

AMERICAN BROADBAND COMPETITION ACT OF
2001 AND THE BROADBAND COMPETITION
AND INCENTIVES ACT OF 2001

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1698 and H.R. 1697

MAY 22, 2001

Serial No. 19

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

U.S. GOVERNMENT PRINTING OFFICE

72-614 PS

WASHINGTON : 2001

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: (202) 512-1800 Fax: (202) 512-2250
Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., WISCONSIN, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., MICHIGAN
GEORGE W. GEKAS, Pennsylvania	BARNEY FRANK, Massachusetts
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
STEVE CHABOT, Ohio	MELVIN L. WATT, North Carolina
BOB BARR, Georgia	ZOE LOFGREN, California
WILLIAM L. JENKINS, Tennessee	SHEILA JACKSON LEE, Texas
ASA HUTCHINSON, Arkansas	MAXINE WATERS, California
CHRIS CANNON, Utah	MARTIN T. MEEHAN, Massachusetts
LINDSEY O. GRAHAM, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
SPENCER BACHUS, Alabama	ROBERT WEXLER, Florida
JOE SCARBOROUGH, Florida	TAMMY BALDWIN, Wisconsin
JOHN N. HOSTETTLER, Indiana	ANTHONY D. WEINER, New York
MARK GREEN, Wisconsin	ADAM B. SCHIFF, California
RIC KELLER, Florida	
DARRELL E. ISSA, California	
MELISSA A. HART, Pennsylvania	
JEFF FLAKE, Arizona	

TODD R. SCHULTZ, *Chief of Staff*

PHILIP G. KIKO, *General Counsel*

JULIAN EPSTEIN, *Minority Chief Counsel and Staff Director*

CONTENTS

MAY 22, 2001

OPENING STATEMENT

The Honorable F. James Sensenbrenner, Jr., a Representative in Congress From the State of Wisconsin, and Chairman, Committee on the Judiciary ...	1
--	---

WITNESSES

The Honorable Terry S. Harvill, Commissioner, Illinois Commerce Commission	
Oral Testimony	4
Prepared Statement	6
The Honorable William P. Barr, Executive Vice President and General Counsel, Verizon Communications	
Oral Testimony	44
Prepared Statement	46
Mr. Jeffrey Blumenfeld, Partner, Blumenfeld and Cohen	
Oral Testimony	50
Prepared Statement	51
Mr. John F. Malone, President and Chief Executive Officer, The Eastern Management Group	
Oral Testimony	56
Prepared Statement	60

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Insert from Mr. John F. Malone	
Wall Street Journal, Yochi J. Dreazen, "Bells' Rivals Double Local Market Share", May 22, 2001	59
Insert from the Honorable John Conyers, Jr., A Representative in Congress From the State of Michigan	
Los Angeles Times Editorials "Ma Bell's Arrogance, Multiplied", April 27, 2001	84
USA Today, "Public Pays Price as Baby Bells Stifle Competition", April 25, 2001	85
MSNBC, "And the broadband played on. . ." Opinion by Brock N. Meeks, April 25, 2001	86
Insert from the Honorable Bob Goodlatte, a Representative in Congress From the State of Virginia	
Press Release - Federal Communications Commission, May 21, 2001 "Federal Communications Commission Releases Latest Data on Local Telephone Competition"	98
Affidavit of Dr. Niel Ransom, Alcatel, USA, Inc., State of Illinois Commerce Commission, Docket No. 00-0393	101
Insert from the Honorable Terry Harvill, Commissioner, Illinois Commerce Commission	
Commissioner Harvill's response to questions submitted by Mr. Goodlatte ...	108

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

Statement of the Honorable F. James Sensenbrenner, Jr., a Representative in Congress From the State of Wisconsin and Chairman, Committee on the Judiciary	119
---	-----

IV

	Page
Statement of the Honorable John Conyers, Jr., a Representative in Congress	
From the State of Michigan	119
Statement of the Honorable Chris Cannon, a Representative in Congress	
From the State of Utah	120
Statement of the Honorable Bob Goodlatte, a Representative in Congress	
From the State of Virginia	121
Statement of the Honorable Rick Boucher, a Representative in Congress	
From the State of Virginia	122
Statement of the Honorable Sheila Jackson Lee, a Representative in Congress	
From the State of Texas	123

MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter submitted to Chairman Sensenbrenner from the League of Wisconsin	
Municipalities dated June 11, 2001	126
Answers to Post Hearing Questions	128

AMERICAN BROADBAND COMPETITION ACT OF 2001 AND THE BROADBAND COMPETITION AND INCENTIVES ACT OF 2001

TUESDAY, MAY 22, 2001

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

The Committee met, pursuant to notice, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. Today, the Committee holds a hearing on H.R. 1698, the "American Broadband Competition Act of 2001", also known as the Cannon-Conyers bill, and H.R. 1697, the "Broadband Competition and Incentives Act of 2001", also known as the Conyers-Cannon bill.

Last week, Speaker Hastert announced his intention to refer to this Committee H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, also known as the Tauzin-Dingell bill. Shortly after the recess, we will hold a hearing on that bill.

We are considering all of these bills because of our jurisdiction over the antitrust laws. On this Committee, we do not look to regulations to solve economic problems. Rather, we believe in removing roadblocks to open competition so that markets will solve economic problems.

It is with that in mind that we turn to the problem of broadband. I want to ensure that all Americans get high-speed broadband service as quickly as possible, while at the same time maintaining competition and choice in that market. Both of the bills before us today, as well as the Tauzin-Dingell proposal, seek that same goal. The question is which, if any of them, will work.

Contrary to what some have suggested, I have not decided that question for myself. Rather, I want to hear all the evidence. In the last couple of months, I spent a full day at AT&T headquarters in New Jersey and a full day at SBC headquarters in Texas trying to learn more about this question. I have scheduled these 2 days of hearings and am still learning.

Above all, whatever legislation we pass must lead us to a world in which individual consumers with choices freely decide market outcomes. At a minimum, we must reverse the Seventh Circuit recent decision in the *Goldwasser* case. That decision directly contradicts the clear Congressional intent that antitrust laws should continue in force in this industry. *Goldwasser* simply reads the antitrust savings clause out of the law and it must be corrected.

All who follow this issue should be on notice that the Judiciary Committee has always exercised its jurisdiction in this area and will continue to do so vigorously this year. This sector of our economy achieved its current vibrancy because of the application of the antitrust laws, specifically in the AT&T breakup decision of the 1980's. Only through the continued application of the antitrust expertise of this Committee, the Justice Department, and the FTC will that free market vibrancy continue, and I fully intend to see that it does.

With that, I will turn to Mr. Conyers for his opening statement, and in doing so, I would like to thank him and his staff for their contributions to our jurisdictional efforts in this area. The gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman and Members of the Committee and witnesses and friends. I start off by thanking Chairman Sensenbrenner for calling the hearing, for exercising excellent leadership in protecting the Committee's historic jurisdiction over competition in the telecommunications industry.

If you don't like the unregulated monopoly control of your local telephone market, which leads to high prices, shoddy service, less innovation, then you'll hate the Tauzin bill, which will create a mirror image of that exact same monopoly control in DSL broadband.

A little history. The Bell system was created intentionally as a monopoly by the government, protected against competition, and it was sued by the Justice Department three times for antitrust violations and was judged to be an illegal monopoly by the Federal courts in 1984, when it was broken into seven regional Bells plus AT&T.

In 1996, Congress again found the Bells to have monopoly control over the essential facility of the local loop. A Republican Congress then said that it was critical to competition that the monopoly's facilities be open to competitors. Five years after passage of the 1996 law, we have seen the fruits of competition in almost all areas of telecommunications, with the notable exception of local telephone service.

What was seven Bell companies and GTE have been reduced by merger to four behemoths. These companies now control in excess of 90 percent of the wires into our Nation's homes and businesses. While innovation has flourished and prices have been slashed in the area of long distance, exactly the reverse has occurred in the local network. The road to local competition has been littered with scores of bankrupt companies and tens of thousands of lost jobs.

The other bill would effectively transfer, effectively duplicate the monopoly over local telephone service into broadband DSL services. That's why I say if you don't like the unregulated monopoly control of your local telephone market, which leads to high prices, shoddy service, and is less innovative, then you will not like the Tauzin bill because it effectively eliminates the 1996 requirements in section 251 and section 271 that the local monopoly facilities be open to competitors. It's a license to monopolists to exclude.

Therefore, the bills introduced by myself and my colleague, Mr. Cannon, take a different approach. It says that the monopolists don't get the right to exclude if they control over 85 percent of the

market, market control that would be sufficient for most any court in an antitrust case utilizing the “essential facility” analysis.

They reiterate the bipartisan consensus that emerged in 1996 that antitrust laws are preserved, that a liberal regulatory apparatus will not insulate a monopolist from antitrust scrutiny, and the bills provide greater incentives not found in the Tauzin approach to broadband roll-outs, and the bills provide for a rapid resolution of disputes.

Competition should be almost our religion in telecommunications. It should be our credo. It is the touch-tone 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, and I welcome the testimony of all the witnesses. Thank you, sir.

Chairman SENSENBRENNER. Thank you.

Chairman SENSENBRENNER. Our panel today consists of four distinguished witnesses. The first witness is Commissioner Terry Harvill of the Illinois Commerce Commission. Commissioner Harvill has a Bachelor’s and a Master’s degree from Illinois State University. Before being appointed to the Commission, he served on its staff, as well as on the staff of Governor Jim Edgar of Illinois. He was appointed to the Commission in 1998 and serves through 2003.

Our second witness is Mr. Bill Barr, the Executive Vice President and General Counsel of Verizon. Mr. Barr has a Bachelor’s and Master’s degree from Columbia University and a law degree from George Washington University. After law school, he clerked for Judge Malcolm Wilkie of the D.C. Circuit. He has a long and distinguished career in public service both at the Central Intelligence Agency and the Department of Justice, culminating with his service as Attorney General of the United States from 1991 to 1993. Before coming to Verizon, he was with the GTE Corporation and also in private practice with the Washington law firm of Shaw, Pittman, Potts and Trowbridge.

Our third witness is Mr. Jeff Blumenfeld, a partner in the Washington law firm of Blumenfeld and Cohen. Mr. Blumenfeld is a graduate of Brown University and the University of Pennsylvania Law School. After serving as an Assistant United States Attorney and an attorney in the Antitrust Division, he founded his own law firm in 1984. In that capacity, he represents a wide variety of clients in the telecommunications field and also serves as an adjunct professor at the Georgetown University Law School.

Our fourth witness is Mr. John Malone, the President and Chief Executive Officer of the Eastern Management Group, a telecommunications consulting firm. He holds a Bachelor’s and MBA degree from the University of Dayton. He spent 10 years with AT&T before founding his current company in 1979. The firm consults with all types of telecommunications companies, and Mr. Malone is recognized as one of the leading consultants in this area.

Gentlemen, would you please all stand and raise your right hand and take the oath. Do you and each of you solemnly swear that the testimony that you are about to give to this Committee will be the

truth, the whole truth, and nothing but the truth, so help you, God?

Mr. HARVILL. I do.

Mr. BARR. I do.

Mr. BLUMENFELD. I do.

Mr. MALONE. I do.

Chairman SENSENBRENNER. Let the record show that each of the witnesses answered in the affirmative.

Without objection, the Chair is granted authority to recess the Committee at any time during this afternoon's meeting, and without objection, each of your written statements will be included in that part of the record where your testimony appears. I would ask each of you to summarize your testimony in about 5 minutes or so, and first up is Commissioner Harvill.

TESTIMONY OF THE HONORABLE TERRY S. HARVILL, COMMISSIONER, ILLINOIS COMMERCE COMMISSION, CHICAGO, ILLINOIS

Mr. HARVILL. Good afternoon, Mr. Chairman, Ranking Member Conyers, and other distinguished Members of the Committee. Thank you for inviting me here today to discuss H.R. 1697, the "Broadband Competition and Incentives Act of 2001", and H.R. 1698, the "American Broadband Competition Act of 2001." I appreciate the opportunity to provide a State commission perspective on this important issue.

My name is Terry Harvill and I'm a Commissioner with the Illinois Commerce Commission. The Illinois Commerce Commission is the State of Illinois' public utility agency which is responsible for several financial and service aspects of investor-owned electricity, natural gas, telephone, water, and sewer utilities.

I'm also an economist, and as a general premise, I prefer competition to regulation. I believe that markets should be defined not by regulators, but by consumers. I believe that markets should be free from government interference. However, I also believe that regulation, in the absence of fully-developed competitive markets and when consistent with the public interest, should be permitted to function as a substitute for certain aspects of competition. These two beliefs are not inconsistent.

Congress showed tremendous leadership when it passed the Telecommunications Act of 1996, a landmark statute that balanced the concerns of consumers with the competitive interests of many competitive telecommunications companies. The act considers the deployment of telecommunications services in a competitively and technologically neutral manner. Rather than designating monopolistic providers with specific technologies, the act allows consumers to choose providers and technologies for their telecommunications needs.

In addition, the act requires Incumbent Local Exchange Carriers, or ILECs, to grant competitors access to their networks and lease the components of that network at reasonable prices. After demonstrating their networks are sufficiently open to competition, the ILECs would then be allowed to enter into the long distance market.

Unfortunately, the progress over the past 5 years has been slow. Explanations for this slow progression vary according to industry interest. Competitive Local Exchange Carriers, or CLECs, claim that the ILECs, unwilling to abide by the market-opening provisions of the act, utilize the regulatory and legal process to delay their market entry and limit their ability to compete. Conversely, ILECs argue that the lack of robust competition is due, in part, to the CLECs' defective and inadequate business plans. While a combination of the two is probably—excuse me, while the combination of the two positions is more likely the case, we're faced with the reality of sparse and sporadic competition.

Lost in the cacophony, however, is the fact that the act is working. Over the past several months, the FCC has granted interlata relief to certain ILECs in four States and a fifth application is pending. Competition for business consumers is beginning to emerge for large consumers throughout the cities in the United States. Although the pace is below the level for which we had hoped, the act—the fact remains that the Act is functioning as intended. This progress should be allowed to continue. I ask that you not confuse frustration regarding the slow pace with the misinformed conclusion that the act has become counterproductive to its intended goals.

Today, I call upon you to allow the markets to develop and leave the act as written. In my opinion, government intercession is not necessary at this time and would create more harm than good. Specifically, any major modification to the act or to the competitive safeguards contained in the act would diminish the vital incentives for the ILECs to meet their obligations to open their local markets. Equally important, major modification would also jeopardize the ability of providers to provide competition to the ILECs.

However, if any modification of the act could be justified, it would be to emphasize and provide additional incentives for continued infrastructure improvements by adding broadband capabilities to existing networks. One such area for modification is the enforcement provisions intended to induce competitive behavior from the ILECs. H.R. 1697 and 1698 would not only maintain the core market opening requirements of the act, but they would also offer effective incentives for the deployment of advanced services.

Specifically, H.R. 1697 would prevent any ILEC from entering the long distance market for either voice or data until its market share reached 85 percent or below. Correspondingly, 1698 would enhance the antitrust remedies available to both the Department of Justice and telecommunications carriers seeking to avail themselves to competitive opportunities created by the enactment of the Telecommunications Act.

The nascent competitive telecommunications market as envisioned by the Telecommunications Act of 1996 should be allowed to develop as Congress intended. To the extent that broadband services continue to be provided over the voice network, the opportunity for unfettered competition should continue. Without competitive guidelines, it's unlikely that millions of Americans will ever experience the intended benefits of the act, and that would be an unnecessary travesty.

Thank you, and I'd be happy to answer any questions you may have.

Chairman SENSENBRENNER. Thank you, Commissioner.
[The prepared statement of Mr. Harvill follows:]

PREPARED STATEMENT OF TERRY S. HARVILL

Good afternoon, Mr. Chairman, Ranking Member Conyers, and other distinguished Members of the Committee. Thank you for inviting me here today to discuss H.R. 1697, the "Broadband Competition and Incentives Act of 2001" and H.R. 1698, the "American Broadband Competition Act of 2001." I appreciate the opportunity to provide a state commission perspective on these two important pieces of legislation. My name is Terry Harvill, and I am a Commissioner with the Illinois Commerce Commission. The Illinois Commerce Commission is the state of Illinois' Public Utility Commission and regulates several financial and service aspects of investor-owned electricity, natural gas, telephone, water, and sewer utilities.

I am also an economist, and, as a general premise, I prefer competition to regulation. I believe that markets should be defined not by regulators but by consumers. I believe that markets should be free from government interference. However, I also believe that regulation, in the absence of fully developed competitive markets and when consistent with the public interest, should be permitted to function as a substitute for certain aspects of competition. These beliefs are not inconsistent.

Congress showed tremendous leadership when it passed the Telecommunications Act of 1996—a landmark statute that balanced the concerns of consumers with the competitive interests of myriad telecommunications companies. The Act considers the deployment of telecommunication services in a competitively and technologically neutral manner. Rather than designating monopolistic providers with specific technologies, the Act allows consumers to choose providers and technologies for their telecommunication needs. In addition, the Act requires incumbent local exchange carriers or ILECs to grant competitors access to their networks and to lease their network components at reasonable prices. After demonstrating that their networks are sufficiently open to competitors, the ILECs would be allowed to enter long-distance markets.

Unfortunately, progress over the past five years has been slow. Explanations for this slow progression vary according to industry interests: competitive local exchange carriers or CLECs claim that the ILECs, unwilling to abide by the market-opening provisions of the Act, utilize the regulatory and legal process to delay their market entry and limit their ability to compete. Conversely, the ILECs argue that the lack of robust competition is due, in part, to the CLECs' defective and inadequate business plans. While a combination of the two positions is more likely the case, we are faced with the reality of sparse and sporadic competition. Lost in the cacophony, however, is the fact that the Act is working. Over the past several months, the FCC has granted interLATA entry to certain ILECs in four states, and notice of a fifth application was filed just recently. Competition for business consumers is beginning to emerge in the larger cities throughout the United States. Although the pace is below the level for which we had hoped, the fact remains that the Act is functioning as intended. This progress should be allowed to continue. I ask that you not confuse frustration regarding this slow pace with the misinformed conclusion that the Act has become counterproductive to its intended goals.

Today, I call upon you to allow the markets to develop and leave the Act as written. In my opinion, government intercession is not necessary at this time and would create more harm than good. Specifically, any major modification to the competitive safeguards found in the Act would diminish the vital incentives for the ILECs to meet their obligations to open local markets; equally important, major modification would also jeopardize the ability of providers to offer competition to the ILECs. As a result, the imperative competition that has spurred technological innovation, and thereby propelled the deployment of advanced services, will be delayed or perhaps suspended. Consumers will ultimately lose, since the expected benefits of the Act, such as increased consumer choice, better customer service, and reduced prices, may never materialize.

However, if any modification to the Act could be justified, it would be to emphasize and provide incentives for continued infrastructure improvements by adding broadband capabilities to existing networks. One such area for modification is the enforcement provisions intended to induce competitive behavior of the ILECs. As written, the Act contains no real penalties if the ILECs fail to open their markets. H.R. 1697 and 1698 would not only maintain the core market-opening requirements

of the Act, but they would also offer effective incentives for the deployment of advanced services.

Specifically, H.R. 1697 would prevent any ILEC from entering the long-distance market for either data or voice until its market share in the state dropped below 85 percent. This legislation recognizes two critical elements of the emerging telecommunications market. First, it recognizes the fact that DSL and the deployment of advanced services, as a whole, are dependent on the local loop networks provided by the ILECs. This legislation would prohibit monopolistic local telephone providers from expanding their reach into the interLATA data services market without first showing that their networks are, in fact, open to competition. Second, H.R. 1697 recognizes the increasing convergence of voice and data transmissions. Given the difficulty in distinguishing data from voice transmission, any exemption from the Act could easily be expanded to include basic voice transmissions thereby eliminating the original intent of the Act. Such a result would prove disastrous for consumers.

In addition, H.R. 1697 would promote competition in rural and underserved areas by creating incentives for companies to deploy advanced services. To this end, H.R. 1697 develops powerful incentives for the deployment of advanced services to those areas.

Correspondingly, H.R. 1698 would enhance the antitrust remedies available to both the Justice Department and telecommunications carriers seeking to avail themselves of competitive opportunities created by the enactment of the Act. By removing any antitrust defenses based on the Communications Act of 1934, and by banning the joint marketing of advanced telecom services with an ILEC's other telecommunication and information services and those of its affiliates, H.R. 1698 would expand the disincentives for anticompetitive behavior by the ILECs. Furthermore, by creating arbitration panels for the resolution of disputes based on Section 252 interconnection agreements, the bill would offer the parties a potent alternative to the state commission processes currently available under the Act. The alternative dispute resolution process could also provide positive outcomes, such as promoting consistent policy decisions across a multi-state region and resolving disputes between carriers more quickly, thereby expediting the development of competition.

The nascent competitive telecommunications market, as envisioned by the Telecommunications Act of 1996, should be allowed to develop as Congress intended. To the extent that broadband services continue to be provided over the voice network, the opportunity for unfettered competition must continue. Without competitive guidelines, it is unlikely that millions of Americans will ever experience the intended benefits of the Act. That would be an unnecessary travesty.

Thank you.



N A R U C
National Association of Regulatory Utility Commissioners

Nora Mead Brownell, *President*
Pennsylvania Public Utility Commission
William M. Nugent, *First Vice President*
Maine Public Utilities Commission
David A. Standa, *Second Vice President*
Michigan Public Service Commission

Allan T. Thomas, *Treasurer*
Iowa Utilities Board
Charles D. Gray, *Executive Director*
Washington, D.C. Office

May 7, 2001

The Honorable W.J. "Billy" Tauzin
Chairman, House Energy and Commerce Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Tauzin:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we write to reaffirm our opposition to the Internet Freedom and Broadband Deployment Act, "the Tauzin-Dingell bill." This bill seriously undermines the key local market opening requirements contained in the Telecommunications Act of 1996 ("the Act"), and guarantees years of costly and time-consuming litigation. In addition, the bill does nothing to stimulate deployment of advanced services in rural areas.

1. H.R. 1542 THREATENS STATE OVERSIGHT OF VOICE SERVICES AND COULD POTENTIALLY RAISE LOCAL PHONE RATES.

H.R. 1542 preempts state commission authority to regulate "the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service or Internet access service, or to regulate the *FACILITIES* used in the provision of either such service." The next paragraph then says, "Nothing in this section shall be construed to limit or affect the authority of any State to regulate voice telephone exchange SERVICES..."

These two sections contradict one another. The facilities used to provide DSL services are the same facilities used to provide voice services. This contradiction between "facilities" and "services" will unquestionably lead to costly litigation over the *scope* of state authority to set local telephone rates. When coupled with the provision to exempt the Bell companies from their market opening requirements, this bill will compromise the state's ability to safeguard local telephone rates where competitive alternatives do not exist. The bill's conflicting definitions of "internet" and "internet access," only further exacerbates the problem.

2. THIS BILL PERMITS BELL COMPANIES TO SOLIDIFY THEIR POSITION AS DOMINANT PROVIDERS OF VOICE AND DSL SERVICES.

The purported goal of H.R. 1542 is to provide the Bell companies incentives to invest the capital needed to upgrade their systems for DSL service for rural and underserved areas. The Bell companies already control at least 75% of the DSL market *and most analysts expect them to pick up the bulk of any new DSL business*. Exempting them from their line sharing, unbundling and resale requirements can only assure that expectation is realized.

A New Paradigm Resources Report released earlier this month entitled "CLEC REPORT 2001" - affirms only few competitors will survive the current economic downturn unscathed. Eight competitors are already operating under Chapter 11 bankruptcy protection and eleven DSL providers are now out of business. Conversely, according to a recently released IGI Consulting Report, the residential data market is still strong with Verizon reporting record DSL sales of 180,000 plus - "even in the first quarter of 2001, supposedly in the middle of the downturn." This bill will accelerate these trends.

Some Bell companies are still reluctant to comply with the current law and open their networks to new entrants. Exempting them from their market-opening obligations virtually eliminates any hope of local voice or DSL competition in the future. Other Bell companies are committing significant resources to open networks, and we would not like to see those efforts reduced or discontinued as a result of this bill.

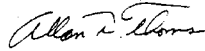
We again urge you to consider the serious constraints this bill will place on the ability of state commissions to protect consumers and promote competition in the voice and DSL markets.

Thank you for your consideration of our concerns. If you have any questions about the status of broadband deployment, local competition, or service quality in your district, please do not hesitate to contact any one of us or your state commission.

Sincerely,



Joan Smith, Chair
NARUC Telecommunications
Committee,
Commissioner, Oregon PUC



Allan Thoms, Vice Chair
NARUC Telecommunications Committee
Chairman, Iowa Utilities Board



Nora Brownell, President
NARUC
Commissioner, Pennsylvania PUC



Thomas Dunleavy, Vice Chair
NARUC Telecommunications Committee
Commissioner, New York PSC



N A R U C

National Association of Regulatory Utility Commissioners

Nora Mead Brownell, *President*
 Pennsylvania Public Utility Commission
 William M. Nugent, *First Vice President*
 Maine Public Utilities Commission
 David A. Svanda, *Second Vice President*
 Michigan Public Service Commission

Allan T. Thoms, *Treasurer*
 Iowa Utilities Board
 Charles D. Gray, *Executive Director*
 Washington, D.C. Office

April 24, 2001

The Honorable W.J. "Billy" Tauzin
 Chairman
 House Energy and Commerce Committee
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Chairman Tauzin:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we respectfully urge you not to cosponsor or support the Internet Freedom and Broadband Deployment Act, sponsored by Reps. Tauzin and Dingell. This bill preempts state commission authority to regulate all rates, charges, terms and conditions for high speed data services including the facilities used in the provision of such services.

This bill will seriously undermine key local telephone market opening requirements contained in the Telecommunications Act of 1996 ("the Act"), and guarantee years of costly and time-consuming litigation. In addition, the bill does nothing to stimulate or assure deployment of advanced services in rural areas.

1. THE "TAUZIN/DINGELL" BILL THREATENS TELECOMMUNICATIONS COMPETITION BY GUTTING KEY MARKET-OPENING PROVISIONS IN THE 1996 ACT.

As proponents have conceded, *The Internet Freedom and Broadband deployment Act eliminates a major incentive for the Bell Companies to open their local markets to competition.* Section 271 of the Act is designed to open local phone markets. That section currently requires the Bell companies to comply with a 14-point market-opening checklist before being allowed to provide long-haul transmission of data or voice across LATA boundaries. The "Tauzin/Dingell" bill eliminates those requirements with respect to data services severely undermining efforts to fully open local markets for competitive entry.

