.R. 1542 undermines the unbundling and line-sharing requirements so severely that it could effectively kill off competition.

"Unbundling" is the requirement that the ILECs make the components of their networks available to competitors at cost-based prices. "Unbundled network elements" (or "UNEs") are the piece-part elements of the local phone network. They include the "local loop" that runs from people's homes to the ILEC's central office and the "trunk" that leads from the central office to the long distance phone network. Under the unbundling requirements of section 251, companies can lease the UNEs from the ILECs and use them in conjunction with facilities they own and deploy in order to provide competitive voice and data services. A CLEC also has the right under section 251 to "co-locate" its own equipment in the ILEC's central office.

Section 4(b) of H.R. 1542 rolls back the FCC's unbundling rules, depriving new entrants of access to the facilities (the UNEs) they

need to compete. Specifically, CLECs would no longer be able to lease various network elements available under current FCC rules to provide high speed data service. Under H.R. 1542, the only way that a company could provide such service would be to build an extensive network from scratch. No new entrant—not even a company that plans eventually to operate its own network—can be expected to build out that network before signing up a single customer. MCI and Sprint began as resellers of AT&T, building up a customer base and market credibility that enabled them to make the investments in their own networks. Local competition in high speed data services can develop the same way, but CLECs must have the same opportunities provided to the original long distance competitors.

Furthermore, section 4(b) could have an extremely harmful effect on competition for voice services as well as data services. This is because section 4(b) exempts the ILECs from providing the network elements used to provide high-speed data services. Network elements are often facilities (i.e. the loop and trunk) that are used for both voice and data services. It is impossible to distinguish between voice and data traffic, since they are both increasingly transmitted in digital form that consists of "ones" and "zeros." Almost every CLEC provides both voice and data services to their customers over the same facilities. If the CLEC cannot obtain a network element because that network element is used for data service, the inability to obtain that network element is almost certain to limit the CLEC's ability to provide voice services as well.

H.R. 1542 also places severe limitations on the "line-sharing" rules adapted by the FCC pursuant to section 251 of the 1996 Act. "Line-sharing" is the unbundling of the high frequency portion of the local loop used to provide high speed data service. CLECs lease this portion of the loop to provide digital subscriber line ("DSL") service to customers in competition with the ILECs. Line-sharing makes it much more convenient and much more economical for residential customers to get DSL. The FCC ordered the ILECs to allow competitors to line-share in November 1999. Since that time, residential DSL competition has exploded, with both the ILECs and competitors providing line-shared DSL.

To the extent that the lines between people's homes and the ILECs' central offices are all copper, competitors can access the high frequency portion of the loop at the central office. Recently, ILECs have begun to replace some of the copper lines with fiber-optic lines.[12] The lines that are closest to people's homes are still made of copper. The place where the fiber ends and the copper begins is referred to as a "remote terminal."[13]

When fiber is "pushed out" to remote terminals in neighborhoods, competitors must be able to locate their own DSL equipment in the remote terminals in order to provide DSL service, or they must be able to get access to their subscribers' data traffic in the central office. The FCC and several States have ruled that competitors must

[12] This yields benefits for consumers (faster, more available DSL service) and for the phone company (lower maintenance costs).

[13] The remote terminal is a piece of equipment that multiplexes the signals from several copper loops onto the fiber optic line. Currently, 35% of American homes are served by remote terminals with a mixed fiber/copper architecture, and this number is expected to grow rapidly, as the ILECs expand their plans to upgrade their facilities.

have access to remote terminals in order to continue to provide their DSL service.

H.R. 1542 would overturn these FCC and State decisions and make it more difficult for consumers to obtain high-speed service from competitors. H.R. 1542 would preclude line-sharing for customers that are served by hybrid copper/fiber loop facilities and remote terminals.[14] This would deny competitors the ability to serve those customers, who will remain captive to the ILECs, a monopolist provider, for voice and data service.

*H.R. 1542 Preempts FCC and State Regulations that Govern the Internet*

Section 4(a) of H.R. 1542 may be construed to completely deregulate high speed data services offered by the RBOCs.[15] As a result, a wide range of current consumer protection and other requirements may not apply to broadband services.[16] The Committee's narrow referral on H.R. 1542 prevented us from addressing our concerns in two areas that fall squarely within the Committee's jurisdiction: "spamming" and the Communications Assistance for Law Enforcement Act ("CALEA").

Unsolicited commercial electronic mail, or "spam," can impose significant economic burdens on Internet access services, businesses, and other recipients because of the finite volume of email that recipients can handle. This issue has recently been addressed by the Judiciary Committee. On May 23, 2001, the Committee marked up H.R. 718, the "Unsolicited Commercial Electronic Mail Act of 2001" to regulate the distribution of unsolicited commercial electronic mail messages. Yet despite the government's interest in protecting recipients from spam, section 4(a) of H.R. 1542 may severely restrict Federal efforts to regulate spam transmitted using the RBOCs" high speed data services.