Bell Companies in five states with widely varying demographics have already passed the Section 271 checklist. To date, New York, Massachusetts, Texas, Oklahoma, and Kansas can now provide cross-LATA voice and data services. There are more applications pending throughout the country. Indeed, an April 12, 2001 Precursor © Group estimate suggests that the Bell companies will file for Section 271 authorization in all but one of the remaining states where they currently lack authorization to move voice or data traffic across LATA boundaries by the second quarter of 2002. It suggests that all will have met the checklist requirements by the second quarter of 2003.

In the Qwest region, 13 states have begun region-wide OSS testing with competitors to solve the technical requirements of interconnection as a prelude to individual State PUC approval of Qwest entry into cross-LATA voice and data services. There is no urgent need to pass this bill and undermine the process that Congress envisioned in 1996.

**2. NOTHING IN CURRENT LAW PREVENTS BELL COMPANIES FROM PROVIDING
ADVANCED SERVICES TO CONSUMERS TODAY.**

The current law does not prevent Bell Companies from providing broadband services to customers. They are only prevented from carrying data traffic across a LATA boundary. Indeed, the Bell companies have had digital subscriber line (DSL) technology for several years. However, only recently, in response to competitive pressure from cable modem service, have local telephone companies begun aggressively deploying DSL.

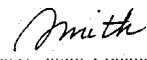
Local competition is the fastest way for consumers to obtain broadband services at competitive prices. The "Tauzin/Dingell" bill would actually inhibit the deployment of advanced services because it reduces the incentives for RBOCS to open their local markets to competition. In fact, Bell companies have already aggressively deployed broadband facilities in their home urban markets and are actively marketing high speed Internet access in the areas where they face competition.

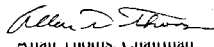
In conclusion, we urge you not to cosponsor this bill and support the continued growth and innovation stemming from the pro-competitive measures in the 1996 Act that Congress worked so hard to pass. Competition will eventually eliminate the need for regulation of broadband services. Exempting these services from Section 271 requirements can only further delay the arrival of competition. *Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral way – not by removing the Bell's incentives to open their local markets.*

We are enclosing a copy of a resolution passed by the National Association of Regulatory Utility Commissioners (NARUC) last March opposing this legislation. This resolution articulates the concerns that all state public service commissions have about this bill.

Thank you for your prompt attention to our concerns. If you have any questions about the status of broadband deployment or the status of local competition in your district, please do not hesitate to contact any one of us or your state commission. You may call Jessica Zufolo at 202-898-2205 in the NARUC Washington office for further details about how to reach us or your state commission colleagues.

Sincerely,


Jean H. Smith, Commissioner
Oregon PUC
Chair, NARUC Telecommunications Committee


Allan D. Thomas, Chairman
Iowa Utilities Board,
Vice Chair, NARUC
Telecommunications Committee

Attachment: NARUC Resolution



N A R U C
National Association of Regulatory Utility Commissioners

R E S O L U T I O N

Resolution Regarding Broadband Legislation In The 106th Congress

WHEREAS, The stated goal of the Telecommunications Act of 1996 (1996 Act) is to provide for a pro-competitive, deregulatory framework "designed to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"; and

WHEREAS, Several bills being considered in Congress would amend the 1996 Act to allow the Bell Operating Companies (BOCs) to provide in-region, interLATA data services without first having to comply with the market-opening requirements of the 1996 Act, including the fourteen point "competitive checklist" requirements of Section 271; and

WHEREAS, Some of these bills also contain provisions that would limit State commissions from enforcing the market-opening requirements of Section 251 for data and advanced services, thereby denying States from fulfilling their obligations to regulate core telecommunications facilities used to provide both voice and data services, and to promote deployment of advanced telecommunications capabilities; and

WHEREAS, Soon the majority of traffic carried over the public switched network will be sent over packet-switched networks, and as such, technical distinctions between voice and data will become less relevant; and

WHEREAS, State commissions have been at the forefront of implementing and enforcing the market-opening requirements of the 1996 Act and in working with the BOCs and competitive local exchange carriers to advance BOC progress towards compliance with those requirements; and

WHEREAS, In approving Bell Atlantic's application to provide in-region, interLATA services in New York, the FCC made it clear that it will rely heavily on the factual record developed by State commissions and the States' rigorous analysis of the evidence in considering whether to grant future 271 applications; and

WHEREAS, The FCC also stated that it will work in concert with the States to monitor post-interLATA entry compliance by the BOCs; and

WHEREAS, Southwestern Bell recently filed its Section 271 application with the FCC, following an extensive review by the Texas Public Utility Commission, and several other States presently are reviewing BOC compliance with Section 271 requirements; and

WHEREAS, In addition to the coordinated effort on Section 271, the States and the FCC have established a joint conference to cooperatively address the numerous and complex issues

associated with the development and deployment of advanced telecommunications capabilities to all Americans, consistent with the objectives outlined in Section 706 of the 1996 Act; and

WHEREAS, This unprecedented level of coordination and cooperation by State and Federal regulators to (1) implement the market-opening requirements of the Act, (2) promote and ensure BOC compliance with Section 271, and (3) foster the deployment of advanced telecommunications capabilities to all Americans, demonstrates that the 1996 Act is working as Congress intended; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its March 2000 Winter Meeting in Washington, D.C., reaffirms its support for the 1996 Act; *and be it further*

RESOLVED, That the NARUC opposes federal legislation that would permit the Bell Operating Companies to provide data services across LATA boundaries without first fully opening their local markets to competition as currently required under the 1996 Act; *and be it further*

RESOLVED, That the NARUC further opposes federal legislation that would limit the ability of State public utility commissions from exercising their authority and resources to fulfill their obligation to regulate core telecommunications facilities used to provide both voice and data services and to promote deployment of advanced telecommunications capabilities.

*Sponsored by the Committees on Telecommunications and Finance and Technology
Adopted by the NARUC Board of Directors March 8, 2000*



STATE OF ILLINOIS

Office of the Chairman & Commissioners

Illinois Commerce Commission

April 30, 2001

The Honorable J. Dennis Hastert
 Speaker of the House
 2389 Rayburn House Office Building
 Washington, D.C. 20515-1314

Dear Speaker Hastert:

On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act"). These requirements, mandating Bell companies to demonstrably open their local markets to competition prior to receiving authority to provide the services authorized by H.R. 1542, are a driving force behind the deployment of broadband services today, and are currently leading to the development of local competition across Illinois.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 attempts to circumvent obligations under the Act which prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- Give monopoly carriers free rein to enter long distance data markets without any of the safeguards contained in the Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology. Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. This bill undermines that competition.
- Pre-empt state commission authority to regulate not only high-speed data services, but also interexchange voice telephone services carried over a packet switch network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a

April 30, 2001
Page 2

unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at its destination using the identification and sequencing information.

- Eliminate the Federal law which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent local telephone company network.
- Drastically reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.
- Endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid deployment of competitive broadband services to consumers.

In sum, we respectfully urge you to oppose this ill-conceived "broadband relief" measure and to support the growth and innovation stemming from the Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,


Chairman Richard L. Mathias


Commissioner Terry S. Harvill


Commissioner Ruth K. Kretschmer


Commissioner Mary Frances Squires



Office of the Chairman & Commissioners

Illinois Commerce Commission

April 30, 2001

The Honorable Richard J. Durbin
United States Senator
364 Russell Senate Office Building
Washington, D.C. 20510-1304

Dear Senator Durbin:

On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act"). These requirements, mandating Bell companies to demonstrably open their local markets to competition prior to receiving authority to provide the services authorized by H.R. 1542, are a driving force behind the deployment of broadband services today, and are currently leading to the development of local competition across Illinois.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 attempts to circumvent obligations under the Act which prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- Give monopoly carriers free rein to enter long distance data markets without any of the safeguards contained in the Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology. Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. This bill undermines that competition.
- Pre-empt state commission authority to regulate not only high-speed data services, but also interexchange voice telephone services carried over a packet switch network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a

April 30, 2001
Page 2

unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at its destination using the identification and sequencing information.

- Eliminate the Federal law which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent local telephone company network.
- Drastically reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.
- Endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid deployment of competitive broadband services to consumers.

In sum, we respectfully urge you to oppose this ill-conceived "broadband relief" measure and to support the growth and innovation stemming from the Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the Act for Bell companies to open their local markets to competition.

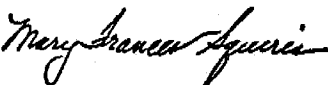
Thank you for your consideration of this matter.

Sincerely,


Chairman Richard L. Mathias


Commissioner Terry S. Harvill


Commissioner Ruth K. Kretschmer


Commissioner Mary Frances Squires



Public Service Commission
State of North Dakota

COMMISSIONERS

Susan E. Wefald, President
Leo M. Reinbold
Anthony T. Clark

Executive Secretary
Jon H. Mielke

600 E Boulevard Ave. Dept. 408
Bismarck, North Dakota 58505-0480
web: www.psc.state.nd.us
e-mail: sub@psc.state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

May 17, 2001

The Honorable Byron L. Dorgan
United States Senate
713 Hart Office Building
Washington, D.C. 20510

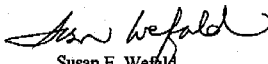
Dear Senator Dorgan:

We are forwarding to you the following letter that we recently sent to Representative Pomeroy. It is regarding HR 1542, the "Internet Freedom and Broadband Deployment Act of 2001."

While we understand that this piece of legislation is currently not before the Senate, we wanted to make you aware of our concerns. As always, please let us know if we can be of assistance to you on utility matters.

Sincerely,


Tony Clark
Commissioner


Susan E. Wefald
President


Leo M. Reinbold
Commissioner

Enclosure



Office of the Chairman & Commissioners

Illinois Commerce Commission

April 30, 2001

The Honorable Henry J. Hyde
Member of Congress
2110 Rayburn House Office Building
Washington, D.C. 20515-1306

Dear Congressman Hyde:

On behalf of the Illinois Commerce Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("the Act"). These requirements, mandating Bell companies to demonstrably open their local markets to competition prior to receiving authority to provide the services authorized by H.R. 1542, are a driving force behind the deployment of broadband services today, and are currently leading to the development of local competition across Illinois.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 attempts to circumvent obligations under the Act which prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- Give monopoly carriers free rein to enter long distance data markets without any of the safeguards contained in the Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology. Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. This bill undermines that competition.
- Pre-empt state commission authority to regulate not only high-speed data services, but also interexchange voice telephone services carried over a packet switch network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a

April 30, 2001
Page 2

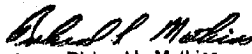
unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at its destination using the identification and sequencing information.

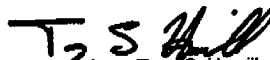
- Eliminate the Federal law which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent local telephone company network.
- Drastically reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.
- Endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This line sharing requirement is critical to the rapid deployment of competitive broadband services to consumers.

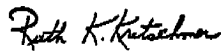
In sum, we respectfully urge you to oppose this ill-conceived "broadband relief" measure and to support the growth and innovation stemming from the Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,


Chairman Richard L. Mathias


Commissioner Terry S. Harvill


Commissioner Ruth K. Kretschmer


Commissioner Mary Frances Squires



Public Service Commission
State of North Dakota

COMMISSIONERS

Susan E. Wefald, President
Leo M. Reinhold
Anthony T. Clark

Executive Secretary
Jon H. Mielke

May 17, 2001

600 E Boulevard Ave. Dept. 408
Bismarck, North Dakota 58505-0480
web: www.psc.state.nd.us
e-mail: sab@oracle.psc.state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

The Honorable Earl Pomeroy
United States House of Representatives
1110 Longworth Building
Washington, DC 20515

Dear Congressman Pomeroy:

The North Dakota Public Service Commission urges you to oppose HR 1542, the "Internet Freedom and Broadband Deployment Act of 2001." If enacted, this bill will thwart our efforts to bring local competition and broadband services to customers throughout North Dakota. In addition, the bill does nothing to stimulate deployment of advanced services in rural areas.

- **H.R. 1542 threatens the balance struck by the Telecommunications Act of 1996.**

When Congress passed the 1996 Act, it carefully crafted an incentive based approach, known as the 14-point checklist, to encourage Bell companies like Qwest in North Dakota, to open their local networks to competition. The act specifies that the Bells meet this rigorous checklist, ensuring that competitors have the ability to enter into the local telephone market. The FCC makes final determination on whether the incumbent local phone company has complied, but it does so upon a record and recommendation built by state commissions. H.R. 1542 undermines this competitive process that Congress worked so hard to construct when it passed the 1996 Act.

HR 1542 would deregulate data traffic prior to a Bell company meeting the obligations of the 14-point checklist. As Internet usage increases among consumers and businesses, data traffic will surpass voice communications by 2002. Deregulation of this traffic would dramatically diminish local oversight of telecommunications companies that to date have retained virtual control over local network.

- **H.R. 1542 will thwart years of hard work and resources spent on the multi-state 271 collaborate project in the Qwest region.**

Qwest has not yet submitted a 271 application to the North Dakota Commission. However, we are working with Qwest and the 14 states in the Qwest region to build the record on which we will make our recommendation once Qwest does apply (perhaps as early as the fourth quarter of this year).

To date, North Dakota is participating in three collaborative efforts with other states in the Qwest region to facilitate this application. We are concerned that HR 1542 seriously undercuts this investment by gutting critical provisions of the 1996 Act.

The Honorable Earl Pomeroy

Page 2

May 17, 20001

- **H.R. 1542 preempts state authority to protect consumers and promote competition and technology in telecommunications.**

The legislation preempts the authority of the North Dakota legislature and commission by creating vast limitations on state or FCC authority regarding data and digitized traffic. For example, it would exempt the Bells from resale and network unbundling requirements that currently are applicable to high-speed data.

This undermines efforts to require incumbent carriers to "line-share," which is a process by which a portion of the local loop is leased by a competitor for the provision of technology such as DSL. Line sharing is critical to the deployment of broadband in North Dakota. In fact, services like DSL have been available for years, but have only recently been made available to consumers, precisely because competition forced incumbent carriers to do so.

- **HR 1542 limits state oversight of voice services and could raise local phone rates.**

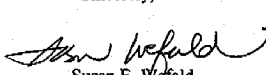
H.R. 1542 preempts state authority to regulate "the rates, charges, terms, or conditions for, or entry into the provision of, any high speed data service or Internet access service, or to regulate the *FACILITIES* used in the provision of either such service." The legislation's next paragraph then says; "Nothing in this section shall be construed to limit or affect the authority of any State to regulate voice telephone *exchange SERVICES*..."

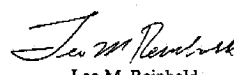
These two sections contradict one another. The facilities used to provide DSL services are the same facilities used to provide voice services. This contradiction between "facilities" and "services" will unquestionably lead to costly litigation over the *scope* of state authority to set local telephone rates. When coupled with the provision to exempt the Bell companies from their market opening requirements, this bill will compromise the state's ability to safeguard local telephone rates where competitive alternatives do not exist. The bill's conflicting definitions of "internet" and "internet access," only further exacerbates the problem.

For these reasons, we respectfully urge you to not support H.R. 1542. If we can be of any assistance to you on this or any other utility issue, please do not hesitate to contact us.

Sincerely,


Tony Clark
Commissioner


Susan E. Wefald
President


Leo M. Reinhold
Commissioner



April 24, 2001

The Honorable W.J. Tauzin
Chairman
Energy & Commerce Committee
U. S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Tauzin:

As you prepare to hold a hearing on the "Internet Freedom and Broadband Deployment Act of 2001," in the Energy and Commerce Committee, AARP would like to make you aware of some concerns we have with the legislation as drafted. Our concerns are not with the goal of the legislation, which is to accelerate the deployment of broadband services to all consumers, but rather with the means by which the legislation proposes to achieve that result.

If enacted, this bill would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 (the Act). The legislation currently being considered would allow the Regional Bell Operating Companies (RBOCs) to provide interLATA data services without fulfilling the Section 271 checklist requirements of the Act. AARP has been a strong supporter of the Telecommunications Act, believing that residential consumers are beginning to see promised benefits of competition. We lent support to Verizon's successful Section 271 application in New York in 1999 and are pleased to see that the RBOCs are fulfilling the Act's requirements in other states as well.

AARP is also concerned that enactment of the Internet Freedom and Broadband Deployment Act of 2001 may adversely impact competition for local telephone service. As drafted, the legislation puts at risk the line-sharing requirements that allow competitors into the local exchange market. Absent these requirements it is unlikely that a truly competitive marketplace will continue to develop, leading to market power concerns and the attendant pressures to increase local rates. Adding provisions in the legislation to discourage the RBOCs from foreclosing competition in the local markets would serve to benefit a large segment of AARP's members.

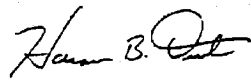
601 E Street, NW Washington, DC 20049 (202) 434-2277 www.aarp.org
Esther "Tess" Canja, President Horace B. Deets, Executive Director

Finally, AARP believes that passage of this legislation is unnecessary. Currently, there is nothing in the 1996 Act that prohibits the RBOCs from providing Digital Subscriber Line (DSL) service to the customers that they now serve. In fact, they are doing so today, competing with other providers in their efforts to satisfy the needs of consumers for high-speed Internet access. AARP believes that legislative language focusing on the enforcement of service quality standards in the provision of DSL service would be helpful to consumers, many of whom have been frustrated in their efforts to achieve high-speed Internet access.

AARP appreciates the Chairman's efforts to accelerate the deployment of broadband technologies to a greater percentage of the population. Efforts to close the "digital divide" while providing residential ratepayers with the Internet access they desire are to be applauded. However, AARP believes that the Internet Freedom and Broadband Deployment Act of 2001, as currently drafted, is not the best means to accomplish this goal.

We look forward to continuing to work with the Committee to find an approach that will bring technological advances to all Americans without endangering the framework that serves to stimulate the competitive marketplace that we all desire.

Sincerely,

A handwritten signature in dark ink, appearing to read "Horace B. Deets". The signature is fluid and cursive, with the first name "Horace" and last name "Deets" clearly distinguishable.

Horace B. Deets

STATE OF FLORIDA

E. LEON JACOBS, JR.
CHAIRMAN



CAPITAL CIRCLE OFFICE
CENTER
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6046

Public Service Commission

April 23, 2001

The Honorable Robert Wexler
United States House of Representatives
213 Cannon House Office Building
Washington, D.C. 20515

RE: The Internet Freedom and Broadband Deployment Act.

Dear Representative Wexler:

On behalf of the Florida Public Service Commission (FPSC), we urge you to consider some of our questions regarding the Internet Freedom and Broadband Deployment Act to be sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). We suggest that you carefully scrutinize the bill before considering signing on as a co-sponsor. The requirements in Section 271 of the Telecommunications Act of 1996 (the Act) mandate that Bell companies demonstrate they have opened their local markets to competition prior to receiving relief from restrictions against providing InterLATA (local access and transport area) service. These requirements are valuable tools to help achieve local competition, which may be undermined by the bill in question.

We have not yet received a draft of the bill, so we do not know whether its provisions will be identical to those contained in last year's H.R. 2420. However, based on the presumption that the legislation will be similar to H.R. 2420, we note the following potential areas of concern:

- The bill may give a monopoly carrier the ability to enter long distance data markets without any of the safeguards contained in the Act. Only recently, and primarily in response to competitive pressures, have local telephone companies begun aggressively deploying digital subscriber line (DSL) technology. Local competition is the fastest and most effective stimulus for consumers to obtain broadband services at competitive prices. This bill could undermine development of local competition.
- The bill may diminish local oversight of telecommunications companies that to date have retained dominant control over local markets. The Internet uses packet switching, in which the "conversation" may include both voice and data traffic. This may result in the commingling of voice transmission over the same facility. Currently, over one-half of the traffic on the network is data. This is expected to climb to over 90% by 2005.

The Honorable Robert Wexler
 Page 2
 April 23, 2001

- The bill may eliminate the federal provision which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent's local telephone company network.
- The bill may reduce incentives for Bell companies to meet their obligations to open local markets. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies may largely lose the incentive to open their local markets to competition. Weakening incentives to open local markets may result in ALECs leaving the market. Every alternative local exchange company (ALEC) has to interface with the RBOC in order to provide service. Currently, ALECs only have 6 percent of the market in Florida.
- The bill may harm pro-consumer policies. Should this Act contain the same language as H.R. 2420, it could put at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. Elimination of the line sharing requirement could decrease the rate of deployment of competitive broadband services to residential consumers.

Furthermore, a statutory change does not appear necessary to achieve the stated purpose of the legislation. Under current telecommunications law, Bell companies are not prevented from providing broadband services to customers if such broadband services do not cross LATA boundaries. In fact, Bell companies are aggressively deploying this very same broadband technology in their home markets where new competitors are offering competing services.

In Florida, local telecommunications competition and the deployment of advanced services by both RBOCs and CLECs is in its infancy. The FPSC has been given the responsibility to promote local competition. We are implementing this mission in several ways. We are currently in the midst of setting prices for unbundled network elements for BellSouth, we have conducted extensive testing of BellSouth operations support systems (OSS), and we are readying to make an expedited decision on a BellSouth 271 application. Through these and other efforts, we believe that we can foster increased local competition and promote the timely deployment of advanced services.

We note that overall, Florida ranks well above the national averages in broadband deployment, number of broadband providers, and lines. According to FCC data, 87% of Florida zip codes are served by at least one broadband provider, 69% are served by one to three providers, and 13% are served by at least 4 providers. These percentages are above the national averages of 59%, 49%, and 4%, respectively. Florida has 100% more ADSL providers, 200% more cable providers, and 40% more types of traditional wireline, optical, satellite, and fixed wireless providers than the national averages. Florida also has 260% more broadband lines than the national average.

Before considering co-sponsorship of any "271 relief" legislation, you may want to obtain answers to the following questions:

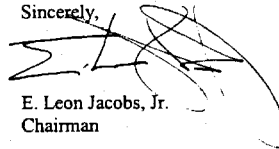
The Honorable Robert Wexler
Page 3
April 23, 2001

- Does the bill undermine the incentives for Bell operating companies to open their local markets to competition?
- Would the Regional Bell Operating Companies lose their incentive to open up their markets if the data traffic were allowed across LATA boundaries?
- Does this bill harm, rather than help, competition in broadband deployment? If so, does that impede broadband deployment to rural areas?
- While the Florida Public Service Commission does not "regulate" the Internet, wouldn't the preemptive language in the bill keep the FPSC from overseeing the nondiscriminatory application of terms and conditions in tariffs for high-speed data services?
- Does the bill take away the regulatory leverage to spur the Bell companies to open up their markets?

In sum, we respectfully urge you to be cautious about this "RBOC relief" legislation. We note that NARUC has passed a resolution against such legislation. Last year, 30 state commissions filed comments against passage of H.R. 2420. It is important to note that when an efficiently operating competitive market is achieved, legislation like that proposed in H.R. 2420 in 1999, might be appropriate. Until that time, we believe that incentive regulation and state participation may well be the best way to ensure that local competition is achieved. Bills like H.R. 2420 have laudable goals, but they could also derail the work that state commissions are currently doing to achieve local competition and they could lessen the incentives for RBOCs to seek 271 approval for voice traffic. We urge you to consider the impact this type of legislation could have in regard to preempting not only the efforts of the FPSC, but more importantly, preempting the Florida Legislature in these matters.

Thank you for your consideration. We would be happy to provide further information about Florida's activities on Section 271 and local competition upon request.

Sincerely,



E. Leon Jacobs, Jr.
Chairman

ELJ:CBM:jm



STATE OF WASHINGTON

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

1300 S. Evergreen Park Dr. S.W., P.O. Box 47250 • Olympia, Washington 98504-7250
 (360) 664-1160 • TTY (360) 586-8203

May 4, 2001

The Honorable Jennifer Dunn
 U.S. Representative
 1501 Longworth House Office Building
 Washington, DC 20515

Dear Representative Dunn:

On behalf of the Washington Utilities and Transportation Commission, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act of 2001, sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). If enacted, H.R. 1542 would seriously undermine key market opening requirements contained in the Telecommunications Act of 1996. The 1996 Act requires Bell companies to show that they have effectively opened their local markets to competition prior to receiving authority to provide interLATA services in their regions.

Current telecommunications law does not prevent Bell companies from providing broadband services to customers, if those broadband services do not cross LATA boundaries. In fact, Bell companies have already deployed this very same broadband technology in their home markets where new competitors are offering competing services. H.R. 1542 circumvents obligations under the 1996 Act. These obligations prevent Bell companies from providing the long-haul transmission of data across LATA boundaries within their own serving areas until they have opened their markets to competition.

If enacted, H.R. 1542 would:

- ▶ Significantly reduce incentives for Bell companies to meet their obligations to open local markets. Data traffic already comprises roughly half of all telecommunications traffic today. If Congress weakens the long distance entry requirements of the 1996 Act with this proposed exception for data communications services, the Bell companies will largely lose the incentive to open their local markets to competition.
- ▶ Give local monopoly carriers the opportunity to enter long distance data markets without key safeguards contained in the 1996 Act. For several years local telephone companies have possessed digital subscriber line (DSL) technology.

Only recently and primarily in response to competitive pressure have local telephone companies begun aggressively deploying DSL. Local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. This bill undermines that competition.

- Potentially preempt state commission authority to regulate not only high-speed data services *but also interexchange voice telephone services carried over a packet switch network*. Packet switching is the way the Internet works. In packet switching, the conversation (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a unique identification and each packet carries its own destination address. The packets are reassembled in proper sequence at their destination using the identification and sequencing information.

In sum, we respectfully urge you to oppose this ill-conceived measure and to support the growth and innovation stemming from the 1996 Act that is beginning to benefit American telephone consumers. We firmly believe that enactment of this legislation will harm competition by destroying the carefully crafted incentives of the 1996 Act for Bell companies to open their local markets to competition.

Thank you for your consideration of this matter.

Sincerely,


Marilyn Showalter
Chairwoman


Richard Hemstad
Commissioner

cc: Charles Gray, Executive Director, NARUC

COMMISSIONERS:

LAUREN "BUBBA" McDONALD, JR., CHAIRMAN
 ROBERT B. BAKER, JR.
 D. L. BURGESS
 BOB BURDEN
 STAN WISE



DEBORAH K. FLANNAGAN
 EXECUTIVE DIRECTOR

HELEN O'LEARY
 EXECUTIVE SECRETARY

Georgia Public Service Commission

(404) 656-4501
 1 (800) 282-5613

244 WASHINGTON STREET, S.W.
 ATLANTA, GEORGIA 30334-5701

FAX: (404) 656-2341
 www.psc.state.ga.us

May 2, 2001

The Honorable Bob Barr
 House of Representatives
 1207 Longworth House Office Building
 Washington, DC 20515

Dear Representative Barr:

I respectfully urge you not to cosponsor or support H.R. 1542, the Internet Freedom and Broadband Deployment Act, sponsored by Reps. Tauzin and Dingell. This bill preempts state commission authority to regulate all rates, charges, terms and conditions for high speed data services including the facilities used in the provision of such services.

This bill will seriously undermine key local telephone market opening requirements contained in the Telecommunications Act of 1996 ("the Act"), and guarantee years of costly and time-consuming litigation. In addition, the bill does nothing to stimulate or assure deployment of advanced services in rural parts of Georgia.

**1. THE "TAUZIN/DINGELL" BILL THREATENS TELECOMMUNICATIONS
 COMPETITION BY GUTTING KEY MARKET-OPENING PROVISIONS IN THE 1996 ACT.**

As proponents have conceded, *The Internet Freedom and Broadband deployment Act eliminates a major incentive for the Bell Companies to open their local markets to competition.* Section 271 of the Act is designed to open local phone markets. That section currently requires the Bell companies to comply with a 14-point market-opening checklist before being allowed to provide long-haul transmission of data or voice across LATA boundaries. The "Tauzin/Dingell" bill eliminates those requirements with respect to data services severely undermining efforts to fully open local markets for competitive entry.

Bell Companies in five states with widely varying demographics have already passed the Section 271 checklist. To date, New York, Massachusetts, Texas, Oklahoma, and Kansas can now provide cross-LATA voice and data services. There are more applications pending throughout the country. Indeed, an April 12, 2001 Precursor © Group estimate suggests that the Bell companies will file for Section 271 authorization in all but one of the remaining states where they currently lack authorization to move voice or data traffic across LATA boundaries by the second quarter of 2002. It suggests that all will have met the checklist requirements by the second quarter of 2003.

In the Qwest region, 13 states have begun region-wide OSS testing with competitors to solve the technical requirements of interconnection as a prelude to individual State PUC approval of Qwest entry into cross-LATA voice and data services. There is no urgent need to pass this bill and undermine the process that Congress envisioned in 1996.

2. NOTHING IN CURRENT LAW PREVENTS BELL SOUTH FROM PROVIDING ADVANCED SERVICES TO CONSUMERS TODAY.

The current law does not prevent Bell Companies from providing broadband services to customers. They are only prevented from carrying data traffic across a LATA boundary. Indeed, the Bell companies have had digital subscriber line (DSL) technology for several years. However, only recently, in response to competitive pressure from cable modem service, have local telephone companies begun aggressively deploying DSL.

Local competition is the fastest way for consumers to obtain broadband services at competitive prices. The "Tauzin/Dingell" bill would actually inhibit the deployment of advanced services because it reduces the incentives for RBOCS to open their local markets to competition. In fact, Bell companies have already aggressively deployed broadband facilities in their home urban markets and are actively marketing high speed Internet access in the areas where they face competition.

3. THE "TAUZIN/DINGELL BILL WOULD MAKE IT IMPOSSIBLE FOR STATE PUC'S TO KEEP BASIC RATES FROM SKYROCKETING.

The bill expressly preempts state commission authority to oversee the nondiscriminatory application of terms and conditions in tariffs for high-speed data services. There may also be the risk that there might be commingling of voice transmission over the same facility. Packet switching is the way the Internet works. In packet switching the "conversation" (which may be voice, video images, data, etc.) is sliced into small packets of information. Each packet is given a unique identification and each packet carries its own destination address.

Currently, over one half of the traffic on the network is data. This is expected to climb to over 90% by 2002. Deregulation of this traffic would dramatically diminish local oversight of telecommunications companies that to date have retained dominate control over local markets.

Since voice and data is indistinguishable over the network, it is likely that at least some voice services will be provided using Internet protocols. These services may not fit within the definition of "telephone exchange service," a terms that presupposes the traditional circuit-switched telephone network of copper loops and central office switches. Under the bill, even if Internet-based telephone service replaces conventional service as a basic mode of local telecommunications, State Commissions would be powerless to protect consumers against higher rates or poor service quality.

In conclusion, we urge you not to cosponsor this bill and support the continued growth and innovation stemming from the pro-competitive measures in the 1996 Act that Congress worked so hard to pass. Competition will eventually eliminate the need for regulation of broadband services. Exempting these services from Section 271 requirements can only further delay the arrival of competition. *Congress should address broadband deployment to rural and urban areas directly and in a competitively and technologically neutral way – not by removing the Bell's incentives to open their local markets.*

We are enclosing a copy of a resolution passed by the National Association of Regulatory Utility Commissioners (NARUC) last March opposing this legislation. This resolution articulates the concerns that all state public service commissions have about this bill.

Thank you for your prompt attention to our concerns. If you have any questions about the status of broadband deployment or the status of local competition in your district, please do not hesitate to contact me.

Sincerely,

Stan Wise
Georgia Public Service Commissioner

TENNESSEE REGULATORY AUTHORITY

Sara Kyle, Chairman
Lynn Greer, Director
Melvin Malone, Director



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

May 8, 2001

The Honorable William L. Jenkins
United States Representative
1708 Longworth House Office Building
Washington, DC 20515-4201

Dear Representative Jenkins:

On behalf of the Tennessee Regulatory Authority, we respectfully urge you to oppose H.R. 1542, the Internet Freedom and Broadband Deployment Act, sponsored by Representatives Tauzin and Dingell. As you know, we sent a letter last year articulating serious concerns regarding H.R. 2420, the identical predecessor to H.R. 1542 as introduced. Several amendments offered to improve the bill failed or were ruled out of order at a markup session held by the House Telecommunications Subcommittee on April 26, 2001. If enacted as currently amended, H.R. 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 ("Act") and thwart the emerging deployment of broadband data services in Tennessee.

The Act currently requires Bell companies to demonstrably open their local markets and networks to competition prior to receiving authority to provide the interLATA data services that would be authorized by H.R. 1542. The main inducement for the Bell companies to open their markets to competitors is entry to the interLATA long distance markets. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies will largely lose that incentive to open their local markets to competition.

Such a result would undo the hard work done in states that have successfully completed the Act's Section 271 process and states that are conducting Section 271 reviews. Bell companies in five states (New York, Massachusetts, Texas, Oklahoma, and Kansas) with widely varying geographic and demographic characteristics have already passed the Section 271 checklist. We currently expect BellSouth to file a Section 271 application for Tennessee this year.

It is important to note that even without a Section 271 application pending for Tennessee, BellSouth is deploying broadband services. After all, Bell companies that have not achieved Section 271 relief are not prevented from providing intraLATA broadband services. Indeed, BellSouth has had digital subscriber line ("DSL") technology for several

years. Only recently, however, in response to competitive pressure from cable modem service providers and other DSL providers, has BellSouth begun aggressively deploying DSL. Clearly, local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. H.R. 1542 undermines that competition.

The current version of H.R. 1542 would endanger crucial pro-consumer policies. H.R. 1542 puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. This "line sharing" requirement is integral to competition in residential markets for advanced telecommunications services. Further, H.R. 1542 would prevent state regulators from requiring Bell companies to provide additional points of network interconnection with competitors and would eliminate Bell companies' wholesale requirements for data offerings. These regulatory requirements for the Bell companies wholesale operations are necessary to create retail competition; and competition will facilitate the provision of advanced services to all Americans at affordable rates as required by Section 706 of the Act.

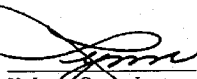
The current version of H.R. 1542 also would pre-empt state commission authority to regulate not only high-speed data services, but also interLATA voice telephone services carried over a packet switch (data) network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Because an ever increasing amount of voice services are carried by data networks, H.R. 1542 would eliminate most of the incentives that encourage Bell companies to work with state regulators and other policy-makers to bring competition to all telecommunications markets.

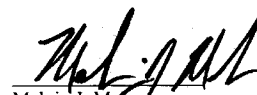
In conclusion, Tennessee consumers will suffer if there is any loss of the developing competition thus far gained in BellSouth's local markets, including the markets for broadband services. While competition may eventually eliminate the need for regulation of broadband services, deregulation at this time is clearly premature for Tennessee and would undermine the progress achieved so far. We firmly believe that enactment of this bill at this time will delay the emergence of broadband competition and its associated benefits by destroying the Act's carefully crafted incentives for Bell companies to open their local markets to competition.

We are enclosing a copy of a resolution passed last year by the National Association of Regulatory Utility Commissioners opposing this legislation. Thank you for your consideration of this matter.

Sincerely,


Sara Kyle
Chairman


H. Lynn Greer, Jr.
Director


Melvin J. Malone
Director

Enclosure

cc: Charles Gray, Executive Director, NARUC

STATE OF FLORIDA

E. LEON JACOBS, JR.
CHAIRMAN



CAPITAL CIRCLE OFFICE
CENTER
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6046

Public Service Commission

April 23, 2001

The Honorable Joe Scarborough
United States House of Representatives
127 Cannon House Office Building
Washington, D.C. 20515

RE: The Internet Freedom and Broadband Deployment Act.

Dear Representative Scarborough:

On behalf of the Florida Public Service Commission (FPSC), we urge you to consider some of our questions regarding the Internet Freedom and Broadband Deployment Act to be sponsored by Representatives Tauzin (R-LA) and Dingell (D-MI). We suggest that you carefully scrutinize the bill before considering signing on as a co-sponsor. The requirements in Section 271 of the Telecommunications Act of 1996 (the Act) mandate that Bell companies demonstrate they have opened their local markets to competition prior to receiving relief from restrictions against providing InterLATA (local access and transport area) service. These requirements are valuable tools to help achieve local competition, which may be undermined by the bill in question.

We have not yet received a draft of the bill, so we do not know whether its provisions will be identical to those contained in last year's H.R. 2420. However, based on the presumption that the legislation will be similar to H.R. 2420, we note the following potential areas of concern:

- The bill may give a monopoly carrier the ability to enter long distance data markets without any of the safeguards contained in the Act. Only recently, and primarily in response to competitive pressures, have local telephone companies begun aggressively deploying digital subscriber line (DSL) technology. Local competition is the fastest and most effective stimulus for consumers to obtain broadband services at competitive prices. This bill could undermine development of local competition.
- The bill may diminish local oversight of telecommunications companies that to date have retained dominant control over local markets. The Internet uses packet switching, in which the "conversation" may include both voice and data traffic. This may result in the commingling of voice transmission over the same facility. Currently, over one-half of the traffic on the network is data. This is expected to climb to over 90% by 2005.

The Honorable Joe Scarborough
 Page 2
 April 23, 2001

- The bill may eliminate the federal provision which currently permits state commissions to enhance competition for local telephone services by requiring additional points of interconnection with the incumbent's local telephone company network.
- The bill may reduce incentives for Bell companies to meet their obligations to open local markets. If Congress weakens the long distance entry requirements of the Act with this proposed exception for data communications services, the Bell companies may largely lose the incentive to open their local markets to competition. Weakening incentives to open local markets may result in ALECs leaving the market. Every alternative local exchange company (ALEC) has to interface with the RBOC in order to provide service. Currently, ALECs only have 6 percent of the market in Florida.
- The bill may harm pro-consumer policies. Should this Act contain the same language as H.R. 2420, it could put at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. Elimination of the line sharing requirement could decrease the rate of deployment of competitive broadband services to residential consumers.

Furthermore, a statutory change does not appear necessary to achieve the stated purpose of the legislation. Under current telecommunications law, Bell companies are not prevented from providing broadband services to customers if such broadband services do not cross LATA boundaries. In fact, Bell companies are aggressively deploying this very same broadband technology in their home markets where new competitors are offering competing services.

In Florida, local telecommunications competition and the deployment of advanced services by both RBOCs and CLECs is in its infancy. The FPSC has been given the responsibility to promote local competition. We are implementing this mission in several ways. We are currently in the midst of setting prices for unbundled network elements for BellSouth, we have conducted extensive testing of BellSouth operations support systems (OSS), and we are readying to make an expedited decision on a BellSouth 271 application. Through these and other efforts, we believe that we can foster increased local competition and promote the timely deployment of advanced services.

We note that overall, Florida ranks well above the national averages in broadband deployment, number of broadband providers, and lines. According to FCC data, 87% of Florida zip codes are served by at least one broadband provider, 69% are served by one to three providers, and 13% are served by at least 4 providers. These percentages are above the national averages of 59%, 49%, and 4%, respectively. Florida has 100% more ADSL providers, 200% more cable providers, and 40% more types of traditional wireline, optical, satellite, and fixed wireless providers than the national averages. Florida also has 260% more broadband lines than the national average.

Before considering co-sponsorship of any "271 relief" legislation, you may want to obtain answers to the following questions:

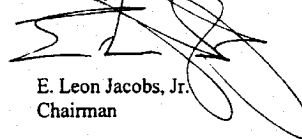
The Honorable Joe Scarborough
 Page 3
 April 23, 2001

- Does the bill undermine the incentives for Bell operating companies to open their local markets to competition?
- Would the Regional Bell Operating Companies lose their incentive to open up their markets if the data traffic were allowed across LATA boundaries?
- Does this bill harm, rather than help, competition in broadband deployment? If so, does that impede broadband deployment to rural areas?
- While the Florida Public Service Commission does not "regulate" the Internet, wouldn't the preemptive language in the bill keep the FPSC from overseeing the nondiscriminatory application of terms and conditions in tariffs for high-speed data services?
- Does the bill take away the regulatory leverage to spur the Bell companies to open up their markets?

In sum, we respectfully urge you to be cautious about this "RBOC relief" legislation. We note that NARUC has passed a resolution against such legislation. Last year, 30 state commissions filed comments against passage of H.R. 2420. It is important to note that when an efficiently operating competitive market is achieved, legislation like that proposed in H.R. 2420 in 1999, might be appropriate. Until that time, we believe that incentive regulation and state participation may well be the best way to ensure that local competition is achieved. Bills like H.R. 2420 have laudable goals, but they could also derail the work that state commissions are currently doing to achieve local competition and they could lessen the incentives for RBOCs to seek 271 approval for voice traffic. We urge you to consider the impact this type of legislation could have in regard to preempting not only the efforts of the FPSC, but more importantly, preempting the Florida Legislature in these matters.

Thank you for your consideration. We would be happy to provide further information about Florida's activities on Section 271 and local competition upon request.

Sincerely,



E. Leon Jacobs, Jr.
 Chairman

ELJ:CBM:jm

STATE OF NEW HAMPSHIRE



PUBLIC UTILITIES COMMISSION

8 Old Suncook Road
Concord, N.H. 03301-7319

CHAIRMAN
Douglas L. Patch

COMMISSIONERS
Susan S. Geiger
Nancy Brockway

EXECUTIVE DIRECTOR
AND SECRETARY
Thomas B. Getz

TDD Access: Relay N
1-800-735-2964

Tel: (603) 271-2431

FAX No: 271-3878

Website:
www.puc.state.nh.us

May 9, 2001

The Honorable John E. Sununu
U.S. House of Representatives
316 Cannon House Office Bldg.
Washington, DC 20515

Dear Congressman Sununu:

As Commissioners of the New Hampshire Public Utilities Commission, we write to express our opposition to the H.R. 1542, the Internet Freedom and Broadband Deployment Act. This bill undermines the central balance of the Telecommunications Act of 1996 ("the Act"), under which Regional Bell Operating Company authority to enter inter-LATA markets comes only upon a showing that local exchange markets are open. The bill would further dilute the ability of state commissions and legislatures to protect consumers and promote competition within our states.

The New Hampshire Public Utilities Commission subscribes to the positions on this bill provided to your committee by the National Association of Regulatory Utility Commissioners in its May 7, 2001 letter. As the NARUC letters explain, H.R. 1542 (1) threatens state oversight of voice services, and could promote increases in local exchange rates, and (2) permits RBOCs to further solidify their position as dominant providers of both voice and DSL services by exempting them from their line-sharing, unbundling and resale requirements for data lines.

HR 1542 raises at least four major concerns that would adversely impact New Hampshire ratepayers and businesses. First, it would preclude any state or federal regulation of high-speed data services, including consumer protection or service quality regulation. Second, HR 1542 includes a limited but incomplete reservation of state authority regarding voice traffic. This reservation does not include continuing state authority over inter-exchange voice telephone services carried over a packet switch network. As voice and data services increasingly are provided over common facilities, this failure to reserve state authority could provide a large exemption from state oversight over even voice services.

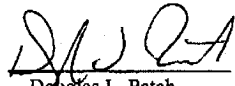
The Honorable John E. Sununu
May 9, 2001
Page 2

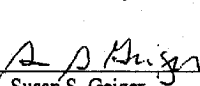
Third, HR 1542 would exempt the RBOCs and other incumbent local exchange carriers from resale and network unbundling requirements that now apply to high speed data and internet access services under the Act. The current "line sharing" requirement is critical to the rapid deployment of competitive broadband services to consumers. Finally, the Tauzin-Dingell bill would also allow Bell companies to provide in-region interLATA (local access and transport area) data services without having to satisfy the market-opening mandates outlined in section 271 of the Act. Since data traffic comprises roughly half of all telecommunications traffic today, this requirement would significantly reduce incentives for the RBOCs to meet their obligations to open local markets.

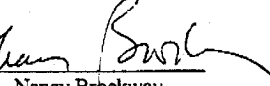
In conclusion, HR 1542 should be opposed, because if enacted, it would seriously undermine the current authority of the states to protect the interests of consumers and ratepayers, as well as to undermine key market opening requirements contained in the Telecommunications Act of 1996.

Thank you very much for your consideration of these comments. We would be more than happy to talk with you or with any member of your staff to discuss these important issues further.

Sincerely,


Douglas L. Patch
Chairman


Susan S. Geiger
Commissioner


Nancy Brockway
Commissioner

cc. ✓ Hon. W.J. "Billy" Tauzin, Chairman, House Energy and Commerce Committee
Hon. Nora Mead Brownell, President, NARUC
Hon. Joan Smith, Chair, NARUC Telecommunications Committee
J. Bradford Ramsay, General Counsel, NARUC



PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA
808 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102

LORETTA LYNCH
PRESIDENT

TEL: (415) 703-8444
FAX: (415) 703-3033

April 30, 2001

Honorable Christopher Cox
Member of House of Representatives
2402 Rayburn House Office Building
Washington, DC 20515

Subject: H.R. 1542, the Tauzin/Dingell bill

Dear Congressman Cox:

The California Public Utilities Commission opposes HR 1542, and urges you also to oppose this misguided and fundamentally problematic piece of proposed legislation. If enacted, HR 1542 would seriously undermine the key market opening requirements contained in the Telecommunications Act of 1996 (the Act).

HR 1542 raises at least four major concerns that would adversely impact California ratepayers and businesses. First, it would preclude any state or federal regulation of high-speed data services, including consumer protection or service quality regulation. In particular, in its proposed new Section 232(a), HR 1542 would prohibit the FCC or the states from regulating the rates, charges, terms, or conditions for, or entry into, the provisioning of any high speed data service. This prohibition is of very great concern to us, because we at the California Public Utilities Commission have received a high volume of complaints regarding the provision of Digital Subscriber Line (DSL) service, and the Tauzin-Dingell bill would prevent us from taking any steps to protect DSL customers from abuses in the future.

Second, HR 1542 includes a limited reservation of state authority regarding voice traffic. However, this reservation does not include continuing state authority over inter-exchange voice telephone services carried over a packet switch network. Packet switching is the way the Internet works. In packet switching, the "conversation" (which may be voice, video, images, data, etc.) is sliced into small packets of information. Each packet is given a unique identification, and each packet carries its own destination address. The packets are reassembled in proper sequence at their destination using provided identification and

Congressman Christopher Cox
April 30, 2001

Page 2

sequencing information. As the Internet becomes an increasingly important component of the voice telecommunications system, this market segment, if deregulated, will not be subject to the same consumer protection laws and requirements as other regulated voice telecommunications providers. At this point in time, when the parameters of this emerging service are still unknown, it would be imprudent to eliminate state oversight over such Internet voice telephone service.

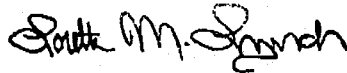
Third, HR 1542 would exempt the RBOCs and other incumbent local exchange carriers from resale and network unbundling requirements that now apply to high speed data and internet access services under the Act. These requirements would put at risk current efforts by the FCC and by our Commission under California law (AB 991 - Papan) to require incumbent local exchange companies to share their lines with competitive local exchange data carriers. The current "line sharing" requirement is critical to the rapid deployment of competitive broadband services to consumers.

And fourth, the Tauzin-Dingell bill would also allow Bell companies to provide in-region interLATA (local access and transport area) data services without having to satisfy the market-opening mandates outlined in section 271 of the Act. Since data traffic comprises roughly half of all telecommunications traffic today, this requirement would drastically reduce incentives for the RBOCs to meet their obligations to open local markets.

In conclusion, HR 1542 should be opposed, because if enacted, it would seriously undermine the current authority of the states to protect the interests of consumers and ratepayers, as well as to undermine key market opening requirements contained in the Telecommunications Act of 1996.

Thank you very much for your consideration of these comments. We would be more than happy to talk with you or with any member of your staff to discuss these important issues further.

Sincerely,



Loretta Lynch
President

NEW MEXICO PUBLIC REGULATION COMMISSION

COMMISSIONERS

DISTRICT 1 HERB H. HUGHES, VICE CHAIRMAN
 DISTRICT 2 BILL POPE
 DISTRICT 3 JEROME D. BLOCK
 DISTRICT 4 LYNDA M. LOVEJOY
 DISTRICT 5 TONY SCHAEFER, CHAIRMAN



1120 Paseo de Peralta
 P.O. Box 1265
 Santa Fe, New Mexico 87504

April 27, 2001

Hon. Joe Skeen
 U. S. Representative
 Rayburn House Office Building, Room 2302
 Washington, DC 20515

Dear Congressman Skeen:

On behalf of the New Mexico Public Regulation Commission (NMPRC) we respectfully urge you not to support H.R. 1542, the Internet Freedom and Broadband Deployment Act, sponsored by Reps. Tauzin and Dingell. H.R. 1542 essentially eliminates a major incentive to open local markets to competition and short circuits the well planned process opening local markets which is now underway in 13 western states.

This bill preempts state commission authority to regulate all rates, charges, terms and conditions for high-speed data services, including the facilities used in the provision of such services. It will seriously undermine key local telephone market opening requirements contained in the Telecommunications Act of 1996 (the Act). In addition, the bill does nothing to stimulate or assure deployment of advanced services in rural areas.

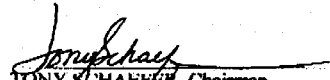
In the QWEST territory there is presently a 13-state collaborative study of Operational Support Systems (OSS) which is an important element of a Section 271 application. Approval of this application allows a Bell Operating Company (BOC) to serve interstate customers with voice and data. In order to qualify for 271 approval, there is a fourteen-point checklist dealing with opening up the telecommunications market to competitors for the benefit of the general public having access to alternative telecommunications services. This study is to be completed by the end of August, at which time QWEST will make their 271 filing in their 14 state territory.

QWEST is not precluded from offering broadband services to its customers. This commission recently approved an Alternative Form of Regulation (AFOR) agreement which requires QWEST to provide high speed data services to both urban and rural areas of the state. Obviously, this will allow improved access to the internet and other services. H.R. 1542 will not improve access to services in New Mexico and could possibly hurt the BOC's incentive to open their markets to competition as required in the Telecommunications Act of 1996.

Enclosed is a resolution from the National Association of Regulatory Utility Commissioners (NARUC) opposing this legislation. Also enclosed is a copy of a letter we received via e-mail from the AARP opposing the bill.

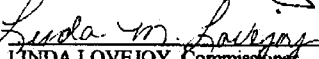
Thank you for your consideration of this matter. Please feel free to call any of the commissioners or staff at the PRC to address any issues you may have.

Yours truly,


TONY K. SCHAEFFER, Chairman


JEROME D. BLOCK, Commissioner


HIRAM HUGHES, Commissioner


LINDA LOVEJOY, Commissioner

Encls. as noted

cc: Sen. Jeff Bingaman (w/encls)
Sen. Pete Domenici (w/encls)

Chairman SENSENBRENNER. Mr. Barr.

TESTIMONY OF THE HONORABLE WILLIAM P. BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS, WASHINGTON, D.C.

Mr. BARR. Good afternoon, Mr. Chairman, Ranking Member Conyers. It's a pleasure to appear before this Committee today. I'd like to focus my comments on H.R. 1697 and 1698. I believe that these proposals are unwarranted and would be destructive to both of the fundamental principles in the antitrust laws and our telecommunications policy.

Now, the Telecom Act created special duties and imposed special duties on the incumbent LECs that go far beyond the requirements in the general antitrust laws. We have to facilitate the business operations of our competitors in countless ways that are summed up in thousands and thousands of pages of FCC rules. This has required a massive investment on our part, an effort to completely redo the systems, the software, and the processes that are used to operate our network so that it can serve as a platform for a countless number of retailers. And what is truly remarkable, in my view, about this very substantial IT project that dwarfs what we have had to expend, for example, on Y2K, is how successful it has been in a relatively short period of time.

Now, many competitors have been quite vocal in suggesting that the ILECs, or the incumbents, are not living up to our obligations to provide wholesale service, and they claim that some kind of substantial change in law is necessary to deal with this alleged misconduct. The indisputable and objective facts, though, I think belie these claims.

First, in our long distance application proceedings, the so-called 271 proceedings, all these claims have been levied by our competitors and they've been painstakingly reviewed by State commissions, by independent auditors, and ultimately by the FCC, and in these proceedings, they have been found—they have been rejected. Our petitions have been approved. We've been allowed to go into long distance. We've been found to be living up to our obligations and not to have engaged in foot dragging. On the contrary, we've been getting high marks for working cooperatively with competitors, and indeed, just 2 days ago, the FCC put out the latest competition data, which shows that it is surging in States where the Bells have been admitted to compete in long distance, far outpacing the other States.

Now, the second point is that the FCC and the States have put in place specific objective standards and measures about what—that we have to meet in providing our wholesale obligations. We have to keep two million, approximately, metrics to demonstrate that we are meeting our obligations. SBC has said that they have to keep three million, and the reason why you keep all these objective standards is precisely to avoid subjective bickering about whether you're doing your job or not. The numbers are there. Either we're meeting the criteria or we're not, and largely those show that we are meeting the criteria required by the FCC. Where we're not, on the margin, we pay no fault penalties and we quickly cure those problems.

Moreover, there are already comprehensive enforcement schemes to deal with any potential misconduct in these wholesale obligations. I've already mentioned the performance assurance plans that are no fault in nature. If you don't meet the standard, you pay. And the FCC has determined, in adopting these plans, that these payments are sufficient to ensure compliance with the act and to deter misconduct.