Similarly, Congress enacted CALEA in 1994 to ensure that law enforcement officials with proper authorization are able to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. Section 4 of H.R. 1542

---

[14] Although the ILECs claim that it is technically infeasible to line-share over a mixed copper/fiber architecture, this is simply untrue. Competitors can access fiber networks by interconnecting their equipment with the ILECs' facilities in the central office where the fiber loops terminate. Competitors can also interconnect with fiber facilities at the remote terminals, where the copper lines meet up with the fiber. There are no technical impediments to these interconnections and, in fact, this is the same way that the Bells offer their own broadband services. Even Qwest Communications has recognized that competitors need access to loops in order to provide broadband service. See Comments of Qwest Communications at 3, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98–147, Second Further Notice of Proposed Rulemaking; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96–98, *Fifth Notice of Proposed Rulemaking* (filed Feb. 27, 2001). And Verizon has stated that an architecture of fiber and copper could be offered to competitive carriers. See Letter from Gordon R. Evans, Vice President, Federal Regulatory Affairs, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, Apr. 26, 2001, at 2, filed May 1, 2001 in connection with *Bell Atlantic/GTE Merger Order*, CC Docket No. 98–184.

[15] Section 4(a) provides that "[e]xcept to the extent that high speed data service, Internet backbone service, and Internet access service are expressly referred to in [the Communications] Act, neither the Commission, nor any State, shall have authority to regulate the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service, Internet backbone service, or Internet access service, or to regulate any network element to the extent it is used in the provision of any such service."

[16] These include subscriber privacy, foreign government ownership of telecommunications facilities, "slamming," obscene or harassing telephone calls, and services for hearing-impaired and speech-impaired individuals.

deregulates technologies that are used to provide high speed data services. These are the very technologies that Congress and this Committee intended CALEA to cover. Section 4 threatens the government's authority to implement and enforce CALEA, and therefore, also threatens the ability of law enforcement officials to conduct electronic surveillance of communications transmitted using high speed data services.

CONCLUSION

Competition should be our credo in telecommunications. It is the touchstone for lower prices, better services, and for unleashing the innovative creativity that has built our new economy from the ground up. And historically, it has been the role of this Committee to preserve those basic rules of competition. Unfortunately, the limited referral given to the Committee prevented us from amending or improving section 4 of H.R. 1542, which raises serious antitrust concerns that in any other context would be within the Committee's jurisdiction and will be in the future.

JOHN CONYERS, JR.
CHRIS CANNON
JERROLD NADLER
DARRELL E. ISSA

## DISSENTING VIEWS

I disagree with the motion approved by the Committee that the bill H.R. 1542 be reported unfavorably, but that the amendment to the bill adopted by the Committee be reported favorably. I would have preferred that the Committee report the bill favorably and without amendment. The bill that was referred to the Committee for consideration was a good piece of legislation, as it would promote competition and reduce regulation in order to encourage the rapid and widespread deployment of high-speed telecommunications networks.

### I. SECTION 271 AMENDMENT ADOPTED IN THE JUDICIARY COMMITTEE—A HARMFUL AMENDMENT

In the Committee, an amendment was adopted that I believe did significant harm to H.R. 1542. This amendment provides that a Bell operating company may not provide, on an interLATA basis, any high speed data service or Internet backbone service as authorized by H.R. 1542, until the Bell operating company (BOC) has filed an application with the Attorney General upon which the Attorney General has 90 days to act. The Attorney General may not approve an application, unless he/she determines that the applicant has demonstrated that it meets the substantive requirements of Section 271(c) and (d). "Substantive Requirements" mean the competitive checklist and the public interest test.

In my view, it is entirely inappropriate for Congress to turn the Department of Justice into a regulatory agency with a dispository role in such a process. When the 1996 Act was considered, such a decision-making role for the Justice Department was considered and rejected by both the House and the Senate in recorded votes. On June 13, 1995, while considering S.652, which was the Senate bill which went to Conference with House Bill H.R. 1555, the Senate defeated by a vote of 57–43, an amendment offered by Senator Thurmond, then Chairman of the Senate Judiciary Committee, to give the Department just such a dispository role. In the House, two months later, a similar result was reached on August 4, 1995 when a decision-making role for the Department in the interLATA long distance approval process was overwhelmingly defeated, by a vote of 271–151 [Roll Call No. 630].

A dispository and regulatory role for the Department of Justice was not a good idea then nor a good idea today. In fact, H.R. 1542 eliminates the Federal Communications Commission (FCC) from any regulatory role in this process with respect to the provision interLATA Internet backbone services. H.R. 1542 does this, because there is no need for any FCC review of Bell provision of these services, and because the elimination of these regulations will lead to increased consumer choice and competition in the interLATA backbone service market. Reimposing regulatory conditions prece-

dent as the Committee adopted amendment does will have the opposite effect.