Moreover, the FCC is free beyond these automatic no fault payments to impose specific sanctions for any misconduct, including substantial fines and taking us out of the long distance market. So, for example, in New York, when we had some failure in third-party-supplied software which resulted in some notifications not going to the CLECs that their order had been received—ten percent of the notifications did not go out because of this software glitch—we were fined \$13 million in excess of the mandatory payments we had to make under the performance assurance plan. It was unintentional, but it was remedied promptly by the FCC.

Beyond this level of enforcement, any aggrieved party can bring claims and obtain remedies from State commissions, from the FCC and the Federal courts specifically under the Telecommunications Act.

I think it's wrong to immediately give credence to all the complaints made by competitors that we're dragging our feet. There's a forum for those to be heard. They've been heard. Our long distance applications have been approved. They have many remedies to demonstrate these claims, and what these claims largely boil down to, what many of them are are policy disputes that are being presented as claims of foot dragging, for example, reciprocal comp, which most of you know has been a big issue. They come in and say, you have to pay for certain—for Internet-bound traffic as if it's local traffic. We say, no, it's interstate traffic. It's not local traffic. We don't owe reciprocal comp on it. They say, yes, you do. You're not meeting your obligations. That brings a policy issue. It goes to the FCC and the FCC adopts a national policy, and guess what? We won that one. It's interstate and they changed the compensation rules on Internet-bound traffic.

These issues come up all the time. What kind of collocation is required? Do you have to let competitors in 24 hours?

Chairman SENSENBRENNER. Mr. Barr, do you think you could wrap it up, since the red light is flashing.

Mr. BARR. Okay. I'd be glad to. These policy issues are presented all the time, and what this act does is unprecedented. What it says is that these issues are—that claims of violation of regulatory statute are automatically per se antitrust violations. That's never been done before. And they're automatic per se violations of antitrust, and then it would throw all these issues out into litigation brought by customers and brought by competitors and to be decided by Federal juries willy-nilly around the country. It's exactly for this reason that we have a telecommunications act, so we have expert agencies setting a comprehensive, coherent policy. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF WILLIAM P. BARR

Thank you, Mr. Chairman, for the opportunity to testify before the Committee. I am Bill Barr, Executive Vice President and General Counsel of Verizon.

I am here to urge you not to support H.R. 1697 and H.R. 1698. Both bills represent bad antitrust policy. Even more important, they also represent bad economic policy for this country.

These bills are based on two premises. The first is that telephone companies like Verizon have been impeding the competition that the 1996 Act was intended to foster. And, second, that new remedies are needed to deal with this bad conduct. Both of these notions are false.

In recent years, we have heard numerous complaints from our competitors that we were failing to live up to the requirements of the 1996 Act. These competitors brought their claims to state regulators and to the FCC. This was done on a comprehensive basis as part of the section 271 process through which we obtained long distance authority in New York and Massachusetts. Many complaints were also pursued apart from those proceedings. The states and the FCC reviewed all these claims and concluded that we were complying with our obligations under the Act.

Moreover, there are many opportunities under existing law if a competitor can show we violated the rules or impeded competition, and new remedies are, therefore, not required. Verizon has entered into "no fault" performance assurance programs, under which we make payments if the service we provide to competitors does not meet objective standards. The FCC has concluded that guarantee payments required by these plans are sufficient to give us the incentive to meet the standards. The FCC has the power to impose significant forfeitures for violations of the Act or its rules or orders. The FCC can suspend or revoke our authority to provide interLATA service if we fail to continue to meet any condition of that approval. A competitor can file a complaint if it believes that we have failed to adhere to our interconnection agreement. Nothing new is needed.

Moreover, the changes proposed in these two bills are ill-advised as both antitrust and telecommunications policy.

Just five years ago, Congress passed the Telecommunications Act of 1996. One of the primary motivations of many Members for working hard to enact this law was that the telecommunications sector was being regulated under the antitrust regime of the AT&T consent decree and that, they strongly believed, was bad for that sector and bad for economy. This Committee, in reporting H.R. 1528, wrote that "national telecommunications policy should be set by Congress acting through generally applicable legislation."¹ These bills would reverse that sound judgment.

These bills would create an antitrust regime for a part of the telecommunications industry that is different both from the regime that applies to American industry generally and from that which applies to most sectors of telecommunications. It would also give the Attorney General extraordinary regulatory authority in the telecommunications industry, authority which that official does not enjoy in any other sector. This authority would include not just making

judgments on the state of competition but also disbursing Federal loans and loan guarantees to providers of telecommunications services and establishing alternate dispute resolution mechanisms for parties to private contracts.

These bills amend the antitrust laws and appear to be concerned about competition. However, both bills completely ignore the broadband providers that together have more than a 70 percent share of the residential broadband market—giant cable companies like AT&T—and focus entirely on telephone companies that are relative new entrants with a less-than-30-percent share. The focus of the bill on these companies is even more remarkable when you add the fact that the cable operators today exclude other Internet providers from their systems. If this Committee is looking for exclusionary conduct to remedy, I would urge them to look at these practices by the cable industry.

H.R. 1697

Section 101 of this bill would give the Attorney General a veto over an Act of Congress. And unlike Presidential vetoes, Congress would not even get an opportunity to override that veto.

If Congress decides to amend section 271 of the Communications Act to allow a Bell company to provide some form of interLATA service, the bill would permit the Attorney General to reverse Congress' action by finding that the Bell company had market power in the provision of wireline telephone exchange service. There is no

¹H. Report 104–203, on the Antitrust Consent Decree Reform Act of 1995, 104th Cong., 1st Sess. (1995).

reason that the Attorney General should be able to taketh away what Congress decides to giveth.

The bill establishes 85 percent of business and residential subscribers as the definition of market power that requires the Attorney General veto. This approach makes no sense for several reasons.

First, it effectively gives Bell company competitors control over Bell company entry.

Second, it would give these competitors a reason not to pursue residential customers. Under the bill, a Bell company is deemed to have market power—and to be precluded from any new authority Congress affords—if its competitors have less than 15 percent of *both* business and residential customers. Our competitors already have every incentive to go after the relatively high value business customers and ignore residential consumers, and this bill would increase that incentive.

Third, and more fundamentally, there is no logic in saying that a Bell company should not be allowed to provide Internet backbone services because it has a large share of the residential voice telephony market where it provides local service. Sprint has a large share of the residential voice market where it provide service, but no one has ever suggested that this fact should prevent Sprint from being an Internet backbone provider. The FCC has concluded that broadband and narrowband are separate markets, and there is no way that a large customer base in the narrowband market can give an firm an unfair advantage in the broadband Internet backbone market.

Finally, this provision reverses one of the judgments made by Congress in the 1996 Telecommunications Act. In those debates, some urged that the new law establish a “market share test” for Bell company entry into the long distance business. This Committee rejected that approach, as did Congress overall. There is no reason that a market share test is makes any more sense today than it did five years ago.

H.R. 1698

Section 2 of H.R. 1698 adds two new provisions to the Clayton Act that together constitute a radical departure from established antitrust law.

New section 28 prohibits an antitrust court from dismissing a claim on the ground that defendant’s conduct is subject to the Communications Act. It also allows a court to consider as a possible antitrust violation any conduct that violates the Communications Act or FCC rules.

New section 29 goes one step further by making violations of certain Communications Act provisions per se antitrust offenses. It then goes on to prescribe a specific penalty for such violations, a penalty that may have nothing whatever to do with the offense—that the defendant carrier be prohibited from jointly marketing any advanced telecommunications service with any other telecommunications or information services.

These provisions scrap years of antitrust jurisprudence, in which violations of regulatory statutes are not antitrust violations and certain regulated conduct cannot violate the antitrust laws. They also reverse Congress’ judgment five years ago to deregulate the telecommunications industry, promote competition and empower agencies, rather than antitrust courts.

There are many regulated industries in this country. Congress and the courts have long accommodated both the regulatory regime and the antitrust laws. Often, regulatory approval or oversight confers immunity from the antitrust laws. In other cases, adherence to regulatory mandates is a defense to an antitrust challenge. H.R. 1698 ignores this long history of regulatory-antitrust accommodation by removing any defense based upon the fact that the conduct was regulated.

For example, one of these well-established principles is the filed-rate doctrine, which prevents courts from revisiting the reasonableness of a utility’s rates once the utility has filed and received approval of those rates with a governmental agency.² Another is state action immunity,³ which that alleged restraints that are supervised and approved by state regulators cannot violate federal antitrust laws. These doctrines make sense: the American public would be ill-served by regulators unsure of whether there would be judicial deference to their decisions, and by courts and juries poorly suited for determining permissible rates or practices in such varied industries as telecommunications, electricity and railroads. But H.R. 1698 casts aside this wisdom, favoring a regime in which any multiplicity of courts could second-guess the highly technical judgments of state and federal regulatory agencies.

² *E.g., Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922).

³ *E.g., Parker v. Brown*, 317 U.S. 341 (1943).

But, more important, these provisions are inconsistent with the regime Congress established only five years ago for this industry. The Telecommunications Act of 1996 opened local telecommunications markets to competition by imposing special duties on incumbent local exchange carriers. It established a carefully balanced system of privately negotiated interconnection agreements, state public commission and Federal Communication Commission supervision, and limited federal court review of agency decisions. All disputes over interconnection agreements were to be brought first to state commissions possessed of the technical expertise and regulatory experience needed to resolve these complex issues.

But Congress did not simply conflate antitrust and telecommunications regulation. On the contrary, it imposed through the Act precisely the kinds of affirmative duties to help one's competitors do not exist under the antitrust laws. And the Act made an appropriate assessment of institutional competence by leaving regulation in the first instance to the regulators.

This bill expands antitrust law well beyond what Congress or any court has found appropriate. Antitrust law exists to promote competition, not to protect competitors. It seeks to remedy competitive injuries, not trivial commercial ones. It deals with intentional or willful conduct, not failure to perfectly satisfy detailed technical regulatory requirements. And yet this bill would transform into per se antitrust violations minor commercial disputes that do not affect competition and without any showing of bad intent.

With very narrow exceptions, antitrust law does not require an incumbent to aid a competitor. This is because the greater such a duty, the more likely the impairment of competitive incentives for both the incumbent and competitor, and the more likely the ultimate harm to the consumer. The Telecommunications Act, however, imposes many such duties on incumbents. The U.S. Court of Appeals for the Seventh Circuit recently recognized that Congress thereby limited antitrust law's application to telecommunications regulation: to use the court's words, the requirements under Sections 251, 252, 271 and 272 "are precisely the kinds of affirmative duties to help one's competitors that . . . do not exist under the unadorned antitrust laws."⁴ Violations of these Telecommunications Act requirements, therefore, is not the stuff of an antitrust violation.

Furthermore, using antitrust law to enforce the Telecommunications Act would discourage competitors from developing their own alternative facilities or services. Such concerns are particularly apt in the context of local telecommunications markets, because the 1996 Act's overriding goal, as Congressman Goodlatte stated years ago, is to "give[] new entrants the incentive to build their own local facilities-based networks."⁵ Why should a competitor build its own network when it can obtain access to another's by wielding the weapon of an antitrust lawsuit? The answer has been self-evident to courts for a century, which is why

they rarely, if ever, subject the type of duties imposed by the Act to antitrust scrutiny. So it is

that "[i]ncreased sharing by itself does not automatically mean increased competition. It is in the unshared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."⁶

H.R. 1698 also risks protecting inefficient competitors and technologies in its expansion of antitrust. Suppose, for example, that a new entrant is faced with the choice of developing a new, wireless interface with a user's premises, or instead purchasing the incumbent's existing wire at cost. Even though development of the wireless interface might offer significant consumer benefit, development of such a system might entail huge sunk cost investment and much higher risk than reliance on existing technology. Using antitrust to broaden the sharing requirements of the Act thus diminishes the incentive of new entrants to innovate, and raises the risk that competitors will merely "free ride" on the incumbents' investments and innovation.

Even if it were appropriate to slap the antitrust label onto any Telecommunications Act violation—which it plainly is not—H.R. 1698 would offer unclear—and hence unmanageable—standards to the courts. Section 28(a)(1) provides that a court "may consider" any Act violation in assessing anticompetitive or exclusionary conduct. What does this mean? It means that some courts may consider it; others may not. Of those that consider, some may find a violation to be conclusive evidence of anticompetitive conduct, notwithstanding the antitrust

⁴ *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 400 (7th Cir. 2000).

⁵ 141 Cong. Rec. H8465 (daily ed. Aug. 2, 1995) (Rep. Goodlatte).

⁶ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (Breyer, J., concurring in part and dissenting in part).

laws; others may find it to be merely suggestive. The smart competitor would now focus not on promoting new facilities and services, but on shopping for favorable fora.

Conversely, Section 29(a), which demands courts find an antitrust violation whenever a carrier is found to violate certain sections of the Act, flicks away years of jurisprudence and usurps the judicial function. The Supreme Court has repeatedly made clear that violation of other legal duties is not an antitrust violation. Aside from the considered judgment of the Court, the fact that antitrust law since its inception never has presumed violation from such things as minor contract disputes should give you pause.

In short, section 2 of H.R. 1698 is bad antitrust law. It's bad telecommunications law. And it's bad for consumers.

Section 3 of the bill directs the Attorney General to establish a mandatory alternative dispute resolution process to resolve disputes arising under interconnection agreements. Verizon is eager to find ways to expedite the resolution of interconnection disputes. We support, for example, the provision in H.R. 1795 that establishes state arbitration of these issues, with a quick decision. We do not understand, however, why the Attorney General of the United States should be the person to set up a dispute-resolution mechanism for this part of the telecommunications industry.

Broadband Policy

Both these bills have the word "broadband" in their titles. However, other than the loan program in H.R. 1697, they have little to do with broadband services and do nothing at all to stimulate broadband deployment.

The Internet is a wonderful tool that developed far faster than anyone could have imagined. Use of personal computers and dial-up access to the Internet fueled the growth of the U.S. and world economy enjoyed in the late 1990's. This growth has now reached a plateau. More is needed now to move the economy to the next level. And that stimulus—stimulus to the economy as a whole—could be provided by greater deployment of high-speed broadband Internet access.

Using policies for the Internet and broadband services that were intended for a local voice telephone market has slowed deployment of broadband, inhibited competition and slowed investment at the very time when we need every possible player involved to help advance the capabilities and capacity of the Internet.

Two landline technologies provide residential consumers with high speed Internet access at a reasonable cost—Digital Subscriber Line (DSL) services and cable modem services. Only one of these services, DSL, is subject to significant federal regulation. Even worse, only certain providers of DSL—the Bell operating companies—are so constrained as to not be able to provide data services across LATA boundaries that were drawn with traditional voice telephone service in mind. If consumers are to get widespread deployment of high speed Internet services from competing providers, it is necessary for DSL services to be deregulated just like cable modem services. Current regulation hampers significant DSL deployment and denies consumers benefits.

Existing federal regulations handicap Verizon's provision of DSL. The FCC has applied the section 251 unbundling and resale requirements to Verizon and other incumbent local telephone companies. They require Verizon to allow competitors to put their DSL equipment not only in our central office equipment buildings but also in small "remote terminal" boxes in local neighborhoods. They require us to provide not only unbundled lines from our locations to customers, but also "subloop" pieces of those lines. The FCC first required us to provide DSL-capable loops, then it required "line sharing"—allowing a competitor to use only a portion of the capacity of the loop almost for free to provide DSL service while Verizon provided the underlying basic telephone service. Now we are also required to "line split"—to arrange for two different competitors to share our lines, while we provide no service at all to the customer.

The FCC is now considering requests from other carriers that we be required to provide our new DSL services to them at very low TELRIC prices—that is prices that are below our costs. If we have to do this, what incentive will we have to make the investments that make these services possible? And yet that investment is exactly what you and the public expect from us.

The other characteristic of the regulatory landscape is uncertainty—participants and investors don't know for sure what the rules are. One federal court of appeals has held that cable modem service is a "telecommunications service" under the Communications Act; another has held the opposite. A third circuit court has found that comparable services provided by telephone companies are "telecommunications services." Whether Verizon must provide wholesale DSL services at discounts to their competitors and whether it must unbundle its retail DSL service are now before the courts. Our investment decisions, and the investment decisions of our competitors,

will be effected by the actions of these courts and by the Commission's actions in response to them. If Congress wants to encourage broadband investment, it needs to set a clear, national broadband policy, and that policy must allow all competitors to play by the same rules.

Thank you.

Chairman SENSENBRENNER. Mr. Blumenfeld.

**TESTIMONY OF MR. JEFFREY BLUMENFELD, PARTNER,
BLUMENFELD AND COHEN, WASHINGTON, D.C.**

Mr. BLUMENFELD. Thank you, Mr. Chairman, Ranking Member Conyers, Members of the Committee. I appreciate the opportunity to address these issues today.

[Microphones were switched.]

Mr. BLUMENFELD. Mr. Chairman, Ranking Member Conyers, Members of the Committee, thank you for the opportunity to address these issues. I would like to devote the time of my oral testimony to two fundamental issues. One is the historical role that antitrust has played in creating competition in the telecommunications industry, and the second is the relation of antitrust to regulation, both in the '96 act and in the legislation that is pending before the Committee at this time.

As the Chairman pointed out in his opening remarks, antitrust has historically played a crucial role in opening this industry to competition. That was true through a series of private lawsuits in every segment of the industry, from ordinary telephones through telephone equipment used to provide services, through the services themselves, including long distance. It was true, also, in the historic government case, which I had the honor of being able to serve as a senior trial lawyer in, and in that case, also, the antitrust were the gravamen of the government's complaint and the basis on which, ultimately, relief was granted which created the competition that we now see in this industry across all of its segments.

The heart of the antitrust laws is to create obligations for companies to deal fairly with each other. The ILECs are fond of quoting the holding of the *Colgate* case, which recognizes that one, economic freedom every company has is the freedom to refuse to deal with certain customers. But they are not fond of quoting what is actually the contrary of that, which is that for a firm with market power, the right to refuse to do business is sharply bounded. Specifically, where a company with market power refuses to do business with a competitor with the purpose and effect of injuring competition, that is, engages in predatory exclusionary conduct, that conduct is illegal under the antitrust laws.

Read in the converse, what that means is the antitrust laws do create an obligation on the part of companies with significant market power to deal with their competitors where the refusal to do so would be anticompetitive, and where it creates that obligation, it creates the obligation in two parts. It creates an obligation to deal with them on reasonable terms and conditions—on reasonable terms and reasonable conditions.

In the networking industries, what that has always meant is that a firm with market power that is a network-based firm must allow access to its network, connection to its network, on reasonable terms and conditions. And there again, for a network company, there are two facets of reasonable terms and conditions. They

must be technically reasonable and they must be economically reasonable.

Technically reasonable interconnection must mean the ability to connect with the incumbent's monopoly network at points that make technical sense both from the competitor's point of view in terms of their business and technology and the point of view of the incumbent. These are exactly the kinds of obligations that are tracked and specified in section 251 of the act.

Similarly, there's an obligation to deal in financially reasonable terms. Everybody in the telecommunications industry has agreed for at least the last decade that financially reasonable terms for monopolists to deal with a competitor means at prices that resemble incremental costs. In fact, the telephone companies themselves in the 10 years or so that they spent successfully and appropriately fighting to change additional regulation from rate-based regulation to price cap regulation, argued, mostly with the support of their competitors and with the acceptance of regulators, that where faced with competition, they should be able to charge prices at incremental costs because prices at incremental cost are the prices that prevail in a competitive marketplace. These are obviously akin to the obligations that are tracked in section 252 of the Communications Act.

So the relationship between the antitrust laws and the Telecommunications Act, both historically and in the '96 act, could not be more different than the *Goldwasser* court described them to be. And in ruling as it did, the *Goldwasser* court was exactly wrong.

The bills that are pending before the Committee today would simply sharpen the relationship between the antitrust laws and the Communications Act to make it clear, as must be both law and the policy in this country, that a course of conduct that violates specific Federal regulatory scheme, which itself was designed to open markets to competition, cannot possibly be a defense to an antitrust case and are more appropriately regarded, as they have been regarded for decades in the antitrust law, as clear evidence of antitrust violation, an integral part of that case.

I commend both of these bills to the Committee for preservation of competition in our industry. Thank you.

Chairman SENSENBRENNER. Thank you, Mr. Blumenfeld.

[The prepared statement of Mr. Blumenfeld follows:]

PREPARED STATEMENT OF JEFFREY BLUMENFELD

Chairman Sensenbrenner, Ranking Member Conyers, members of the Committee, good afternoon. Thank you for the opportunity to testify before you on two important pieces of legislation:

- H.R. 1697—the Broadband Competition and Incentives Act of 2001; and
- H.R. 1698—the American Broadband Competition Act of 2001.

I am Jeffrey Blumenfeld, co-founder and managing partner of the law firm Blumenfeld & Cohen—Technology Law GroupSM.

Just as the legislation before the Committee seeks to reaffirm the proper balance between antitrust laws and government regulation in the communications industry, throughout my professional career I have been intimately involved in the interplay of these bodies of law in the communications sector. In the 1980s, while at the Antitrust Division of the Department of Justice, I participated in the *AT&T* litigation and subsequently led the group charged with implementing the *AT&T* consent decree. I left the Antitrust Division to start my own law firm, recognizing the crucial interplay between the antitrust and telecommunications regulation. For the past

decade and a half I have taught telecommunications law and trial practice at Georgetown University Law Center. Most recently, from August 1997 to March 2001, I served as General Counsel to Rhythms NetConnections Inc., a data CLEC. Through all these experiences I have developed a perspective on what works and what doesn't in opening monopoly markets in the telecommunications sector.

Perhaps the most important lesson I have learned over the years is that only when the antitrust laws are given free rein will telecommunications competition develop properly. In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress clearly intended that antitrust law continue to apply along with the 1996 Act. In fact, the 1996 Act includes a specific antitrust savings clause. Unfortunately, a recent appellate decision, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) ("*Goldwasser*"), despite the court's claims to the contrary, failed to give full force to this clause, and instead essentially found an implied antitrust exemption that threatens to foreclose antitrust law as an avenue for recourse. This, coupled with the anticompetitive effect of intransigent behavior by incumbent telephone monopolists, cries out for Congressional action.

H.R. 1697 and H.R. 1698 effectively address these concerns. Regulation under the 1996 Act should complement, not supplant, the antitrust laws. Congress must reaffirm the crucial role that the antitrust laws have played and must continue to play in opening telecommunications markets to competition. To accomplish this important goal, Congress must overrule the *Goldwasser* decision. In addition to ensuring that antitrust remedies are available to competitive carriers and to the public at large, Congress should provide for a rapid, fair mechanism for CLECs to obtain remedies for continued incumbent telecommunications company violations of the 1996 Act. The two bills before the Committee will attain these objectives. If they are enacted, they will provide the necessary complement to regulation under the 1996 Act and will enable consumers to benefit from a quick, effective infusion of local telecommunications competition.

Today there is widespread recognition that competition is desirable in telecommunications markets, and should be the rule, rather than the exception. Indeed, wherever it has been allowed to flourish, competition has brought lower prices, product and service variety, and innovation to telecommunications consumers. Antitrust law has been the principal driver of this telecommunications competition. Initially, regulatory decisions by the FCC, exemplified by the *Carterfone* and *Specialized Common Carriers* decisions, created opportunities for firms to enter markets dominated by the Bell System, including the Bell Operating Companies. Numerous companies, large and small, tried to capitalize on these perceived opportunities to compete. Faced with Bell System intransigence, however, they found the delays and costs resulting from trying to play the regulatory game against this experienced, powerful opponent stymied them in their efforts to introduce competition into the telecommunications industry.

When these would-be competitors could not capitalize on the FCC's market-opening decisions, they turned to the antitrust laws. Through antitrust litigation these firms won significant victories. They established that, contrary to the Bell System's arguments, the Communications Act does not create an implied exception to the antitrust laws. See, e.g., *Southern Pacific Comm. Co. v. AT&T*, 740 F.2d 980, 999-1000 (D.C. Cir. 1984). Of equal importance, they established that AT&T's refusal to provide them with interconnection violated those antitrust laws. E.g., *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1982).

The culmination of these private efforts was the government's antitrust action against AT&T and the ensuing break-up of the Bell System. The competitive benefits of the *AT&T* decree have been clear. We see striking evidence of this in today's fierce price competition in long-distance telephone service and abundant choice and innovation in telephone network equipment and terminal equipment.

The 1996 Act was a natural follow-up to earlier antitrust activity. It essentially attempted by Congressional action to jump-start competition in the last monopoly portion of the telecommunications market—the local market. The 1996 Act recognized that competitive market structure and competitive behavior are the keys to creating high-quality, innovative, local telecommunications services at affordable prices. Indeed, the stated purpose of the Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." To achieve this goal, the 1996 Act, among other things, established specific interconnection obligations applicable to incumbent providers. These obligations were expressly designed to promote efficiency and competition, while ensuring that the incumbents still receive a reasonable profit.

The 1996 Act was thus meant to serve the same purposes as the antitrust laws. But Congress did not envision that the 1996 Act would be the sole means of achiev-

ing those ends. Rather, the 1996 Act was plainly meant to complement existing anti-trust obligations. The Act made this explicit, providing that “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.” 47 U.S.C. § 601(b)(1). Thus, the 1996 Act sought to create local competition through the promulgation of specific regulatory provisions, with the Federal Communications Commission and state commissions providing the details, and with the antitrust laws serving their historical function of vindicating the interests of competition.

While early FCC and state commission decisions provided much hope for competitors, it now appears that, as in the past and as Congress anticipated, communications regulations alone is not enough to counteract the intransigence of the incumbent monopoly providers and create competitive markets. ILECs have shown time and again that they will resist and negate competition by using every loophole in the regulations and the narrowest interpretation of their regulatory obligations. In addition, the regulatory process is inherently slow-paced. For example, incumbent providers challenged the FCC’s authority to promulgate pricing rules for interconnection and access to their local networks, as well as the merits of the rules themselves. Only this coming fall, over five and a half years after the passage of the 1996 Act, will the Supreme Court hear a challenge to the merits of the FCC’s pricing rules and potentially provide the competitive sector of the industry with the pricing certainty necessary to develop long term business plans.

These realities have seriously retarded the competitive provision of advanced services. For instance, due in large part to howls of protest from incumbents, it took the FCC over two years to complete its line sharing proceeding, and this Order is now in the courts, three years after the issue was raised. In light of the ILECs’ ability and willingness to continually tie the regulatory process in knots, additional avenues of recourse are needed to open local markets.

This is not to say that federal and state regulators are failing to act to open the local market. Rather, federal and state regulators simply do not wield a heavy enough club to truly stop ILEC behavior intended to retain their local monopolies. For example, Verizon generated \$63 billion in revenues in 2000, or \$173 million per day. Even if the FCC’s enforcement authority is increased to a maximum of \$10 million (as requested by Chairman Powell and as is currently under consideration in the Committee on Energy and Commerce), even the most egregious and willful continuing violation of the 1996 Act by Verizon would only result in a fine of less than 6% of its revenues for *one day*. In fact, even if the FCC fined Verizon \$10 million per day each day of the year, the fines would amount to only 3 weeks of revenues. Clearly, regulators do not have the tools to pry open local markets against the wishes of incumbents.

Congress attempted to provide the ILECs with incentives to cooperate in opening their local markets to competition by permitting them to enter the long distance markets in their home regions if they opened their local markets to competition—so-called Section 271 authority—but this has failed to provide sufficient incentives. Instead, the ILECs have determined that there is more value in protecting their monopoly market share than in providing in-region long distance. Five years after the 1996 Act passed, incumbents have gained Section 271 authority in only five states, and only after a long process of fits and re-starts in seeking such authority. And even in these states, ILECs still wield monopoly market power, and will now do so without the incentives Section 271 provides to cooperate in opening the local market. In fact, once Verizon (then Bell Atlantic) received Section 271 authority in New York, its performance in complying with the 1996 Act declined, resulting in Verizon agreeing to pay up to \$27 million if its performance remained substandard. In essence, Verizon exchanged a sum equal to roughly four hours’ revenues for the right to shirk its obligations under the 1996 Act.

The current state of competition demonstrates that regulation is insufficient to open local telecommunications markets on its own. Over five years after the passage of the 1996 Act, ILECs still control almost 92% of the local market. After a promising few years, almost every single competitive carrier is struggling not just to compete with the ILECs, but merely to survive. CLECs that once had stock valuations of hundreds of millions, if not billions, of dollars have been forced to exit the market. Winstar, NorthPoint, e.spire and others, once so high-flying, filed for bankruptcy in recent months. Other CLECs are on the verge of bankruptcy. Those that are not in quite this dire situation have still watched their stock values drop well over 50%, and in some instances over 90%. These declines have forced CLECs to curtail expansion plans, particularly because these plans often require expending well over sixty percent of a start-up company’s revenues, as compared to the approximately twenty percent of revenues that ILECs spend on capital expenditures.

Moreover, the companies best financed to enter the local markets of the incumbent providers are the other ILECs. The 1996 Act lifted all restrictions on ILECs providing either local or long distance services out-of-region, yet out-of-region ILEC local competition has not materialized, and ILECs are eschewing the opportunity to enter long distance markets outside their local monopoly regions. Rather, the ILECs are only interested in providing competitive long distance service in markets where they can leverage their existing local monopolies.

Faced again with Bell company intransigence and delay, and seeing the promise of the 1996 Act fade as the years pass, would-be competitors and consumers are again turning to the antitrust laws. As it attempted to do with the savings clause in the 1996 Act, Congress must again ensure that antitrust remedies remain available for behavior that not only violates the antitrust laws, but may also violate the 1996 Act. CLECs like Covad and Intermedia have filed antitrust suits alleging monopolization by the ILECs, and consumers have filed class actions relying on similar allegations. *Goldwasser* is one of these actions, but it stands out for its far-reaching, wrong-headed pronouncements on the application of the antitrust laws to the telecommunications industry. In *Goldwasser* a panel of the Seventh Circuit affirmed dismissal of a complaint that, among other things, charged Ameritech with monopolization under Section 2 of the Sherman Act. That decision, if followed by other courts, threatens to undo the combination of regulation and antitrust enforcement that has proven so beneficial over the years.

Two of *Goldwasser's* holdings are especially problematic. The first involved complaint allegations that the court viewed as claims that Ameritech's behavior was illegal simply because it violated the 1996 Act. In dismissing these allegations, the court strongly implied that the obligations imposed by the 1996 Act categorically could not be obligations imposed by the antitrust laws, and therefore that conduct violating the 1996 Act could not violate the antitrust laws. The court did not consider whether the alleged conduct could constitute an independent violation of the antitrust laws, whatever the status of that conduct under the 1996 Act, nor did it account for prior decisions holding that the violation of regulatory requirements related to the promotion of competition can lead to a finding of antitrust liability. See, e.g., *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342 (9th Cir. 1985); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985). Unfortunately, some district courts in other Circuits have followed this aspect of *Goldwasser*. *Law Offices of Curtis V. Trinko v. Bell Atlantic*, No. 00 Civ. 1910 (SHS) (S.D.N.Y. 2000); *Intermedia Communications v. BellSouth Telecommunications*, Case no. 8:00 Civ.-1410-T-24(c) (M.D. Fla. 2000).

The court dismissed other allegations in the *Goldwasser* complaint with the holding that the 1996 Act "must take precedence over" the antitrust laws when the two statutory schemes cover the same field. This is nothing less than an erroneous conclusion that the 1996 Act creates an implied exemption from the antitrust laws. It gives short shrift to the savings clause in the 1996 Act, which explicitly forbids an implied antitrust exemption. The court attempts to explain away the savings clause by interpreting it to cover only markets that are not regulated because they have become sufficiently competitive. This is a Catch-22 of the highest order: forbidding antitrust suits when there is a monopoly that is regulated, and permitting them only when the market power that could support a monopolization claim no longer exists.

Goldwasser also ignores consistent precedent teaching that federal regulation under the Communications Act, even before it contained a savings clause, did not result in an implied antitrust exemption. And finally, *Goldwasser* fails to account for the history of productive, pro-competitive interplay between antitrust law and telecommunications regulation.

H.R. 1697 and H.R. 1698 represent pro-competitive, pro-consumer responses to *Goldwasser* and to current conditions in telecommunications markets. H.R. 1698 confirms that the antitrust savings clause to the 1996 Act means what it says—nothing in the Act supercedes the antitrust laws, and the antitrust laws are to be given full play in this industry. Given the history of this industry and the centrality of the antitrust laws in achieving the competition we see in some segments of the industry today, the wisdom of this approach is indisputable.

H.R. 1698 also reflects a proper recognition that the market-opening provisions of the 1996 Act embody Congressional establishment of rules of conduct necessary to promote telecommunications competition. Congress plainly intended that the 1996 Act be a prescription for competition, and it imposed a set of duties on incumbent carriers to achieve that objective.

Those duties are largely grounded in the antitrust laws, and the seminal antitrust decisions in the telecommunications industry. It is correct, as the *Goldwasser* court observed, that the *Colgate* doctrine recognized that an integral part of economic

freedom recognized by the antitrust laws is the right to refuse to do business. It is also correct, however, that for a firm with market power that right is not unbounded. Beginning at least as early as *U.S. v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912), and continuing through *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the antitrust laws have uniformly held that a firm with market power violates the law when it engages in a predatory refusal to deal, conduct with the purpose and effect of harming competition. Where the refusal to deal with a competitor would be illegal predatory conduct for a firm with market power, that firm is obligated to deal with its competitors on reasonable terms and conditions.

In a networking industry, whether railroading or telecommunications, the antitrust obligation for a firm with market power to deal with its competitors on reasonable terms and conditions translates to an obligation on the part of the incumbent with market power to connect its network with the networks of its competitors on reasonable terms and conditions. *E.g.*, *Terminal Railroad Ass'n*, *supra*; *MCI v. AT&T*, *supra*.

In the telecommunications industry, "reasonableness" has two components: technical and financial. Technically reasonable terms require connection of the networks at technically feasible points of the two networks. When competition came to the long distance market, the antitrust courts eventually determined that connection between the networks of the Bell System and its competitors was required in a way that would allow the long distance company to reach its customers over the local loop plant of the local telephone companies. This requirement has become the now common and widely accepted practice of local access. Interestingly, if we restate that in the somewhat pejorative jargon the ILECs like to use in these discussions, the ILECs would say "the antitrust courts forced us to allow our competitors to use our networks to serve their customers." Connection between networks for competition in the local market on technically reasonable terms, given the businesses and technologies at issues, would mean a variety of feasible connection points, including connection for local loops, connection for local switches. In other words, antitrust determinations of technically reasonable connection points would result in obligations much like those imposed by Sections 251 and 271 (despite the semantic difference that the 1996 Act uses the term "unbundling" to denote connection at certain network points).

Financially reasonable terms generally would translate to financial terms that would prevail in a competitive market, that is, that the incumbents should be able to charge for connection the amounts they would be able to charge in a competitive market, *i.e.*, in a market where they faced competition for the sale of network connections. In the telecommunications industry competitive prices are measured by incremental cost. This approach is agreed upon not only by all regulators, but by all industry participants as well, including the ILECs. Throughout the late 1980s and early 1990s, as the ILECs actively sought to change the regulatory scheme from rate base regulation to price cap regulation, they uniformly argued—successfully, and generally with the concurrence of their competitors—that where they faced competition they should be able to price at incremental cost, because incremental cost was the appropriate measure of a competitive price. This, of course, is exactly the concept that is captured in Sections 252 and 271. In antitrust, regulation and the 1996 Act, incremental cost includes a competitive rate of return or "reasonable profit."

Thus, the market opening requirements of the Act are closely tied, in both purpose and substance, to the duties imposed by the antitrust laws. This is a far cry from the *Goldwasser* view that the obligations imposed by the 1996 Act are somehow alien to the competitive regime of the antitrust laws. The *Goldwasser* view is simply wrong as a matter of antitrust law and antitrust history in this industry. Contrary to the *Goldwasser* view, the Act's specific requirements are consistent with antitrust law, and complement and effectuate general duties established under antitrust laws. H.R. 1698 properly recognizes that aspect of the 1996 Act, by allowing antitrust courts and antitrust enforcers to look to the Act for guidance in measuring behavior under the antitrust laws.

H.R. 1697 embodies another important link between antitrust principles and the 1996 Act. The 1996 Act's bargain with the RBOCs, set out in Section 271 of the Act, was that they could begin provide long-distance service originating in their own regions when, on a state-by-state basis, they satisfied a competitive checklist meant to demonstrate that the local exchange markets that they had historically dominated were open to competition. The history of the telecommunications industry teaches us, however, that, despite regulatory requirements meant to foster competition, incumbent telephone monopolists have a distressing ability to thwart competition by abusing their market power. Regrettably, it is becoming clear that in prac-

tice Section 271 is an example of the failure of such a requirement. Even in the few states where the FCC has granted the ILEC authority to provide in-region long-distance service by finding that the ILEC has met the market-opening requirements of Section 271, the competition envisioned by the 1996 Act remains minimal.

By adding a requirement that incumbents seeking Section 271 approval not have monopoly power, H.R. 1697 provides an important competitive safeguard. By committing the question of monopoly power to the Department of Justice and providing a clear standard based on market shares, the legislation provides for a well-informed decision by government officials with expertise and long experience in both antitrust principles and telecommunications markets. Under this provision Antitrust Division officials will apply the full spectrum of their knowledge of telecommunications markets and their familiarity with antitrust analysis to determine whether an ILEC has market power. If there is such a finding of market power, Section 271 authority will not be available. In addition, the Bill would establish that no ILEC with a market share of 85% or more could receive Section 271 authority.

Both of these provisions are salutary efforts to import the key antitrust concept of market power into Section 271. A possible concern with these provisions arises out of the bill's market share standard. That standard is best read to identify only situations in which an ILEC has market power and thus cannot receive Section 271 authorization. That is, the bill provides that the Attorney General can never grant Section 271 relief where an ILEC has a market share of 85% or higher in either the business or residential markets. My concern is that the provisions might be misread to embody a negative implication, *i.e.*, to say that an ILEC with less than 85% market share *must* meet the requirements of Section 271. The Committee should foreclose the possibility of the Bill being read to imply that ILECs with a market share less than 85% do not have market power. The 85% standard is well in excess of the level at which courts have been willing to find full-blown monopoly power, and such a reading would be inconsistent with the role that the Bill assigns to the Department of Justice. Therefore, and perhaps in an excess of caution, the Committee may wish to consider adding language to the Bill or the legislative history to ensure the correct reading.

H.R. 1698 also provides a solution to one of the most vexing problems with both traditional antitrust and 1996 Act regulatory tools for opening the local market: it would create a mechanism that enables individual, speedy, multistate dispute resolution of interconnection agreement disputes. While such a remedy is limited to the rights negotiated or arbitrated into an interconnection agreement, the 45-day commercial arbitration dispute resolution provision would enable competitors to have specific allegations of agreement violations remedied in a matter of weeks, rather than the years that are often necessary for antitrust and regulatory proceedings. While antitrust (or regulatory) remedies would generally be necessary to cure overarching anti-competitive behavior, commercial arbitration with discovery rights and a 45-day decision window will enable CLECs to obtain redress for specific interconnection agreement violations. Such rapid, cost-effective redress is essential if individual CLECs, struggling to stay afloat today, are to be able to afford to address specific ILEC bad acts in time to take advantage of the remedies.

In conclusion, the interplay between antitrust law and telecommunications regulation is crucial to the development of competition in local telecommunications markets. In light of current trends in the market and the unfortunate holding of *Goldwasser*, it is imperative that Congress step in and reaffirm what the 1996 Act antitrust savings clause says—that antitrust law and communication regulation complement each other in the battle to create local telecommunications competition. H.R. 1697 and 1698 would accomplish this and therefore should be passed.

Thank you.

Chairman SENSENBRENNER. Mr. Malone.

TESTIMONY OF MR. JOHN F. MALONE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE EASTERN MANAGEMENT GROUP, BEDMINSTER, NEW JERSEY

Mr. MALONE. Thank you, Mr. Chairman, Ranking Member, Members of the Committee. For 20 years, I have been President of a management consulting company working in the communications sector exclusively. All of our firm's 400 clients are either carriers, including CLECs, ILECs, interexchange carriers, or manufacturers

or software companies. Our business is to help our clients compete effectively in a crowded telecommunications market.

I'd like to share with you some insights about the CLEC market today based upon our experience. Right now, there are 150 CLECs operating in the United States, according to NPRG. In each of the 15 largest markets in the United States, there are an average of 15 Competitive Local Exchange Carriers working within those markets. Frankly, I think that's too many.

The next 150 markets boast an average of three CLECs per market. I think that's closer to the right number. Lots of CLECs have targeted these smaller markets and found far less competition, companies like KMC, Commonwealth. Smart business thinking, as far as I'm concerned.

CLECs right now are bulldozing through the ILEC marketplace. The FCC just reported that CLECs now have 8 percent, or 8.5 percent, share of all the access lines. They've captured 15 percent of the marketplace for small and medium business size customers. CLECs have 20 percent market share of business customers in many cities, and 20 percent total market share of all customers, including residence, in some non-major areas.

Interestingly, one-half of all businesses who either start up and procure telephone service or are relocating are passing those orders to Competitive Local Exchange Carriers. Let me repeat that. One-half of the businesses who are putting in service are giving the business to CLECs.

So, if this industry is so great, then why isn't anybody making money? I think that's a really good question. I'd like to share with you, based on my experience working with CLECs, three reasons why.

Number one, there is far too much competition in this marketplace. Venture capitalists know when they put money into companies that about one in every seven investments will work. Behind every one of the 150 CLECs, there is a good venture capitalist, and these venture capitalists, if you polled them, would say, with one-seventh of the investments expected to work long term, we figure this marketplace ought to hold about 21 profitable CLECs, not 150. Not every CLEC can be expected to survive and we can't make them.

Reason number two, bad business plans. I've seen a lot of CLEC business plans. They don't reflect competing against anybody except the phone company. Every major city I indicated has an average of 15 CLECs. Think of Reagan National Airport, 15 shuttles, all competitors, departing every hour on the hour for La Guardia. If that sounds preposterous, imagine that each one of them thought that the only competition they would face would be the Amtrak Metroliner.

Tampa is a fairly typical CLEC target. It's not in the 15 largest cities, it's a little bit smaller than that. It's got 36 CLECs operating in the city. Each CLEC has an extensive network that they put in place. Each CLEC must sign up about 6,000 business customers in order to hope to break even on their investments or they'll risk extinction—6,000 business customers. But Tampa doesn't have 6,000 business customers for each of 36 CLECs. That would be over a

quarter of a million businesses. Tampa's got about 5 percent of that number of businesses. That's an example of bad business planning.

Problem number three, operating company, or operating problems with businesses. Many CLECs face enormous amounts of employee turnover. Two-hundred percent per year employee turnover is not uncommon. If your employees are turning over every 6 months, think of it as every 6 months, all the employees take their passes and hand them in and walk out the front door. You can't build a business that way. It doesn't surprise me that CLECs find that one-quarter to one-half of their customers leave each year, and it's not because the telephone companies are messing around with the CLECs, it's because the CLECs are messing around with themselves. Funny thing, many sales reps leave a CLEC and then take their customers with them.

In conclusion, the CLEC industry is robust. It does have problems, of course. I make a living solving them. But CLECs report to us that the problems that they have are well within their control and they'd like to be able to be left alone, at least on the operating level, to solve them.

I just would like to finish by saying that it would please me if I might enter into the record as part of my testimony a piece that was in this morning's Wall Street Journal. It's headlined by Yochi Dreazen, the writer, "Bells' Rivals Double Local Market Share," based on a report that came out from the FCC purporting CLEC penetration last year.

Chairman SENSENBRENNER. Without objection, the article will be included.

[The information of Mr. Malone follows:]

THE WALL STREET JOURNAL.

© 2001 Dow Jones & Company, Inc. All Rights Reserved.

VOL. CCXXXVII NO. 100

EE/WO ***

TUESDAY, MAY 22, 2001

WSJ.com

Bells' Rivals Double Local Market Share

By Yochi J. Dreazen

Staff Reporter of The Wall Street Journal

WASHINGTON—New Federal Communications Commission data show that competitors to the four large regional phone companies nearly doubled their share of the nation's local phone-service market last year, though the Baby Bells continue to dominate the market.

The report is likely to bolster continuing Bell efforts to win FCC approval to sell long-distance service in as many states as possible. Bell competitors have long contended that the Bells shouldn't be allowed to offer long-distance until they relax their control over the local phone-service market. But the data could make it easier for the Bells to argue that their local markets are already sufficiently open to competition. "The market is open," said BellSouth Corp. spokesman Bill McCloskey. "It is time to let the Bells compete in long-distance."

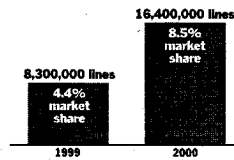
The FCC said that so-called competitive local-exchange carriers, or CLECs, controlled 16.4 million local lines, or 8.5% of the total, as of the end of last year. A year earlier, the Bell rivals controlled just 8.3 million local lines, or 4.4% of the total.

The FCC also found that the Bell rivals secured their largest footholds in the five states where Bell companies opened their local markets to competition in exchange for the right to sell long-distance phone service. Bell rivals control 20% of the local market in New York, for example, where Verizon Communications has been selling long-distance phone service since December 1999.

The report offered a rare burst of good news for the beleaguered CLEC industry, which has been hammered by plunging stock prices, an inability to raise needed new capital, and a string of pro-Bell FCC decisions. Several Bell competitors have filed in bankruptcy court in recent months, and many others are teetering.

Local Phone Service: How Competition Stacks Up

Bell competitors nearly doubled their share of the local phone market last year



¹As of December 2000. ²In New York, Bell rivals' market share surged after the FCC granted Verizon's long-distance bid in December 1999.

Source: FCC

Competition was strongest in the five states where Baby Bells have won the right to offer long-distance service:

State	Local lines Served by Rival	Market share ¹
New York	2,800,000 ²	20%
Kansas	220,328	13%
Texas	644,980	12%
Massachusetts	509,731	11%
Oklahoma	102,456	6%

Some CLECs also accuse the Bells of anticompetitive behavior designed to preserve their lucrative near-monopoly over the local phone-service market. Officials at several other Bell rivals also tried to call attention to the fact that the Bells still control more than 90% of the local phone-service market nationwide.

"In a couple of places, like New York and Texas, the Bell monopoly is eroding," said John Windhausen, the president of the Association of Local Telecommunications Services, a trade group representing Bell competitors. "But in the vast majority of states, the Bells have a very, very strong stranglehold on the local market."

Bell officials, by contrast, said their local markets were open to competition and urged the FCC to allow them to sell long-distance in as many states as possible. Verizon spokesman Peter Thonis said that the entry of the Bells into the nation's

long-distance markets will ultimately force incumbent long-distance companies like AT&T Corp. to begin offering local service as a way of holding onto their consumers. "Our entry would spark competition," he said.

—Shawn Young
contributed to this article.

Mr. MALONE. Thank you for your attention.
[The prepared statement of Mr. Malone follows:]

PREPARED STATEMENT OF JOHN MALONE

Mr. Chairman and Members of the Committee. My name is John F. Malone. I am President and CEO of The Eastern Management Group. Thank you for inviting me to share with you my knowledge and views of the competitive telecommunications industry. I trust these insights will be helpful as you endeavor to formulate judgments regarding both the "American Broadband Competition Act of 2001", and the "Broadband Competition and Incentives Act of 2001".

My firm, The Eastern Management Group, is a management consultancy. For more than 20 years we have assisted Incumbent Local Exchange Carriers (ILEC), Interexchange Carriers (IXC), Competitive Local Exchange Carriers (CLEC), Internet Service Providers (ISP), Operations Support Systems (OSS) software developers, and network infrastructure manufacturers. We have assisted our clients by developing business strategies and operating plans that help each one to compete effectively in a crowded telecommunications environment. The Eastern Management Group has more than 400 clients worldwide.

Among The Eastern Management Group's clients are such distinguished firms as AT&T, Verizon, Nortel, and Telcordia Technologies. In addition we are proud to have a remarkable list of CLEC clients, dating back to the early 1990s, when my firm first assisted Centex Telemanagement, now a component of WorldCom, with refining its business operations.

There is a robust and healthy market for competition in the communications industry today. More than 150 CLECs contend for business against the incumbent telephone companies. Each of the largest 15 markets (Tier I MSAs) is home to an average of 15 CLECs.

The next 150 markets (Tier II, III, IV MSAs) are each served by an average of three CLECs. And how big is a Tier IV market? Chico Paradise, California is the 165th largest MSA according to the Department of Commerce, with a population of 200,000. Three CLECs in a market is a comfortable number of businesses to be competing against the incumbent telephone company. However there is evidence that some of these smaller markets are beginning to get very crowded with CLECs, which may eventually pose problems.

CLECs have successfully penetrated the customer base of the incumbent telephone companies. According to the FCC, CLECs have successfully devoured more than seven percent of the ILEC business. The US Telecommunications Association (USTA) contends that CLECs serve 20 million access lines, though the actual number may be far greater.

Such penetration numbers do not tell the entire story. CLECs are not known to target the residential customer. Focused primarily on business customers, CLECs enjoy greater than 15 percent share of the market for medium and large business customers. In some cities the CLEC market share is substantially above 20 percent.

One-half of all companies, acquiring telephone service for the first time, or relocating, buy from a CLEC.

BellSouth losses to CLECs are on the order of \$30 million per month. Verizon monthly losses to CLECs exceed \$40 million.

Given the environment described, it is prudent to ask why CLECs are not yet making money, and why are bankruptcies being filed. The answer is that to succeed, CLECs need four things: 1.) Business plans, 2.) Management, 3.) Back-office, and 4.) Money. On occasion one or more of these requirements is absent.

The CLEC market is saturated with competitors. In business school, students learn that empirical evidence exists to demonstrate no more than five competitors can successfully compete within a market. For any business, including a CLEC, to knowingly enter into a market already occupied by more than five competitors is worse than bad judgment it is suicidal. Yet in the 15 largest markets, from New York (1) to Phoenix (15), there are an average of 15 CLECs doing business in each market.

If Reagan National Airport offered 15 competing Shuttles to LaGuardia, each one departing on the hour, anyone might rightfully question whether all these competing companies had sound business plans or common sense. Yet this is analogous to the current situation in the CLEC market.

The cornerstone of a CLEC business is a large computer called a Central Office, which routes the CLEC customers' calls. Beginning in 1996, with the passage of the Telecommunications Act, CLECs began to purchase these devices. Each CLEC would purchase one for each city in which it operated.

At a purchase price of \$6 million per Central Office, a CLEC needs, on average, 6000 customers connected to each Central Office to cover costs.

In a city where 15 CLECs are competing for customers, the aggregation of CLECs would require a total of 90,000 customers (15 X 6000) if they all hope to succeed. Since CLECs choose not to serve residential customers, this means that 90,000 business customers must be signed-up for service. It is interesting to note that a city (MSA) with a population of 3 million (Tier I) will have on the order of 100,000 businesses. It is improbable that 15 CLECs could expect to capture 90 percent of any market.

Should a city with a population of 2 million have 15 CLECs the unfortunate circumstance is that only, on average, 70,000 businesses would exist and not the 90,000 required by the CLECs.

The Tampa MSA ranks number 21 in size according to the Census Bureau. It boasts 36 CLECs operating in the city. Collectively these CLECs own 41 Central offices. This should require that the 36 CLECs be capable of signing-up 250,000 business customers. Tampa has only a small fraction of the number of businesses CLECs would need as customers if they were ever to prosper.

Standing behind each of the 150 CLECs is a Venture Capitalist, the investor of first-resort. No Venture Capitalist expects all portfolio companies to succeed. One in seven is a likely expectation. Of 150 CLECs, 21 companies is the total number of successful ventures that Venture Capitalists would probably expect to see remaining when the market settles-down.

As an industry, CLECs have done better at signing up customers than servicing them. Employee turnover for many CLECs is 200 percent a year meaning the average employee stays on the payroll for six months.

There is a lot of training that goes into preparing a CLEC employee to meet customer needs. Though three months is typically allocated to training one could not easily profess to be an expert in less than a year.

Even at 12 months of experience, sales people frequently sell only \$1,000 per month of new business when more than double that amount is required to grow a healthy CLEC. Customer Service people with similar experience are just beginning to see a payoff in fewer typed errors on orders passed to the ILEC for service.

CLECs face high customer turnover. A look-alike competitor offering a lower price will victimize those that eschew selling unique or innovative services. In the CLEC industry it is not uncommon to witness one-half of a company's customers leave each year. Routinely sales people depart a CLEC and take their customers with them.

As CLECs grow in size, software systems (Operations Support Systems), often cannot keep growing to meet the increasing demands of the business. CLECs often do not plan for enormous success, and faced with an onslaught of new customers, software systems can grind to a halt. Orders may be slow to process. There are numerous examples of bills not going out at all. A customer cannot pay a CLEC if a bill is not rendered. At some CLECs the average customer balance is three to six months in arrears.