The Committee adopted amendment will institute a totally new regulatory scheme, with the Attorney General as regulator in Chief. This is an unnecessary role for the Justice Department, as well as one that is needlessly regulatory, which is not warranted by the competitive circumstances in the first instance.

A major inhibiting and limiting factor to broadband deployment throughout the United States, which H.R. 1542 would eliminate, is the Local Access and Transport Area (LATA). The LATAs were created by the Modification of Final Judgment (MFJ), which settled the antitrust case brought against AT&T in 1974 and which resulted in the divestiture of the BOCs from AT&T. The Congress eliminated the applicability of the MFJ with the passage of the 1996 Act. One remnant does remain, however, as LATAs were transported largely intact to the FCC by the 1996 Act. The Bell System's territory was divided in 1983 into 163 LATAs which thus remain intact today.

The LATAs of 1983 have no relevance today to Internet traffic and the World Wide Web, and H.R. 1542 addresses and corrects that issue squarely. There was no commercial Internet in 1983 when LATAs were adopted by Judge Greene (560 F. Supp. 990, 994). Yet, they are being applied today to the Internet, and this is frustrating the deployment of broadband facilities, due to the fact that BOCs cannot cross these LATA lines with their data services. H.R. 1542 eliminates the LATA as such an obstacle.

## II. MAIN COMPONENTS OF H.R. 1542

H.R. 1542, the bill which I supported prior to its amendment by the Committee, has three main components. First, the bill broadly preempts, with certain narrow exceptions, State and federal regulation of high speed data service, Internet backbone service, and Internet access service. Second, the bill clarifies that Internet backbone and high-speed data services are not subject to the interLATA restriction in section 271 of the 1996 Act. Third, the bill ensures freedom of choice to Internet users by requiring each incumbent local exchange carrier to allow Internet service providers to interconnect with the incumbent local exchange carrier's high speed data service for the provision of Internet access service.

## III. WHY H.R. 1542 IS NEEDED

Until five years ago, local telephone service in the United States was largely a regulated monopoly. In each local service area, a single telephone company, known as an incumbent "local exchange carrier" or "LEC," was the dominant, if not the sole, provider of service. State regulators treated that company as a public utility—requiring it, for example, to provide basic local service to residential customers at relatively low rates. This system resulted in incumbent LECs providing the overwhelming share of local telephone service in each local service area. And because of concerns relating to the potential for discrimination by these providers of local service, the largest of them—the Bell operating companies ("BOCs") that had been divested from AT&T in 1984 pursuant to the Modi-

fication of Final Judgment—were precluded from, among other things, providing most interLATA services.

As part of the Telecommunications Act of 1996, Congress replaced this system with a pro-competitive, deregulatory framework for the provision of local and long distance telephone service. The overriding premise of the 1996 Act was and is that competition, not regulation, is best suited to ensure low prices and improved services.

At the same time as it enacted these measures to facilitate local voice competition, the 1996 Act also took steps to increase competition in long distance. In particular, Congress recognized that, except for a few services that were uniquely related to the local voice telephone market—in particular, long distance voice service—there was no reason to prohibit the BOCs from providing interLATA services. Moreover, even as to those services that were related to BOC control over the local voice market, the Act allowed BOCs to provide such services, provided that the BOC could show, on a state-by-state basis, compliance with a precisely delineated 14-point checklist designed to ensure that the local market in question was open to competition.

Although the primary purpose of these provisions is clear—to facilitate local and long-distance competition—in the five years since the enactment of the 1996 Act, the FCC has taken a number of steps that contradict that purpose. First, the FCC has substantially diminished, if not eliminated, any incentive a new entrant may have to deploy its own local service facilities. At the same time that it adopted policies that have deterred sustainable, facilities-based local competition, the FCC also put off the long-distance competition that the Act envisions. As noted above, the 1996 Act allows a BOC to provide interLATA services in an in-region State if it can demonstrate to the FCC that it has satisfied the 14-point checklist. The FCC has, however, expanded that 14-point checklist beyond recognition, thereby delaying BOC entry into long-distance far beyond anything Congress envisioned in 1996. H.R. 1542 is needed to address these problems of implementation of the 1996 Act.

## IV. INTERNET BACKBONE SERVICES

The FCC has construed the 1996 Act to preclude BOCs from providing in-region interLATA Internet backbone services and high-speed data services, absent FCC approval pursuant to section 271. As with the FCC's treatment of incumbent LEC provision of high-speed Internet access, this interpretation is contrary to the de-regulatory intent of the 1996 Act. The 1996 Act lifted the prohibition on BOC provision of interLATA services, except where Congress determined that an interLATA market was uniquely related to local voice service. The Internet backbone market is not such a market. Because the BOCs' historic control over the local exchange provides no inherent advantage in the Internet backbone market, there is no basis on which to continue to restrict their provision of interLATA high-speed or Internet backbone services.