Following the Telecommunications Act of 1996, Wall Street lavished CLECs with money. While some companies applied reasonable financial practices in managing their businesses others did not. Those less disciplined have been and will continue to be penalized.

Equity and debt financing is available to CLECs today. In 2001, CLECs will invest between one and two dollars in their network for every one-dollar of new revenue generated from customers. Investments in CLECs through public and private debt and equity offerings are still being made in tranches of \$100-500 million. It is clear that this money would not be available if the CLEC industry were not robust and with a promising future.

Finally, in a recent study by The Eastern Management Group 30 CLECs were interviewed to assess the state-of-the-industry. While operating managers at CLECs acknowledged existing problems with business plans, management, back-office and money management, they felt solving those problems was within their own grasp, and solvable.

The study showed that CLECs do not believe ILECs are hindering their performance.

CONCLUSION

The CLEC industry is healthy. More than 150 CLECs currently operate within the US and have captured more than seven percent of the market. The CLEC industry is doubling in size each year. For CLECs to succeed each one needs good business plans, a strong back office, good management, and money. CLECs have been

learning this lesson well. What CLEC operating managers do not contend they need is greater restrictions on incumbent telephone companies.

Chairman SENSENBRENNER. The Chair has noted the arrival of Members on both sides of the aisle, and as has been done in the past, we'll recognize the Members in the order of arrival, alternating between the Republican and Democratic side, and we'll enforce the 5-minute rule vigorously on everybody including himself, given the number of Members who have appeared. So let me start out.

I'd like a yes or no answer, Mr. Barr and Mr. Malone. Do you agree that the *Goldwasser* case was wrongly decided insofar as it reads the antitrust savings law out of the Telecom Act of '96?

Mr. BARR. I think it was rightly decided and it does not leave the savings clause out.

Chairman SENSENBRENNER. Okay. Mr. Malone?

Mr. MALONE. I am not an attorney and I would really have to defer to somebody else who's a lot smarter in that subject than I.

Chairman SENSENBRENNER. Well, Mr. Barr, do you want a market in this area where antitrust laws don't apply, or do you think that antitrust laws should apply in this area?

Mr. BARR. Which area?

Chairman SENSENBRENNER. The area of telecommunications, both—

Mr. BARR. The antitrust laws generally apply to that area. I think that a lot of the discussion is based on a misunderstanding of the *Goldwasser* case and the relationship between antitrust law and specific regulatory regimes.

Chairman SENSENBRENNER. Mr. Harvill, *Goldwasser* was a Seventh Circuit case that applies to Illinois as well as Wisconsin. Would you like to add to this?

Mr. HARVILL. Once again, I'll take the same out as Mr. Malone. I'm not an attorney, so I probably should consult with counsel.

Chairman SENSENBRENNER. Okay. Now, the Bell companies argue that their local networks are sufficiently open to allow competing local exchange companies to compete for local service. If that's true, why haven't the Bell companies themselves become competitors for local service outside of their region on a major scale? Mr. Barr, I think that Verizon pulled out of local phone service in certain parts out of their local area. Why don't we see more competition between the big Bells versus the little ones?

Mr. BARR. Because I think we need a business model that's profitable and where we will make a sufficient return, and I believe that right now our emphasis is pursuing—trying to pursue broadband.

Chairman SENSENBRENNER. Well, don't you think that a Verizon, with its assets, is better able to establish competition in the Midwest, which is SBC Ameritech, than somebody who Mr. Malone is describing as somewhat undercapitalized and not able to attract venture capital?

Mr. BARR. In some areas, yes. In fact, GTE, because it was able to do interlata, was able to put facilities across the country and have a national network, and that would provide an excellent platform for us to move out of franchise, as the expression goes. That's one of the reasons why this data relief provision, the interlata part,

would contribute to competition around the country, by allowing us to put core facilities there.

Chairman SENSENBRENNER. But GTE isn't around anymore.

Mr. BARR. GTE is part of Verizon.

Chairman SENSENBRENNER. I know.

Mr. BARR. Yes, but we're not allowed to own ingenuity or own those facilities which were nationwide networks because of the interlata restriction on data.

Chairman SENSENBRENNER. Commissioner Harvill, can you tell us a bit about the Illinois experience with the deployment of DSL by SBC and where does that matter stand now?

Mr. HARVILL. As it stands right now, the Illinois Commerce Commission entered an order a couple of months ago which required Ameritech Illinois to unbundle what's been termed Project Pronto by SBC Ameritech. Project Pronto, for all intents and purposes, according to the Commission order, is essentially an upgrade to the network that's already in place. What we've required them to do on an unbundled network element basis is to unbundle the components that are necessary for the competitors to purchase to provide advance services or high-speed access to consumers. The response we saw from SBC from that order was that they stopped deploying Project Pronto for data, and I reference data only. They continue to deploy Project Pronto for voice under the argument that it would cost too much to share that network with their competitors.

Chairman SENSENBRENNER. Now to all of you, if there's no change in the current law, how long do you expect it to be before the Bells get into the long distance market in all of the States? I know the Bells are in the long distance market in some States. How long do you think it's going to be without Tauzin-Dingell before the bills get into the market in the rest of the States?

Mr. HARVILL. As it relates to Illinois, we had a previous section 271 proceeding in Illinois 2 years ago, before Ameritech Illinois was acquired by SBC. My understanding from that case was they had met a clear majority of the checklist, the 14-point checklist.

As it stands right now, the one major burden that they have to overcome is obviously their operational support systems that facilitate the CLECs and consumers from switching from one company to another. That process is on track in Illinois. I would expect probably within 12 to 18 months, you will see a decision from the Illinois Commerce Commission either supporting or not supporting that order. But they are on the right track.

Chairman SENSENBRENNER. Does anybody else wish to respond to that?

Mr. BARR. We plan to complete the section 271 process, or hope to, by the middle of next year.

Chairman SENSENBRENNER. Mr. Blumenfeld?

Mr. BLUMENFELD. Mr. Chairman, I would say probably within a year. If I can just make one comment on that, the pace at which they get section 271 permission has always been completely in their control. The pace that we have seen is not because they don't know how to do this, it's because they're hoping they won't have to.

You know, when my children were young, we had a requirement, my wife and I, that you had to practice piano for an hour before

you went out to play, and, of course, about 10 minutes in, the kid would show up saying, "Can I go out now?" and we'd say, "No, you have to practice for an hour." So they'd come back 5 minutes later and say, "Can we go out now?" and you'd say, "No, you have to practice for an hour."

Well, pretty soon, you realize three things. One is, you're never going to last an hour. No one can hold out that long. The second is that after about two more tries, they're going to your spouse. There's got to be a better forum somewhere. And the third is, if they spent this much time practicing piano as they did trying to get out from practicing piano, they'd be pretty good piano players.

Chairman SENSENBRENNER. No concert pianists in the Blumenfeld family. [Laughter.]

Chairman SENSENBRENNER. Mr. Malone?

Mr. MALONE. Mr. Chairman, I'd just like to make a couple of comments here. It will probably take a year to 2 years. The FCC has indicated they expect ten applications this year. I talked to a lot of regional Bells in different States and it seems to be going a heck of a lot faster than that.

Second point, I would strongly urge a Regional Bell Operating Company, and a few of them are clients of mine, not to do anything in terms of interstate competition until they receive section 271 relief. These companies within their own territory have a leveragable brand. It's less leveragable when they go outside their territory. If they can sell long distance in the entire United States, you can take one marketing cost and spread it across all 50 States, but what they have to do is they have to distribute that marketing cost. The same dollar of marketing is going to be spent if they're outside their territory, but they're going to pick up far fewer customers. It's just not good economics to be selling it all over the country. But I argue that once they receive section 271, they'll all be in each other's backyard.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I appreciate all the witnesses' testimony, but it's always especially good to visit with the former Attorney General. We go back 20 years or so, and you're as good as ever. The only thing I can't understand is your—if your companies are—and the other Bell companies are complying with the 1996 Telecommunications Act and its provisions are working, then there'd be no reason for you to want to roll back section 251 regulations and sanction the enforcement, the gut section 271, right?

Mr. BARR. Well, that's not what we're trying to do.

Mr. CONYERS. Oh, okay.

Mr. BARR. We're not entirely happy with the access regime that has been adopted with respect to our local exchange facilities, but we are working through that process under the section 251 and section 271 process. But we are seeking two changes. One is the application of the long distance or interlata restriction to data traffic. In our view, that shouldn't—that is taking an old category that existed with respect to long distance voice and applying it to a different marketplace and there is competition is suffering in that marketplace now. The FCC has said that a little while ago, there

were 30 backbones. Now, it's probably four or five. It's becoming highly concentrated and there's concern over the degree to which that is concentrated.

Mr. CONYERS. But isn't that gutting section 271? I mean, maybe my language is not as smooth as yours, but you're talking about changing 271.

Mr. BARR. We're talking, I think, about clarifying section 271 so that it does not apply to data. Now, the incentives, the extent to which the entry into long distance is perceived as a carrot, would still exist. The broadband market, I mean, the long haul data market right now is \$6 billion compared to \$100 billion—

Mr. CONYERS. Okay. Okay.

Mr. BARR [continuing]. So it's still very important to enter the voice long distance market.

Mr. CONYERS. Okay. Now, do you agree that the Bells have, in effect, in real time, monopolistic control over the local loop, the essential facility for the provision of DSL broadband?

Mr. BARR. Not today, I don't believe.

Mr. CONYERS. You don't think so?

Mr. BARR. No. In fact, I—

Mr. CONYERS. Do you agree that the Bells ever had monopolistic control over local phones?

Mr. BARR. Oh, yes, of course.

Mr. CONYERS. But not DSL? You're going to use the same lines, but you'll be good guys this time.

Mr. BARR. Well, FCC has found that—I believe that the FCC has found that broadband is a discrete and separate market and some of the providers of broadband do use spectrum on their facilities. Cable was a monopoly and telephones were a monopoly, but the fact that they're both competing in this new market doesn't make them monopolies.

Mr. CONYERS. Let me sleep more—

Mr. BARR. These were both essential facilities or neither of us are essential.

Mr. CONYERS. Let me sleep more comfortably tonight. Will you be nice guys and non-monopolistic even though you have 90 percent of the market?

Mr. BARR. Of which market?

Mr. CONYERS. The one you have 90 percent of. [Laughter.]

Mr. BARR. Well, we—

Mr. CONYERS. You've got more than—you've got several?

Mr. BARR. Well, in New York, for example, I think we have below 80 percent of the market—

Mr. CONYERS. All right.

Mr. BARR [continuing]. In the local exchange market. In the broadband market, we're the insurgent. Cable has over 70 percent of the market.

Mr. CONYERS. We're not making much progress this afternoon.

Mr. BARR. Excuse me?

Mr. CONYERS. Mr. Former Attorney General, we're making little progress this afternoon, me and you.

Mr. BARR. Facts are stubborn.

Mr. CONYERS. Yes. Okay. Now let me—maybe you can just help me with this disconnect about the facts that are so stubborn. The

Atlanta Constitution, April 4 this year, "Once Mighty Telecom Competitors Fell Far Fast." Boston Globe, "Ringing In a Year of Opportunities, Bell Companies Have Won Recent Regulatory Victories But Face Big Test for Bigger Gains: Revamp of Telecom Act." Business Week, "Don't Let Telecom Competition Vanish." CBS Marketwatch, "The Death of Competitive Telecom?" Chicago Tribune, "Consumers Yet to See Benefits of Telecom Act." Interactive Week, "Carrier Retreat Bashes Gear Vendors." Los Angeles Times, "Ma Bell's Arrogance, Multiplied." It goes on and on.

What don't we, me and them, understand about your approach that leads to this flood of material that's available to everybody?

Mr. BARR. When you look at the local exchange market, traditional switch telephony, which is how people tend to measure competition—I think wrongfully so, but that's how they do it—competition goes where the money is, and because of regulation, the margins are in the business customers and in certain narrow segments of the consumer market, basically, the high value, big spending individuals and communities. That's where competition is directed.

Most people, or a very large segment in many markets, do not cover their costs of service, so people rarely come in to compete for customers who are—who have no margin. I think that's one of the principal problems. Competition is focused on the business market—

Mr. CONYERS. You know, that's one of the most non-responsive answers you've ever given me in over 20 years, Bill Barr.

Chairman SENSENBRENNER. On that happy note, the gentleman's time has expired.

The gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

Let me direct my first question to Mr. Blumenfeld. Mr. Blumenfeld, I don't pretend to fully grasp all of this. The one thing I have grasped is I want to make this decision based on what's best for the consumer here, and I'd like for you to address how you see both bills, Cannon-Conyers and Tauzin-Dingell, affecting the average consumer.

Mr. BLUMENFELD. Thank you, Mr. Congressman. I think that the effect of each is fairly clear, and the effect of Tauzin-Dingell is obviously radically different from the effect of Conyers-Cannon.

It was interesting to hear Mr. Barr say that he thought that his company no longer had market power in the DSL market. As you know, for 4 years—almost 4 years—I was general counsel of Rhythms NetConnection, one of the three nationwide DSL competitors. To the extent that his statement can be true, it can be true only because the unbundling provisions of the Telecommunications Act required his company and others like it to unbundle elements of their network, and the act was focused on elements of the network, not on the services, to allow competitors like Rhythms and others to provide whatever services they want and to deploy, in the words of Congress in the purpose of the act, new technologies to do so.

That's exactly what DSL was. DSL was a technology that was invented by the Bell companies almost 20 years ago. When they saw that the only way that they could deploy it as a customer service at the time was by undercutting their much higher-priced existing

services, they took it downstairs and locked it in the basement. The '96 Telecom Act gave Rhythms and other companies like it the keys to that closet in the basement, and we went down there and we unlocked that DSL technology. We bought unbundled network elements. We bought collocation space. We paid through the nose to do it, and we deployed DSL for the first time ever to consumers.

And to hear those companies now talk about the disastrous disadvantage they have compared to cable companies when they had this technology for almost 20 years, could have deployed it decades ahead of the cable companies ever even thinking about data, could be deploying it out of region now and don't do that, it's kind of a surprise.

So to me, here's the difference between the bills. The Tauzin-Dingell bill would eliminate the obligation of telephone companies to unbundle network elements that are relied upon, that are necessary, that are essential for data competitors to exist on the telephone network, and so it would eliminate competition within the telecom sector for data, allowing only competition between a telephone monopoly and a cable monopoly.

Where I got trained in antitrust, competition between two monopolies is not enough. The Cannon-Conyers bill, by preserving the antitrust laws and by sharpening their focus, would provide consumers with a greater variety of choices, a greater variety of providers, better price and services, not only between technologies, but within each technology. That's what competition is about in this country.

Mr. KELLER. So Cannon-Conyers would be good for consumers and Tauzin-Dingell would not be good for consumers?

Mr. BLUMENFELD. Without question, Mr. Congressman.

Mr. KELLER. Mr. Barr, you may have a different take on that same question?

Mr. BARR. H.R. 1697 would be a disaster for consumers because competition—the difficulty, as I mentioned, is that competition has been focused on the business market. The competitors have not been interested in going into the residential market because margins are low, and that's why it's very significant that once the Bells get into long distance, there's a big jump in residential competition, as the FCC just reported and said in their press release. That's where the surge is coming.

However, if this bill were passed, then the IXC's could keep the Bells out of long distance and continue to focus on the business market because the trigger of 85 percent in the consumer market would never be met. So I think it's a bad idea. Tauzin-Dingell, I think, is very pro-consumer.

I never talked about the DSL market. That would be talking like the Delta shuttle market. The FCC has said there is a broadband market and the two products right now that are the biggest contenders in that market are cable modems and DSL. The cable companies are completely deregulated and, as they said with wide approbation, that in order to invest, they need to be able to derive revenue other than transport revenue, and that's all we're seeking.

The current rules say that if someone wants to just do broadband and not serve in the local exchange market, which was what the bill was all about, they can take our pipe, take our investment, and

derive all the value, and leaving us just mere transport at telluric prices and no one's going to invest under that regime. And people are saying it is going to cost around \$200 billion, ultimately, to get the kind of infrastructure we need in this country in broadband. That's a large investment.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman, and I want to join with you in thanking each of the four witnesses for their testimony here today.

Mr. Barr, under H.R. 1697, the Bell companies would be barred from utilizing the benefits of any new legislation that gives them the right to offer new interlata services until such point in time as both their business and residential markets have competitors serving 15 percent or more of those markets, and the assumption of that provision would seem to be that, in some way, the Bell companies have acted to keep competitors out, to have their markets closed.

And I'd like for you to comment on that general assumption and on several facts with respect to the relative share of the local exchange market that is held today by competitors with respect to the business market, on the one hand, and the residential market, on the other. So several questions.

First of all, are the markets open? Secondly, is there an identical right of access for both the business market and for the residential market by competitors? Third, what percent of the small business market do the competitors have? I'm told it's something on the order of 35 to 40 percent, which would suggest that it is fully open and competitive. And what percent of the market on the residential side do the CLECs have? I'm told it's something like 5 percent. And why is there this difference? I mean, why, if the markets are open, as I'm assuming you're going to say, and if the right of access is the same, as I also assume you will say, is there such a difference between the presence of competition in the business market, on the one hand, and the residential market, on the other?

Chairman SENSENBRENNER. Before the witnesses answer, let me say that there are two votes scheduled and then the next round of votes will be about 4:30. We've got about 3 minutes left in Mr. Boucher's time. I would appreciate you all wrapping it up in 3 minutes. We'll then recess the Committee and come back right after the votes. Who would like to answer first?

Mr. BOUCHER. It's Mr. Barr.

Mr. BARR. Obviously, we believe the market is open and certainly has been certified as open in the States where we've gotten long distance approval, such as Massachusetts and New York, and we're moving rapidly in that direction in the other States.

But as I mentioned before, and I don't think there's anything wrong with this, it's just that people—competition goes where the margin and the money is, and because of the pricing system in the retail market that's mandated, the margin is in the business market. So that's where the competition has been drawn. SBC says that in their major cities, 40 percent of the business market has been lost to them. The reported competition in New York is up over 20 percent of the business market has been taken from us. The fig-

ures are much lower in the residential market, and what the FCC recently reported is that when the Bells are admitted into long distance, then the residential competition really takes off and substantial benefits go to consumers as a result.

Mr. BOUCHER. I'm told that, across the nation, approximately 40 percent of the local exchange lines going into residences are at rates that are actually below the cost of the telephone company in providing the service to that resident. Is that true?

Mr. BARR. I'm not sure about the national picture, but in some States for us, it is higher than that, and in other States it's there, and in other States, it's not. That doesn't surprise me. In some States, it's over half of our lines are below cost.

Mr. BOUCHER. And so would you agree that there's very little incentive on the part of competitors to serve a market where you can't charge even as much as the cost of providing the service?

Mr. BARR. Absolutely, and I understand that 2 weeks ago, before the Senate Judiciary Committee—I wasn't there, but I understand that Reed Hunt, the former Chairman of the FCC, and Pat Wood, the Chairman of the Texas Commission, identified the primary problem as precisely what you're driving at, which is these low below-cost retail rates. I think that was described as the primary problem that competition faces.

Mr. BOUCHER. And so it would be that an explanation for why only 5 percent of the residential market is in the hands of competitors, that they would rather stake their claim and make their investment in the much more lucrative business market where higher margins can be earned, would that be correct?

Mr. BARR. We think that's exactly what's happening.

Mr. BOUCHER. And so the bill really is requesting the impossible, that is, that competitors be found in a circumstance where competitors simply don't want to make the investment. Is that a proper conclusion?

Mr. BARR. That's right. I think what is triggering residential competition is precisely the Bell entry, so that the long distance companies have to offer packages and have to start selling that local element to consumers. And if that is blocked, until you reach 85 percent in the residential market, that's just not going to happen.

Mr. BOUCHER. Thank you very much, Mr. Barr. You've been a terrific witness. [Laughter.]

Mr. BOUCHER. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's time has expired and the Committee stands in recess.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. I would say that the Chair has still got his list of who appeared in order and we will not prejudice anybody for coming back late. But the one person who is ready and eager to ask questions is the gentleman from North Carolina, Mr. Coble, who is recognized for 5 minutes.

Mr. COBLE. I thank the Chairman. Gentlemen, good to have you all with us. Let me catch my breath.

Mr. Barr, now it seems like one of you all said four States. I was thinking five States had already received section 271 authority. Is that right, five States?

Mr. BARR. That's my understanding.

Mr. COBLE. All right, sir.

Mr. BARR. Three from SBC, two from Verizon.

Mr. COBLE. All right. So having said that, a number of other applications are scheduled to be approved in the next year. Many would say, what's the need for legislative action by the Congress today? Some would argue that the Telecom Act in its current form is working.

Let me put this question to you, Mr. Barr. Does the Tauzin-Dingell bill offer other benefits to the industry in addition to allowing the RBOCs to offer long distance data services prior to receiving section 271 approval?

Mr. BARR. Yes, Congressman. There are two parts to that bill. One is the interlata data relief, which you have referred to, which would allow the BOCs to provide long haul for data traffic. The other part deals with broadband access, essentially the last mile, and what it seeks to do is make the rules that govern cable and the DSL pipe, broadband pipe, more equitable, more on the same playing field, thus allowing investment to be recovered and for there to be some opportunity to profit from the investment.

Mr. COBLE. Well, now who would suffer detriment from such a proposal, if anybody, if anyone?

Mr. BARR. I don't think anyone would suffer detriment. I think it would lead to greater competition and more rapid deployment and wider deployment of broadband.

Mr. COBLE. Commissioner Harvill, the competitive industry has complained that the Bell companies are able to use their control over the local loop to hinder their competitive efforts. A, do you think these complaints are valid, and if so, how about giving us some specific examples of what is occurring.

Mr. HARVILL. Thank you. I think in some instances, as I mentioned in my prepared testimony, that the truth lies somewhere in the middle. Yes, there probably are instances where the ILECs or the incumbents are not providing the services that they're required to, and there are probably other instances where the CLECs are overstating the problem. As I said, it's somewhere in the middle.

I would say this. In Illinois, we have a continuing problem with regard to the orders that we pass, actually having the companies implement what we ordered. An example of that is, and it doesn't matter what the service is, but in this case it was shared transport. The Illinois Commerce Commission ordered a particular product, or a particular service, to be provided by Ameritech Illinois on five different occasions. The first instance, it took 11 months to reach that decision. Ameritech made a compliance, finally. It took another 11 months to actually get to a conclusion on that. Ameritech filed a tariff but refused to actually provide the service, so it was litigation and delay, and that was a particular problem. That problem wasn't actually solved until SBC acquired Ameritech and we made it a provision of the merger approval. So I think that's one specific instance.

Mr. COBLE. Mr. Blumenfeld, would you or Mr. Malone want to add to either one of those questions I've put?

Mr. MALONE. Yes, thank you. I'd like to just make a comment. Section 271 relief in any State probably is a free ticket to about \$1 billion of additional revenue for a regional Bell. This is very important to a regional Bell. I don't know if you know, but the average regional Bell figures that in any given year, 70 percent of the growth in revenue that they'll experience over the prior year will come from one service. Think of call waiting features. Think of caller ID. These are ideas that, in the years they're introduced, generated about 70 percent of the growth in revenue.

Section 271 relief, long distance, will do that. Look what occurred at Verizon when they introduced it in New York, and you're seeing the same kind of thing up in Massachusetts. No regional Bell in their right mind would trifle with a CLEC as part of a corporate plan in order to try and stifle the competition when you've got the section 271 opportunity there in front.

Now, does that mean that out of 500,000 employees spread amongst the regional Bells that there isn't some nut out there? Maybe there is, but it certainly doesn't seem like it passes the red face test in terms of a concentrated effort to jeopardize that decision.

Mr. COBLE. Mr. Blumenfeld?

Mr. BLUMENFELD. Mr. Congressman, again, I think that the issue is not so much, is there a concentrated effort, as that a company acts on what it believes to be its rational economic incentives to preserve the monopoly it has rather than to get into a market where they're not competitive.

I think the post-divestiture AT&T company shows us how much harder it is to be a competitor in a competitive market than it is to be a successful player in a monopoly market, and I think that while I've heard others as distinguished as Mr. Malone argue that the rational economic incentive is to give up control of the local monopoly in order to get into long distance, I'm afraid, unfortunately, that most of the Bells believe in the heart of their business planning that the rational incentive is to keep the monopoly as long as possible and give up as little as possible and still get permission to be in long distance.

Mr. COBLE. Mr. Chairman, I see that red light. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

The other gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. It looks like I jumped the line here.

Chairman SENSENBRENNER. Promptness pays.

Mr. WATT. I should take advantage of it.

Let me do a little poll here so I know where everybody is. I take it there are two people on this panel who think these bills are good bills. Raise your hand if you think these bills are good bills.

[Show of hands by Mr. Harvill and Mr. Blumenfeld.]

Mr. WATT. There are two people on this panel who think these bills are terrible bills but think that Tauzin-Dingell is a good bill. Raise your hand if you think that.

[Show of hands by Mr. Barr and Mr. Malone.]

Mr. WATT. But everybody thinks that the Telecommunications Act was a good act.

[Nodding of heads.]

Mr. WATT. All four of you. And shouldn't be changed. So two of you think that it ought to be changed one way, but it shouldn't be changed the other way. Two of you think it ought to be changed the other way and shouldn't be changed the other way. Am I right? Yes?

Mr. BLUMENFELD. It may appear that way, but I think, at least speaking for myself, which I'm safest doing, that the reality is that the heart of the Cannon-Conyers legislation is to clarify that Congress really meant what it said in preserving antitrust jurisdiction, a point that the *Goldwasser* court got exactly wrong, and then adds—

Mr. WATT. I take it Mr. Barr's argument would be that the heart of Tauzin-Dingell would be to clarify, not to change, am I right? Maybe I'm wrong. I don't want to put words in Mr. Barr's mouth. Am I misstating what your position is?

Mr. BARR. No. I think the Telecom Act did not fully anticipate the internet market and I think that the Tauzin bill tries to accommodate that new market.

Mr. WATT. So you think it—you think Tauzin-Dingell clarifies and Mr. Blumenfeld thinks Cannon-Conyers and Conyers-Cannon clarifies, but everybody's satisfied with the Telecommunications Act?

Mr. BARR. My position—

Mr. WATT. It's just not clear.

Mr. BARR. I agree with something that you said earlier, I think last year. I think it was your position in connection with the Boucher-Goodlatte bill. The Cannon-Conyers bill changes the antitrust laws and it does so by incorporating a very complex code of conduct for one industry and making those per se violations within the antitrust law, and I believe your position last year was you were very concerned about taking the general rules that are applicable to everybody and start packing it with specific industry-specific codes of conduct, and I think that's my concern—

Mr. WATT. You remember where I was last year better than I remember where I was last year. [Laughter.]

Mr. BARR. I think that was your position.

Mr. WATT. Which is not unusual. So would a credible position be from all four of your perspectives to leave both ends of this alone and let the telecom bill work itself out for a few more years? Is there something wrong with that, Mr. Malone?

Mr. MALONE. I'd just like to make—I'd like to make two comments, Representative. I think, first comment, the Telecommunications Act is a great voice act, and as Mr. Barr had just mentioned, it really was not designed to cover data.

The second point—

Mr. WATT. Well, there's some dispute about that, though, isn't there?

Mr. MALONE. Well, there is dispute, yes.

Mr. WATT. Yes. Okay.

Mr. MALONE. The second point that I would like to make, though, goes to the Conyers-Cannon piece about 15 percent of the

residence market being in the hands of competition before the regional Bells would be allowed to pursue interlata services. The practical matter is that the Competitive Local Exchange Carriers really don't want to play in that residence market.

Mr. WATT. Okay. That actually brings me to the final point, and my red light is getting ready to go off, so let me try to ask the final question. What can we do—is there something that we can do to incentivize all of these players to get into the local residential market as opposed to the local business market?

Mr. MALONE. It's a wonderful question. Relative to the Competitive Local Exchange Carriers, forget about it. They don't want to play in that marketplace. They don't want to play in it for a very good reason. It's not—

Mr. WATT. I understand why they don't want to play in it. I'm trying to figure out, what can we do to change that?

Mr. HARVILL. If I may, I think the Telecommunications Act of 1996 is very clear, and if anything, this is proof that the Telecom Act is working. In the States where the RBOCs have opened up their markets, you're starting to see competition for both business and residential consumers. If it wasn't working, you wouldn't see competition at all, and I think this is testimony to the fact that the act, as written, is working, and by removing incentives from that act, you're going to just go in the other direction.

Mr. WATT. Well, for whatever reason—

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. Thank you, Mr. Chairman.

General Barr, the answer you gave to the Chairman puzzled me a little bit when he alluded to the fact that antitrust could apply even under current law. Your fear is that if one of these bills had been adopted or would be adopted, there would be an odd mixture of the antitrust and regulatory jurisdictions, is that correct? Well, let me back up. Under current law, there are instances, are there not, where antitrust can apply?

Mr. BARR. Yes. I think that current law was well described by *Goldwasser*. I disagree with those who feel that *Goldwasser* was a departure from the mainstream. What *Goldwasser* said was, I think, the three traditional approaches to how you deal with a general competitive statute, like the antitrust law, and then specific regulatory regimes, and the three principles are these.

One, the existence of the regulatory regime does not in itself exempt the regulated industry from the application of antitrust laws. The case specifically says that and specifically says we are not saying there's any implied immunity. So today, even though we're regulated, an ILEC can be liable for price fixing, market allocation, predatory conduct. It would be a violation under the antitrust laws.

Principle number two, the fact that an industry may violate a regulatory statute that's specific to its industry does not and never has been deemed to be necessarily a violation of the antitrust laws. The basic principle is, you violate the antitrust laws if the action would be a violation apart from the regulatory regime. H.R. 1698 changes that and says it's a per se violation, which would mean that you're making—under the antitrust laws, you're bringing a host of regulatory disputes.

The third principle is where the real rub is, I think, and the third notion, what the court says is it focuses on a specific claim, that is, the claim of the essential facility, and Mr. Blumenfeld made my point, essentially, because what he says is the antitrust law says that under the essential facilities doctrine, you need reasonable access, and what the court said was when Congress has passed a specific law tasking an agency to determine precisely the same issue, what is reasonable access, how should it be given, on what terms, what are reasonable terms, and the agency has a comprehensive scheme where it is addressing those questions, then it must be given precedence over courts and juries deciding the question otherwise and saying, well, we don't think interconnection should take place in 90 days. We think it should be 45 days. You can't have two hands on the steering wheel.

Mr. GEKAS. So that if an action were taken under current law against your company or a company like yours on antitrust, you could interpose a defense that under the Communications Act and the regulatory scheme, that's covered in a separate jurisdiction, is that what you're saying?

Mr. BARR. No. I'm saying that some claims, we would not have any kind of defense on. We would be subject to it just like everybody else. On the other hand, if we were doing something because we were told to do it by a Federal regulatory agency acting under a Congressional enactment, then we would have—

Mr. GEKAS. Like the Communications Act.

Mr. BARR. Well, no, the specific act. In other words, price fixing, for example, we're regulated, but that's an act that's not authorized. But on the other hand, if we're charging a UNE price that's specifically approved by the FCC, we shouldn't be liable for that.

Mr. GEKAS. Under the proposed law, you would be subject to that liability, is that what you're saying?

Mr. BARR. Well, I think under—yes, you could read the proposed law that way. But the main problem under the proposed law is that these policy disputes as to what reasonable access is, which are supposed to be decided by the FCC on a coherent basis, that's why the act was partially adopted. It's now going to be kicked over to juries and plaintiffs' lawyers and customers to decide piecemeal in a hodgepodge of litigation, and you can't have a coherent policy if you have two hands on the steering wheel.

And this is the basic doctrine in what's called primary jurisdiction. Where Congress has an expert agency, tasks it with doing something, sets up a specific enforcement mechanism, that should take precedence over other remedies.

Now, *Goldwasser* did not deal with a suit by a competitor. It dealt with a suit by a customer, and what the court said was a customer has a much higher hurdle weighting in here, because, ultimately, their claim is that the rate is wrong, that the rate should be lower, and under the filed rate doctrine of the Supreme Court, which has been black letter law for a long time, the Court's right.

Mr. GEKAS. I have no further questions.

Mr. BLUMENFELD. May I respond briefly to that, Congressman?

Mr. GEKAS. Yes, certainly.

Mr. BLUMENFELD. And I'll try to stay within my time. I recognize that Mr. Barr was the Attorney General, and I hate to say this, but

he has unfortunately just overturned many decades of antitrust law. Several reasons. First of all——

Mr. GEKAS. The first time.

Mr. BLUMENFELD. And this is the place to do it, certainly. But first of all, it has always been true under the Communications Act, even before the '96 act was passed, that a person who felt that a regulated carrier had violated Communications Act had a choice of enforcing that act either in the courts or at the FCC. So that's always been the law. That's nothing new.

Second of all, throughout the history of antitrust litigation in this industry, it has always been litigated against the background of telecommunications law being formulated by the FCC with very specific regulatory requirements, including those about interconnecting networks. Nevertheless, the antitrust courts have always been free to conclude, as every court that's looked at it, including the Supreme Court, have repeatedly said, has always been free to conclude that a company is violating the antitrust laws even though it's regulated. One of the better wits on our staff when I was trying the *AT&T* case used to describe this defense by the Bell system as the defense of regulation means never having to say you're sorry. But what the courts have correctly said is that what you're doing is violating the regulatory commandment. You can hardly say that that regulatory commandment takes precedence over the antitrust law, and that itself should, and is, evidence of the anticompetitive activity.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Weiner.

Mr. WEINER. Thank you, Mr. Chairman.

General Barr, would you help me with a philosophical issue. If we assume for a moment that our Nation's policy should be to encourage competition, both competitions in the DSL market and competition in the global broadband market, so you're the giant in the DSL market but you're relatively small in the overall broadband market, but if we look at the '96 act, aren't you guys the perfect example for why we shouldn't touch anything?

You've gone through the process. You've done it well. You've done it through an arduous process, admittedly. You've done your checklist. You've come to States like my home State of New York and shown people that you're willing to compete, although it was difficult and expensive to do it. As a result, according to the Wall Street Journal piece that Commissioner Harvill just held up, there is increased competition for DSLs. There are cable companies throughout the country who have a big advantage over you, admittedly, in passing many more homes who are delivering broadband. In some areas like mine, I've got broadband choices. I've got yours, because you hit my block first, and now I'm going to try out the one from my local cable company.

Why is it that this is not exactly the way things should be working? I mean, as it is, you're all going to get your butts kicked when satellite gets its deal in order and then we'll—you know, we are notoriously bad in this House of deciding who the big guy is. You know, in the '80's, the big guy was the phone company who was going to squash the not-so-big-guy cable company, and now the cable company is the phone company.

So I guess what I'm asking is, don't we have an opportunity now to kind of look at the way things have played out and say, do you know what? All things being considered, it's kind of worked the way we hoped it worked, with some glitches, but it's kind of worked the way we'd hoped it worked.

Mr. BARR. I think that this is a dynamic marketplace and that as to—a lot depends on what market we're talking about, and that's how, looking at this from an antitrust standpoint, that's the first question. What's the market?

And I would agree with you generally philosophically as to the voice market, that is, the local exchange business that these rules were initially adopted to deal with. I'm not happy with them. I think the FCC went overboard. I think a lot of what's happened is that they were subsidizing competitors, and I'm not happy with the regime. But I agree that it's chugging along. Results are starting to be achieved. And I'm not here suggesting that that be fundamentally changed.

But looking ahead to the telecommunications market of this century, where there's convergence going on and a different market is taking shape, where content and telecommunications are going to merge into a hybrid market so that people will be offering content with a telecommunications component, I think it's very important not to distort that market at the beginning and give undue market power to any particular player. I agree, you should be neutral as to technology. Let the tele-satellite people come in. Let the fixed wireless come in. Let the cable people compete, even though they're coming in with major advantages in market share at this point. But don't handicap the local telephone company in that emerging future market.

I view this somewhat as wireless, as the wireless market. We originally had two players coming in. It was a duopoly initially, third, fourth, fifth. Look what's happened, an explosion of new services. Prices have dropped dramatically from the early days. There was that early concern that, somehow, the local company, if it was allowed to go into wireless, would somehow leverage that. It didn't happen.

Mr. WEINER. But certainly—and I'll get to you in a moment, Commissioner, but isn't there a pretty good argument, looking at the Verizon example, that there isn't anything about the '96 act that is inherently tying your hands and constricting you so much? You have the ability to go deliver DSL service. The only question is, do you help along these other guys who, frankly, couldn't exist in the—I mean, is it fair to say a lot of the players in the DSL market, besides yourselves, would cease to exist if they didn't have the advantages or the leveling of the playing field that was granted to them in the '96 act?

I mean, for Verizon, of all folks, who have learned to do it well, and maybe you're, for the purpose of this question, a victim of your success, if you look at the five States that have—that you've gone through the process, well, everyone has. I mean, in fairness, everyone has benefitted. It's caused you a little more aggravation than anyone else, but it has worked.

So I'm talking about the broadband marketplace. I'm not talking about telephony. So, I mean, the problem is that it seems to be

making the argument that you're hamstrung by this process so much, yet when the process does play out, and within a year, according to testimony, it's going to play out nationwide, we'll have—all worlds will have the Bells. We'll have the Bell's competitor for DSL. We'll have cable is going to continue to have its penetration. And we're going to have technological investments going on in satellite and then everyone benefits.

Mr. BARR. Well, let's ask ourselves the question, why isn't cable, when it comes to the Internet right now, why isn't it an essential facility? Why aren't there courts or people saying, gee, you have to carry? The reason is because the telephone exists.

Now, our point is we're not an essential facility when it comes to the broadband market. Either we both are or neither are, and we're not. We're competitors. And yet the rules that apply to us say that we cannot make a profit on any investment. This is not like the local exchange business, where you have a relatively stable legacy network structure. We have to make a lot of investment, and to make that investment—

Mr. WEINER. That's a persuasive argument.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. To those of us who are afraid of applying antitrust even more places, we're told that this is simply a stick and that it will likely not be applied here, just threatened, and that that will carry the action needed. Mr. Blumenfeld, could you address that? How many times do you think, or how often do you think that—do you foresee antitrust action would be coming in and being enforced here or just threatened, and then Mr. Barr, if you could give your opinion on that, as well.

Mr. BLUMENFELD. That's a very good question. I mean, first, I think it's important to recognize that what the bills before the Committee are talking about are looking specifically at antitrust enforcement where the conduct violates the Telecommunications Act. So the bills are not attempting to say that even conduct that complies with the act might violate the antitrust laws, although, frankly, the antitrust laws do say that because they're independent jurisdiction. So the bill does nothing to change the antitrust status of conduct that complies with the Telecommunications Act.

Secondly, antitrust law is a very effective remedy both where it is brought, but even more than that, where there is a possibility of it being brought. Firms are more likely to confirm their conduct to the antitrust requirements than they are to the regulatory requirements because the penalties are so much greater. The history of regulation in this industry is that you cannot enforce regulations enough to create competition. Commissioner Harvill talked about that to some extent. And even where fining is involved, that's true.

I know that Chairman Powell proposed increasing penalties to \$10 million for a violation. Not to pick on Mr. Barr's company, but they reported year 2000 revenues of roughly \$63 billion. That's roughly \$173 million a day. A \$10 million penalty is something like less than 2 hours' revenue. Put another way, for a family with a \$63,000 income, that's a \$10 fine.

So the regulatory process is not enough. It takes antitrust exactly because not the fact of an antitrust inquiry, but the effective

remedies that are available on the antitrust laws do provide a strong incentive for compliance. That's why the antitrust laws have always been a significant part, the most significant part, perhaps, of creating competition in this industry.

That's why, as a proponent of this, I think it is important to ensure that the antitrust laws continue to apply, and that's, frankly, why the ILECs are not pleased about the notion that they would still be exposed to antitrust liability even with the existence of the '96 act. I don't think it will be frequent in actual lawsuit terms, but I think it will be effective because of the remedies that are available, both the government remedies of further divestiture and of specific conduct requirements, as well as the threat of treble damage actions from private plaintiffs.

Mr. BARR. I think that the exposure to the treble damages and the per se rule that would be adopted in this, a per se violation of the antitrust laws, would be highly destructive of competition in the Telecom Act, and I'd like to—three specific ways.

These claims, as I say, come up in policy context. Gee, you're not obeying the law because you're not giving us 24 hours' access. Gee, you run out of space. You have to add new space. It's your obligation. Gee, you have to add new space. You have to—it's your burden to go and get the zoning permit, not ours. It's unfair competition to force us to do it. All these issues come up and they're resolved by the FCC in a coherent way. This will make those decisions decided by juries all over the country, and, therefore, we'll have a hodgepodge.

Second, it will disrupt the expeditious process for resolving these things and getting on with life on a no-fault basis that the FCC has put into place. Currently, as I say, we have to meet certain criteria. If we miss, we pay a fine. And while our overall revenues are very healthy, obviously, as you know, the net revenues are what count. It's the profit that counts, and these have a major impact on our net revenue.

Now, what this would do is cast the whole thing into a litigious, fault-finding blame game, instead of the way the FCC has it, which encourages cooperation. We are a wholesale provider. We have a customer relationship and these people are trying to shove it into a contentious, litigious relationship.

The third way it will hurt is just the burden and litigation risk it exposes us to. Moving to new technology, putting in fiber, raises a host of new questions on unbundling. How do you unbundle fiber? Fiber is inherently different than cable. It's hard to sequester a piece of the fiber and say, this is going to be unbundled. There are all these new issues that come up when you put in new technology and new capacity, and yet these are precisely the issues that claims come in. Oh, gee, you're not following the act because you haven't followed this, or you should apply this rule to this. So any change in the way we do business, especially into these new riskier technologies, will create massive litigation risks and destroy the incentive that the act was designed to achieve.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I first wanted to thank the Chair for scheduling this hearing in such a prompt fashion as soon as the referral was made. I think it's very healthy that this Committee is looking at these important, and I think somewhat complicated, issues.

I was thinking, listening to the debate and the questions from my colleagues, that we're all really believers in the free market, but markets can be defeated in a lot of ways. I mean, you can defeat markets by over-regulating, but you can also defeat free markets by the accumulation of market power in the private sector and the use of that power in a way that is unfair to competitors, and we don't want either extreme. We want actual free markets.

So I guess the question I have listening to this is, everyone agrees that, at least if I'm hearing it correctly, no one is saying that the '96 act was a mistake, that we shouldn't have gone forward with that, but it hasn't quite done everything we wanted to do, and the question is what to do about that fact.

I remember when we looked at the act and the Judiciary Committee had a role in it, and then antitrust whiz Ann Bingaman argued very strongly to us that the Justice Department should have a much bigger role in the act than was ultimately concluded. I'm wondering, Mr. Harvill, if you believe—I mean, obviously, we have not had the kind of competition that we'd hoped we would, and I heard and listened with great interest to Mr. Malone's comment about some of the start-ups and maybe they weren't such good business people and they had turnover, and I think, you know, there's some truth to some of those comments. But we've also heard, not on this panel today so much, but we've heard in real life and seen that some of these companies had litigation departments as big as engineering departments, and the Kovads and North Points are really limping today and they really had a hard time getting the act complied with.

So I'm wondering, Mr. Harvill, if the Ann Bingaman suggestions of a greater role for the Justice Department Antitrust Division had been included, would that have assisted in the effort to bring competition to, especially broadband, in your judgment?

Mr. HARVILL. Thank you for the question. It's a very good question. The Telecom Act, as I said previously, I think created a clear path for the ILECs to get into the long distance market. I believe that, obviously, the pace is not quite what we had expected, that there—we're on that path and we're going to get there. We're going to get there in Illinois and I'm assuming we're going to get there across the country, eventually.

One of the nice things about the '96 act was the fact that it provided incentives for the ILECs to open their markets, and that was, obviously, the carrot of getting in the long distance market.

The problem is, as we sit here today, there is no penalty if the ILECs choose not to comply with that. If the ILECs choose not to open their local markets, obviously, they don't get into the long distance market, but there is no real penalty.

So I think anything that you can do to increase the incentives, and I'm big on incentives here. You try and put incentives in place as opposed to penalties. But anything that you can do to incent them to get into this, to open their markets up to their competitors,

is one of the best things that you can do. Hindsight is 20/20. You know, obviously, maybe if you would have done that, things might have been different, but we deal with the reality of what we have today.

Ms. LOFGREN. The second question is really for Mr. Barr, and that has to do with the incentives for deployment in rural as well as inner-city areas for broadband. In the Conyers-Cannon bill, there is a provision that has a loan scheme that would assist or make available the roll-out of technology in those underserved areas, and my understanding is that Mr. Dingell had an amendment that required build-out in the Commerce Department bill. Which of those two approaches do you think is preferable, and will either one of them actually work, in your judgment?

Mr. BARR. I think the best way to approach it is through a technology neutral approach. That is, not pick any one type of provider, such as a telephone line or a cable line, but try to have the most efficient provider address these areas. In some of these communities, satellite—for example, rural, satellite would be more efficient. So I think a carrot approach involving loans, tax credits—

Ms. LOFGREN. If I could—I don't want to interrupt you, but actually, the bill, the Conyers-Cannon bill, I don't think is specific technology. It talks about providers of broadband, not a specific—

Mr. BARR. Right.

Ms. LOFGREN [continuing]. Type of provider.

Mr. BARR. Right. And, therefore, I think that that is a good approach, and, you know, I also think there should be an examination of the use of the excise tax revenues and other things to provide a carrot to have a, really a race to get those kinds of benefits out to those communities.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. I'd like to begin by thanking you and the staff for putting together an outstanding panel today. The witnesses have provided both a broad policy and legal framework within which to consider this legislation, and all four of them have demonstrated a very keen grasp of the specifics and the legal and mechanical issues involved. It really is one of the very best panels that we've had on this or other legislation.

I am particularly intrigued by the back and forth between Mr. Barr and Mr. Blumenfeld, and it really does, as I think Mr. Barr indicated, illustrate that what we're talking about here are policy differences. I think you can see in the two witnesses different approaches of different administrations with which they have been associated, and we really are talking about fundamental policy differences.

And I think I share some of your concerns, Mr. Barr, that if you look at the areas in which both H.R. 1697 and H.R. 1698 take us in tandem, they would seem to expand the power of the Department of Justice in several areas, including the antitrust area, with the per se violation provision that you've dealt with. And in both of these areas, in H.R. 1697 and H.R. 1698, expanding the power of the Attorney General over—in areas involving decisions regarding market power, as well as in the per se violation, that these are

at the expense of the proper role of Congress in setting the policy and the laws.

And I'd like your thoughts with regard to whether or not these are unique forays by legislation. Are these unique areas? Are these unique approaches? Is this the first time, really, in any industry that is regulated by the Congress that we would be seeing this per se rule and the ability of the Attorney General to override, basically, Congressional intent and Congressional power and where you see that taking us in perhaps some other areas, as well, in terms of its precedent setting value.

Mr. BARR. Yes, Congressman. I think it is unprecedented in several respects, and one of them is the finding that violations of regulatory regime are per se violations of the antitrust laws. Per se violations of the antitrust laws are very rare. They are reserved for section 1. There are no per se violations for section 2. And this basically trivializes the antitrust laws by taking any regulatory violation, including technical violations, and treating them as per se violations of the antitrust laws.

Also, I think what is unique here, and I may be wrong on this, but certainly in my memory, the antitrust—Congress passed this law against the backdrop of antitrust enforcement. The industry was run by an antitrust consent decree administered by Judge Greene. So there had been a history of antitrust enforcement, but Congress was specifically trying to substitute a coherent regulatory regime run by an expert agency and have a coherent national policy. So that's why the MFJ, the antitrust results of all this antitrust enforcement, was removed and the legislation was substituted, along with a very specific regime that involves process, that involves coordination with the States, that involves an expert agency.

And what this does, essentially, is with a sweep of the hand, turn this all over, not to Judge Greene but to 850 Judge Greenes around the country, and more importantly, because these are frequently fact questions, turns it over to juries all over the country.

What Congress did in the act was it took certain fact finding and turned it over to be legislative fact finding by an administrative agency. We all know the distinction in administrative law has been adjudicative facts and legislative facts, and what Congress did was say, we want an expert agency to give a coherent policy through this fact finding process. What this does is turn it all into case-by-case adjudicative fact finding by juries. It is a complete retreat. It will lead to a throttling of the progress that has been made to date under the Telecom Act, which I would not underestimate.

I would urge the Congress to go back and look at the progress of competition in the long distance market and compare it to the progress of competition here. I would urge the Congress to—this Committee to go back and look at competition in the cable, and when was cable deregulated? What was the level of competition that led this body to deregulate cable from soup to nuts? There's a lot of competition out there right now in the local market.

Chairman SENSENBRENNER. The gentleman's time is about ready to expire, and I'm afraid that if we wait until after the 4:30 roll calls, nobody is going to come back.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I thank the Chairman and I probably won't use my full time, so if the gentleman from Georgia wants to ask that final question, I will yield to him the balance of my time.

Mr. BLUMENFELD. Mr. Barr makes a point about the issue of competition, and the progress, the apparent progress that has been made. I think it's by the year 2002, it's, and I've seen it somewhere, in some memorandum, it's likely that there will be some 20 States that the Bells will be allowed to provide long distance service.

I mean, what implications does that have in terms of the Conyers legislation, in terms of what position we should take?

Mr. BLUMENFELD. Thank you, Congressman. I think, actually, it has important implications for our understanding of what's going on here. Mr. Barr said earlier that where ILECs obtain competitive entry, competition flourishes. I think he has reversed the cause and the effect.

The point of section 271 and the reason that process has worked as well as it has is not, I think, as originally envisioned, because it provides the ILECs a strong incentive to open their markets. As I said, I think their incentive is to open their markets as little as possible and still get long distance authority. The reason section 271 has worked in practice is because of the process that it sets up. It sets up a process under which, first, the local regulators, and then the FCC, with the participation of the Justice Department, have to make very close determinations of whether the companies have opened their markets to competition enough, and in the course of that process, all of the States have adopted and the FCC has adopted a set of processes to look into that.

Mr. DELAHUNT. And you're satisfied with those processes?

Mr. BLUMENFELD. Yes, exactly. And those processes are working. Those processes produce market opening behavior, which in turn frees the ILECs, as it should, to go into long distance and opens the markets to competition. That's why we're saying—

Mr. DELAHUNT. And you're suggesting that Conyers-Cannon would be that spur, if you will, in this situation?

Mr. BLUMENFELD. That's right, and most certainly we should not eliminate the requirements that are embedded in section 271 or section 271 itself.

Mr. DELAHUNT. Taking back my time, Mr. Barr, do you want to—

Mr. BARR. I think this proves my point. Conyers-Cannon isn't the law, and yet in State after State, despite all these complaints of misconduct, the authorities are saying, you're meeting your obligations in letting us in. Moreover, after we're let in, contrary to the supposition there would be backsliding, I saw Pat Woods said there hasn't been backsliding. If anything, it's been improved performance after the ILECs after they're let in and competition takes off, because, I mean, let's look at brass tacks.

A lot of people in New York, they never hear from the IXC. They don't know they have a choice. Anyone in New York, anyone in Massachusetts can pick up the phone today and have an alternative carrier—anybody—but they never hear that.

Mr. DELAHUNT. Well, the fact that competition opens up, what is the impact, therefore, in terms of the RBOCs as it relates to the Tauzin-Dingell bill?

Mr. BARR. Well, I think that there's a superceding market that is developing, and that's broadband, and that's where a lot of the value is going to be. As the voice market is commoditized over time and prices are driven down to their incremental costs, no one invests money just to get their incremental costs back.

Mr. DELAHUNT. No, but in the case of telephony, if that's the correct term, I mean, really what we're talking about is a loss leader. I mean, I wouldn't think that Verizon is going to complain substantially about having market share in terms of the traditional telephone because it presents opportunities to promote and market other services, DSL, all the Internet services that would be embodied in broadband activity, so——

Mr. BARR. Well, I think you were talking about moving into the broadband market——

Mr. DELAHUNT. Right.

Mr. BARR [continuing]. And that is where margins should be higher and returns should be higher because it's a riskier new business. It requires more investment, new products, content, putting—there's a host of things that people demand that we can supply in competition with cable and we think that's going to be the marketplace of the future. A lot of companies are not going into providing local telephone competition. They're looking ahead and they're leapfrogging and they're putting their investment in broadband and new technology and we want to be competitors in that market and we think that's the right policy for the country, to have maximum competition. We think that if you distort it now and the market is turned over to the cable companies, which we think there is a risk of, then 3 years from now, you'll be sitting around trying to figure out what to do with the cable companies.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Michigan.

Mr. CONYERS. I ask unanimous consent to include these several articles in the proceedings.

Chairman SENSENBRENNER. These articles will be included in the record, if no objection. Without objection, so ordered.