The immediate entry of BOCs into the Internet backbone market will increase consumer choice and enhance public welfare. This is why I opposed the Committee-approved amendment requiring prior Justice Department review. The Internet backbone is highly con-

centrated, with the bulk of backbone revenues as well as ISP connections resting in the hands of a few major providers. With their broad geographic reach, BOCs are well suited to compete in this market, especially in those areas of the country that have limited backbone capacity. BOC entry into the Internet backbone market will increase competition in the market, leading to lower prices and improved service. In addition, this prohibition places the BOCs at a further disadvantage to competing providers of high-speed data services and Internet access services. All of these providers, including the cable providers that dominate high-speed services are allowed to provide Internet backbone as part of their service offerings. H.R. 1542 thus exempts high-speed data services and Internet backbone services from section 271 of the 1996 Act.

## V. CHOICE OF INTERNET SERVICE PROVIDERS

Consumers will benefit not just from the widespread deployment of high-speed data networks, but also from a choice of Internet service providers that can provide service over those networks. Historically, such a choice has not been available to customers that receive high-speed Internet access from cable operators. H.R. 1542 accordingly guarantees Internet service providers the opportunity to interconnect with incumbent LECs' high-speed data services for the provision of Internet access services, and it requires incumbent LECs to allow Internet users to subscribe to any Internet service provider that interconnects with the incumbent LECs' high-speed data service.

## VI. GOLDWASSER DECISION

I am also concerned with the section of the Committee adopted amendment that seeks to "fix" the *Goldwasser* case problem. I believe this section attempts to fix a problem that does not exist. The amendment attempts to address a small portion of a single decision by a single panel of a single Court of Appeals in a case the losing parties chose not to take to the Seventh Circuit en banc or to the United States Supreme Court for review on the record. The decision in question is *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

There have been repeated suggestions that the decision is very broad—that is, that it exempts the entire telecommunications industry or portions of that industry from antitrust scrutiny. Stated differently, the assertion has been made that the Goldwasser opinion creates some sort of "implied immunity" for conduct that would otherwise be subject to antitrust remedies because that conduct violates the antitrust laws. In my view, this is not the case.

The Court in the *Goldwasser* case declared and held that :

> Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust law. Such a conclusion would be troublesome at best given the antitrust savings clause in the statute. It is that the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws. Those duties do not conflict with the antitrust laws either; they are simply more specific and far-reaching obligations that Congress believed would accelerate the de-

velopment of competitive markets, consistently with universal service (which, we note, competitive markets would not necessarily assure).

There is no way to read this explicit rejection by the *Goldwasser* court of "implied immunity" as an activist attempt to undo the 1996 Act or its savings clause. This language explicitly rejects implied immunity and explicitly recognizes and applies the savings clause. The savings clause, after all, does not suggest that duties created under the 1996 Act shall be considered to be and enforced as antitrust laws. The savings clause essentially states the new law does not displace existing duties under the antitrust laws or prevent them from being enforced as they were before the 1996 Act took effect.

Having rejected implied immunity, the *Goldwasser* court considered whether the plaintiffs had stated an antitrust claim—that is, a claim under the antitrust laws that was based on the violation of duties that existed under those laws. The plaintiffs claimed that they had alleged such a claim under a doctrine known as the "essential facilities" doctrine. The problem with the plaintiffs' essential facilities claim, however, was that the competitors actually did have access to the specific facilities alleged to be essential through the specific processes established under the 1996 Act. Those processes not only provided for access in general but specified the precise manner in which both price and nonprice terms of access would be established and enforced. In short, the claims that plaintiffs portrayed as "freestanding" antitrust claims were nothing of the sort. The so-called freestanding claims were instead "inextricably linked to the claims under the 1996 Act." *Id.*

Nothing in this decision suggests that telecommunications carriers are immune from liability for conduct that violates the antitrust laws. The need for the Committee's action to overrule that case, therefore, does not exist.

The Internet is a significant engine of growth in the nation's economy. That growth depends, however, on competition—in particular, on telecommunications carriers competing with one another to deploy the high-speed data networks that can carry the ever-increasing amount of data traffic sought to be transmitted over the Internet. The purpose of the bill that was referred to us was to facilitate that competition, by implementing a de-regulatory framework for the provision of Internet backbone services and high-speed data and Internet access services, and by ensuring that all providers of such services are allowed to compete on an equal footing, regardless of the technology or platform they use to provide service. The amendment adopted by the Committee would render this framework ineffective. Consequently, we need prompt passage of this important legislation without the inclusion of the Committee's amendment in order to keep this economic engine running at maximum speed.

BOB GOODLATTE

○