[The information of Mr. Conyers follows:]

LOS ANGELES TIMES EDITORIALS

JOHN P. PUERNER, *Publisher*JOHN S. CARROLL, *Editor*JANET CLAYTON, *Editor of the Editorial Pages*

Ma Bell's Arrogance, Multiplied

The nation's regional telephone companies, or Baby Bells, agreed five years ago to open their lines to competition in exchange for the right to enter the long-distance phone market. That was then. Today, they still control 95% of the local phone market and, like all monopolies, stick their customers with ever-rising bills. They deploy a barrage of legal maneuvers and technical hurdles to block other companies from offering high-speed Internet services, known as digital subscriber lines (DSL), over their networks.

The 1996 Telecommunications Act, meant to bring competition into local phone service, clearly hasn't delivered. Most consumers have no choice but to pay high prices. Reps. W.J.(Billy) Tauzin (R-La.) and John D. Dingell (D-Mich.) say they intend to fix this by allowing the Baby Bells into the long-distance DSL business while keeping their local-service monopoly. It is a proposal without logic. The change would only strengthen the Bells' chokehold on local service and remove any incentive to compete and innovate.

The reasoning behind Tauzin's bill, HR 1542, is that the local Bells need an incentive to invest the billions of dollars it would take to upgrade their systems for DSL service, and giving them free range in long-distance data service would do the trick. A staunch supporter of the local Bells, Tauzin says high-speed Internet service is in its infancy and

should not be hobbled by regulation.

The Bells already control at least 75% of the DSL market, using their monopoly muscle to keep others out. The only thing they can't provide is long-distance services, voice or digital, unless specifically authorized. They prevent others from competing in their market, as some 70 California Internet companies told the Federal Communications Commission earlier this month, by delaying or denying service to independent Internet providers, stealing the independents' customers and pricing them out of the market. The penalties for such conduct are so low that the Bells simply consider them part of the cost of doing business. If there are no competitors in some markets, it is largely because the Bells drove them out.

Requiring competition in the local phone market by law has not so far provided sufficient incentive for the Bells to open up to newcomers. Lifting that mandate for the most profitable long-distance DSL services would kill any hope of competition in the future. The Bells would keep on charging their consumers high prices regardless of the quality of their service.

No one except the phone companies would mourn the death of the Tauzin-Dingell bill.

To Take Action: Rep. Tauzin, (202) 225-4031 or www.house.gov/tauzin. Rep. Dingell, (202) 225-4071 or www.house.gov/dingell.

WEDNESDAY, APRIL 25, 2001

"USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."

—Allen H. Neuharth, Founder, Sept. 15, 1982

President and Publisher: Tom Curley

Editor: Karen Jurgensen
Executive Editor: Bob Dubill
Editor, Editorial Page: Brian Gallagher
Managing Editor:
News, Hal Ritter; Money, John Hildreth;
Sports, Monte Lorell; Life, Susan Weiss;
Graphics & Photography, Richard Curtis



Senior Vice Presidents: Advertising, Jacki Kelley;
Circulation, Larry Lindquist; Electronic, Jeff Webber
Vice President: Finance, Tom Miller;
Human Resources, Janet Richardson;
Information Technology, John Palamiano;
Marketing, Melissa Snyder;
Production, Ken Kirkhart

Today's debate: High-speed Internet access

Public pays price as Baby Bells stifle competition

Our view:
Lobbying, roadblocks preserve monopolies, make DSL scarce.

Consumers hoping for the day when they might enjoy the fruits of local telephone competition got another blow with the demise of PSINet. Last week, it announced that it would likely file for bankruptcy protection, and this week, it gets delisted from Nasdaq.

The Ashburn, Va.-based company offers competitive high-speed Internet access over local phone lines. But it, like many other "digital subscriber line" firms, has crashed in recent months. That leaves customers with few choices other than their good old local Baby Bell monopolies, which control about 87% of the once-competitive DSL market.

This is just a microcosm of a much bigger problem for consumers. Despite a 1996 law designed to break open the local Bell monopolies, little competition has emerged. And where it did show promise, such as the DSL market, the Bells hobbled it. Result: Consumers pay more, and quality suffers.

This sorry state of affairs has prompted some states to consider a radical solution: break up the local Bells to foster competition. But in Washington, lawmakers are looking to reward the local monopolists.

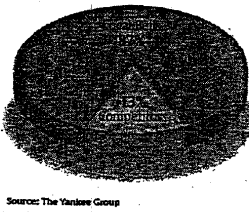
The Bells say it's not their fault that many DSL firms had lousy business plans or were slammed by tough economic times. While some DSL firms have themselves to blame, the Bells helped others along, using their control over the wires and switches making up the phone network to hamstring companies that need access to that network to compete. A sampling:

► The Federal Communications Commission found that Verizon, the local Bell serving mainly the Northeast, almost always processed orders for its own Pennsylvania customers in a timely fashion last year, but did so for competitive companies only about 20% of the time. Verizon says the comparison isn't fair and it's better now at processing DSL orders.

► Kentucky ruled last November that Bell South harmed a DSL competitor in the state by providing "preferential and discriminatory service to itself."

Bells keep monopoly

The once-competitive "digital subscriber line" (DSL) market for high-speed Internet access is being monopolized by the local Bells. Share of residential DSL markets:



Source: The Yankee Group

By Adrienne Lewis, USA TODAY

► Washington state this month ordered Qwest, the local Bell serving the Northwest, to give AT&T access to its equipment. AT&T had complained that Qwest, among other things, padlocked equipment boxes to "frustrate competition."

The effect: Struggling competitors have to spend time and money fighting with the Bells instead of winning new customers.

Given such Bell intransigence and the general lack of competition, several states are now wondering whether breaking up the Bell empire would bring needed consumer choice. The hope is that a separate hardware company would have no incentive to deny network access to competitors. And the breakup of AT&T quickly resulted in healthy competition for long-distance service.

But the idea has little chance of gaining traction. Pennsylvania's utility commission considered "structural separation" and was buried under an avalanche of Verizon lobbying. And in Washington, lawmakers wooed by aggressive Bell lobbying are looking the other way. A bill to be introduced this week by Rep. Billy Tauzin, R-La., would, in fact, loosen rules on the Bells, letting them provide long-distance data service without first opening their markets.

Until somebody faces up to the fact that the local Bell monopolies won't go willingly into a fair fight, consumers will be left with higher bills and no real choice.



And the broadband played on ...

Bill lets local phone monopoly infect high-speed data market

OPINION
By Brock N. Meeks
MSNBC

WASHINGTON, Apr 25th — The Baby Bells have cannibalized their siblings, gorging themselves on bull market-fueled mergers and acquisitions faster than venture capitalists could write ludicrous checks for ludicrous sums of money funding even more ludicrous dot-com business plans. It was all legal; all done under the radar, lost in the noise of baby billionaires and \$3,000-per-head B2B conferences held in Toledo. And it was done in the spirit of competition and telecom "reform." And we all got screwed in the process.

THE 1996 TELECOM Reform Act promised to level the playing field, drop prices and jump-start competition for local, wireless and high-speed Internet services. Instead we got a footrace to the feeding trough, and when the feasting was over, the seven "Baby Bells" were four.

In the wake of this consolidation there is only vapor-like competition. Instead we have a pock-marked telecom industry, littered with failed or failing competitors, that is second only to the spectacular financial flameouts whose epitaphs are chiseled into the Chapter 7 tombstones of the dot-com graveyard.

And now a bill in Congress is looking to blow away any facsimile of making the local telephone companies obey the law that mandates they open their networks to any and all competitors in an effort to level the competitive playing field. This bill, dubiously called the "The Internet Freedom and Broadband Deployment Act of 2001," does nothing more than strip-mine the remaining competitive safeguards of the current law, green-lighting the Bells to bludgeon any remaining competitors into oblivion.

GRAB FOR HOLY GRAIL

The Telecom Reform Act was sham from jump street but the act's critical voices were drowned out in the din of the lobbying bloodbath being waged between cable and telecom interests who were throwing more cash into congressional coffers than Las Vegas sports books see on Super Bowl Sunday.

The law requires the local monopoly telephone companies to resell their network services to competitors. And when that local network is quantifiably competitive — based on a 14-point checklist written into law — the Bells are granted the Holy Grail of Telecom: entry into Valhalla, er ... I mean, the long-distance market.

But the Bells have kept underfinanced competitors tied up in legal battles and fought the 14-point checklist in the courts, spending billions trying to put the regulatory genie back in the bottle.

And along the sidelines of the so-called level playing field lies the carnage of broken promises: By now consumers were supposed to have several local phone companies from which to choose, including residential services offered by long-distance, cable and wireless companies. Many have tried, a few have made lurching advances, but all have failed to make a significant dent in the residential offering of telephone service. As of June 2000, Baby Bell competitors served only 3.2 percent of residence and small business phones.

And remember "video dialtone"? Those promised multibillion-dollar cable-like networks the Bells said they would build to compete with local cable operations? They are all toast.

Finally, while long-distance rates have fallen faster than Madonna's latest single from Billboard Magazine's Hot 100 — down 34 percent since Ma Bell was broken up — local telephone rates have RISEN 70.2 percent.

FREAKY LEGISLATIVE MOJO

That the Bells have been aggressively deploying broadband services at all comes only after nimble but faltering companies like Covad invaded their space and began offering DSL cheaper, faster, whether the Bells liked it or not. And clearly, they did not.

Even as the Bells are currently being fined tens of millions of dollars by the FCC for stonewalling competitors' DSL orders and providing sloppy service to connect those DSL customers to their networks, they realized the writing on the digital wall and began to actively market their own DSL services. But only in those areas where companies like Covad have penetrated.

If this broadband deployment bill is passed, the Bells will be in a position to monopolize yet another market: the high-speed data market.

The bill "would be a boon for the Baby Bells but a disaster for consumers," says Mark Cooper, director of research for the Consumer Federation of America. "The Bells are being rewarded with a bill that will help them maintain their local phone monopolies ... and at the same time, establish a new national monopoly — this time in the broadband services market," Cooper says.

If the bill passes, the Bells no longer have to prove their markets are competitive to get into long-distance data services, from which they are currently banned. They'll be able to offer those services immediately, meaning they'll be instant long-haul data competitors to companies such as WorldCom and AT&T, Broadwing and others.

And if that happens, it'll take more than Broadwing's "freaky engineer mojo" to keep the Bells from dominating the field and crushing upstarts.

In addition, rural areas will be bypassed in the broadband land rush; hell, the Bells today loathe having to service the high-cost rural areas with plain old telephone lines.

And when the Bells have little threat of competition, they all too easily fall back into the sloth that made them the plodding monopolies they are today. They have escaped the enthusiasm and entrepreneurial passion that has fueled Internet-based companies, and not by accident, but by choice and design.

The telephone companies hovered below the market "bubble," out of sight, out of mind. Sat there grinning, dammit, waiting for this time, this environment, this Congress.

The broadband bill is being fast-tracked; too few hearings, too quickly for much groundswell of debate. Congress and the deep-pocket telephone company lobbyists writing fat checks are depending on your being asleep at the keyboard, not making much noise.

Shhhh... if you're real quiet you'll be able to hear another DSL provider going belly up and the boys in the Bell boardrooms slapping each other on the back.

Chairman SENSENBRENNER. The gentleman from California is—did I interrupt you in the middle of a sentence, Mr. Delahunt?

Mr. DELAHUNT. [Shakes head no.]

Chairman SENSENBRENNER. The gentleman from California is recognized for 5 minutes.

Mr. ISSA. Thank you very much, Mr. Chairman.

Mr. Barr, you know, when I was a kid growing up, I always was told, be careful what you ask for. I think what I'm seeing here is what you want to do is have it both ways. You want to have the advantages of retaining your monopoly. You want to tell us that there isn't enough market to support lots of CLECs, that clearly there can't be enough, so we're going to have to have more or less a monopoly or a duopoly or something akin to it with very little competition.

And then at the same time, if I understand what's been said here, you want to say that you have this incredible competitor over on the other side called cable and that if we don't help you, if we don't essentially free you up very quickly, you're going to have your clock cleaned by cable, and it's sort of interesting, because I hear there's not enough market, and then I hear, but on the other hand, we're in a competitive market because of one other monopoly of some sort that exists in each of your markets.

Which is it? Is there enough market that, aggressively, all the 280 million Americans who want broadband and will use what should logically be one MIP-plus speeds, is that a market worth going after at \$39 a month or isn't it?

Mr. BARR. Well, you obviously misheard me, and it's probably because I wasn't clear enough. What I was saying, CLECs and other companies can come in and compete for local switch telephony. I don't know how many competitors is the right number. I don't know how much the market will support. That's for the marketplace to decide, and there are hundreds of CLECs out there all trying to make their plans work and we are meeting our obligations, to the extent that they want to rely on our facilities.

So I'm not suggesting that—first, I don't think we have a monopoly anymore, and second, I'm not suggesting that it has to be a monopoly, a duopoly, or that there's not enough business there to attract new entrants who can be successful.

What I'm saying is that the market and technology have a funny way of moving and that the marketplace is evolving and what's taking place is, I think, a superceding technology, where cable and telephony are really sort of blending into the same offering, which is a broadband offering, very rich in content, video offering, where telecommunications will be an imbedded functionality—voice mail, conferencing, video conferencing, voice telephony, and so forth, and this is all going to be part of a unified offering and that this is naturally a competitive market. Today, it's a competitive market, and there are promising technologies that will mean it's even more and more competitive over time and we want to participate in that marketplace—

Mr. ISSA. Well, to the extent that—

Mr. BARR. We think it's a good policy that we be allowed to do so.

Mr. ISSA. To the extent that you say you want to participate, I'm a little confused, because Verizon has recently pulled out of the California market. What would be your reason for wanting to pull out of the richest market in America?

Mr. BARR. I'm not sure what you're—are you talking about selling the video business?

Mr. ISSA. Yes.

Mr. BARR. Yes. Well, that—please focus on this. What I am saying is precisely that you have a convergence of technology. To compete against cable, it would be prohibitively expensive for us to come in and over-build, that is, build a new cable system from scratch when we already have a wire into the home. That's why we invented DSL, so we could compete with cable. And so how we want to compete with cable is to fit our system to compete with cable over our system. Cable wants to compete with us by doing the same thing.

Mr. ISSA. Okay. Well, if I can give you a—

Mr. BARR. So that's what we want to do. We want the telephone to compete with cable and cable to compete with telephone. That's the way it—I think everyone anticipated it when the act was passed. That's the way it should be, and the rules should allow both to happen, and—

Mr. ISSA. And if I can follow up with another question, since my time is so limited, would it surprise you, and this happens to be in California where you have chosen not to compete—

Mr. BARR. No, we want to compete. We just don't want to compete by building an analog video system. We want to have a broadband offering.

Mr. ISSA. I understand. Would it surprise you to know that within a two-mile area, DSL is not available, even though T1 lines are available in large amounts. The cost of an Internet connection at T1 speed is about \$800 a month, while the cable companies are supplying two MIP, roughly twice T1 speed, for \$49. Would you say that a market in which a consumer is paying \$49 for T1 times two and a business next door is paying \$800 for T1 is a dysfunctional market at this time?

Mr. BARR. Well, you're sort of making my point, which is we want to configure our network through investment, substantial investments, so we can offer a broadband offering at the most efficient price. That requires massive investment. The recent cable has made that—can make that investment is because they get it back.

Mr. ISSA. Okay. Then back to my original—

Mr. BARR. The rules say we don't get it back.

Mr. ISSA. Back to my original question, if I heard you correctly, and I think I have for a second time, you're really arguing that you'd like to go back, at least in broadband, to being a monopoly and able to compete one monopoly against another, which I think—wait a second, this is my question. My time is expiring. I think you are clearly saying that cable is your competition. You need to have a monopoly to compete. Is that correct, yes or no?

Mr. BARR. It is a complete and utter nonsequiter to say that two monopolies are competing with each other.

Mr. ISSA. I'll take that as a non-responsive answer, then. Thank you, Mr. Chairman.

Mr. BARR. If two companies are competing with each other, by definition, it's not a monopoly.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Florida is recognized for 5 minutes.

Mr. WEXLER. Thank you, Mr. Chairman.

To Mr. Blumenfeld and Mr. Barr, I just want to acknowledge that, at least from my point of view, it's been actually wonderful to listen to both of you and learn from both of you. You're both excellent advocates for your cause and I really do appreciate what you've been saying.

Mr. Blumenfeld, I was struck by your analogy that you gave at the beginning with respect to your children and playing the piano and you setting a standard of practicing for an hour and so forth. But in fairness to your analogy, in the context of your advocacy for the bill that you're here about, wouldn't the more appropriate analogy be you set the standard for an hour for your kids to play the piano and then they can go out and play. Forty-five minutes into their practicing, your wife comes in the room, maybe doesn't like what she hears, and she says, an hour is not going to be good enough. Practice for an hour and a half. It would seem to me that would be a closer analogy to the bill than your original analogy.

And if I could just follow with that, I'm privileged to represent the State of Florida. If I understand the facts in Florida correctly, Bell South has lost upwards to 900,000 people in terms of local customers. That suggests to me, if I understand the standard in the act is—it's open, there's competition, not bringing out a specific percentage, but that suggests to me it's open.

Understanding that you and Mr. Barr have a different view of the past behavior of the Bell Souths of the world in terms of why or why not there's competition, would you agree with Mr. Barr's assessment that once the Bells are able to get into the long distance business, that at least at that point, then, competition in the local market increases?

Mr. BLUMENFELD. Congressman, I believe that competition in the local market increases because the Bell has finally complied, by and large, with the requirements of the act, which have resulted in the market opening and have also resulted in the Bell getting into long distance. If the question is, does their being in long distance introduce another long distance competitor, obviously, it does.

Mr. WEXLER. Okay. So following that, then, if under the current law, when the Bells comply and then they are allowed to get into long distance and then competition in the local business gets greater, then why would you be here advocating for yet another hurdle for the Bells to get into the long distance? If open market is enough, then why do we want to have a specific market share requirement, as well?

Mr. BLUMENFELD. I think that is a difficult question under the act. As I understand the provisions of the Conyers-Cannon bill, the point is to say, the way I read the provisions acting together, the point is to say that the determination of market opening is based on sort of a traditional analysis of whether or not a market is open, but that if the Bell retains a share of 85 percent, that that would prohibit a finding that the market is open. That 85 percent, I

should note, is a higher number than has appeared in a number of antitrust cases that have looked at market share.

It is certainly not crucial in the antitrust laws to have a particular market share, but market share is meaningful. It is hard to believe that you have a structurally competitive marketplace if there are—if one provider has virtually all of the customers, because in a structurally competitive marketplace, one would envision customers making choices among providers over time, and so that share should logically come down over time.

But the most important thing is to not gut the exact provisions that have created the opening in the marketplace. That is, you can't say, as I think Mr. Barr would like to, once we've opened the market, we can get rid of the rules, and once we've opened the market, or actually before, we can get rid of the antitrust laws, so long as it's something in the jurisdiction of the Telecom act, because that way we have a nice orderly regime. That, I don't see at all, and that will not create competition.

Mr. WEXLER. Mr. Malone?

Mr. MALONE. May I just make one comment? I've spent a lot of time in Florida dealing with CLECs and customers there. A very important point that we found. We interviewed 30 competitive local exchange carriers to find out, both before section 271 and after section 271, did the CLECs feel that the regional Bell operating companies were incumbering their performance? Now, we didn't talk to lawyers, lobbyists, or people like that. What we talked to is we talked to the operating managers, the CEOs, and the top officers and the workers inside the company, and here's what they said.

Twenty-eight out of 30 companies said that the regional Bells are not the problem with running their business. They don't have performance issues with the regional Bell at the rank and file level. What they have is they have problems inside their own company and they're working their way through them, and that's both before section 271 and after section 271. The facts seem to suggest that the regional Bells are not running roughshod.

Chairman SENSENBRENNER. The gentleman's time has expired.

Now, let me ask for a show of hands of how many Members wish to come back after these votes and ask questions.

[Show of hands.]

Chairman SENSENBRENNER. One, two, three, four, five. I would ask the Members to come back promptly, because I believe these will be the last votes of the day. The Committee is recessed for the votes.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order and the Chair recognizes the gentleman from California, Mr. Schiff, for 5 minutes.

Mr. SCHIFF. Thank you, Mr. Chairman.

I'd like to pose a question for Mr. Barr and also for Mr. Blumenfeld. Mr. Barr, looking at the *Goldwasser* decision, there seems to be some internal inconsistency in the court saying, on the one hand, that our principal holding is 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. And yet the court

goes on to say, nevertheless, when one reads the complaint as a whole, these allegations appear to be inextricably linked to the claims under the '96 act, and even if they were not, such a conclusion would force us to confront the question of whether the procedures under the '96 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.

So on the one hand, it says we're not finding that they are incompatible, and on the other hand, it says we're finding that they're incompatible, and I wonder if you could address that.

And if I could pose a question to Mr. Blumenfeld at the same time, assuming that the court erred, isn't the remedy to provide that an antitrust claim is not otherwise superceded rather than saying—going beyond that and saying that any act that would violate the '96 act also constitutes an antitrust violation? Is that what the bill does, and doesn't that go beyond remedying any flaw in the court decision?

Mr. BARR. That's an excellent question about these paragraphs that deal with what I call the third point in *Goldwasser*, and I think the key to it are the paragraphs that begin, "The only question that remains under the antitrust law," and then goes on through the ensuing paragraph, because what the court's doing there is after it's making its first two preliminary points, which are there's no general immunity and what's a violation of a regulatory regime is not necessarily a violation of antitrust, then it's focusing on the specific claim that there's a violation of the essential facility doctrine, and the ensuing two paragraphs are all focused, saying, look, your remaining claim is the essential facilities doctrine under which the argument is that there has to be reasonable access.

But the statute we're dealing with is specifically designed by Congress to define that reasonable access. Therefore, the statute is addressing exactly the same subject matter and Congress has made a decision that the FCC shall determine what is reasonable access and on what terms, and where you have precisely the same subject matter being addressed, and that's what they say at the end of that second paragraph I pointed to, it's in that situation that you have to give precedence to the specific scheme. Otherwise, who decides? I mean, that's fundamentally what the court's saying here. Who decides what's reasonable access?

Mr. SCHIFF. Are you reading the act, then, and the savings clause to mean that whenever you are dealing with a telecommunications issue outside of the parameters of the '96 act, the antitrust laws are not superceded, but when you're within that area, they are superceded?

Mr. BARR. No. I'm even being a little bit more generous to the antitrust laws than that. What I'm saying is there is no general exemption from the antitrust laws, even on matters that are subject to the Communications Act. However, when a specific matter, such as the reasonableness of access, has been addressed in the statute and the FCC has been charged with making that determination, then that has to be given precedence over a general directive of the antitrust law.

All the antitrust law says is that if it's an essential facility, there has to be reasonable access. Well, that's not very enlightening.

That doesn't tell you whether it's 45 days, 90 days, and what the scope of that obligation is. Where Congress has specifically said—section 251 is all about what is reasonable access. The FCC shall go not only up through the essential facility requirements, but beyond them if it wishes, and it shall make those determinations and shall do so in consultation with the States and have one national policy that when you have a specific later enacted regime that is directed at precisely that question that's addressed in the antitrust law, then it has to be given precedence. That's all the court was saying.

Mr. SCHIFF. Mr. Barr, if I can interrupt you for a second, because I do want Mr. Blumenfeld to address the second half of the question, that is, if there's a problem in the court decision, does the remedy go too far?

Mr. BLUMENFELD. Thank you, Congressman. I think, in addition to the two pieces of language you read, you have to look at the ending of the first paragraph on the—I'm sorry, the ending of the paragraph you were reading from, the '96 act, in short, more specific legislation that must take precedence. This is Mr. Barr's theory that the '96 act has somehow displaced the antitrust laws on specific conduct that's subject to the act. That is the essence of an implied immunity, which is just flat wrong under the antitrust law.

If it goes too far, and I have no question that the *Goldwasser* case is wrong, it is certainly correct that paragraph 28 of the proposed legislation specifically addresses that issue. It's paragraph 29, as I understand it, which is the gist of your question. Do we need the additional paragraph 29 to say not only that, but where there is a violation of the act, that is a per se violation of the antitrust laws.

And I think if the Committee wants to consider whether the additional provision of paragraph 29 is necessary or whether, perhaps, the Committee might want to restate it in terms of "shall be considered," "shall be presumptively admissible," "shall be taken as indicative of unreasonable conduct," I think that any of those approaches would certainly be consistent with what the antitrust laws would do.

Chairman SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. First of all, I would like to apologize for being late and would like to ask unanimous consent that my opening statement be included in the record.

Chairman SENSENBRENNER. Without objection.

Chairman SENSENBRENNER. Also without objection, three articles, newspaper editorials requested by Mr. Conyers will be included in the record. And also, without objection, Members may send written questions to the witnesses, which will also be included in the record.

Now I will reset the clock and you are recognized for 5 minutes.

Mr. CANNON. Thank you. You know, I have a couple of passions in life. The dissemination of broadband is one of them and political debate is another. I must say that in an area of creative security, with only a few facts that we can see with clarity, we've had some marvelous weaving of the perception or the reality that we are

dealing with or trying to fumble with as a politician in this case. I couldn't help but notice that today in this obscure area, we have some poignant things happening. Teligent filed for chapter 11, and interestingly, below the fold, "Verizon Hikes Charges," and in this case it's for national 411 service. But a couple of weeks ago, that was for DSL service. But I hasten to point out here that it's not the urgent problems that some companies are having, but rather the larger issues that are important here, so I appreciate both your time.

I'd like to just clarify a couple things with Mr. Barr that you said. First of all, you talked about voice and data, and one of the problems we have here is that we've got two competing bodies of law and, over time, we have changes here. I just want to be clear that when we have this bundled package that we're moving toward, there's not going to be much difference between voice and data. You cannot segregate those out. So if the RBOCs get data relief, they will effectively get voice relief. I mean, do we agree on that?

Mr. BARR. No. The proposal is merely for the long—the ability to do long-haul carriage of data bits, including voice bits. However, as I understand it, the ILEC will not be allowed to make a voice offering to the customer. In other words, they cannot offer a product to the customer that's a voice substitute, which creates another incentive for—

Mr. CANNON. But this is one of those areas that may be obscured a little bit by language, but if a person has the long distance data capability and he has the ability on the other end to get out of an IP protocol, he can use that long distance for voice over IP even now, right?

Mr. BARR. Not for his own voice over IP. That's the point. They're two separate markets.

Mr. CANNON. Actually, ultimately, they merge, right?

Mr. BARR. They will ultimately—I believe that they will largely converge, but the relief being sought in the Tauzin bill is for the back-end long haul of data, but the ILEC would still be prohibited from offering a voice over IP that would be a substitute for its own retail voice product.

Mr. CANNON. Would you like to comment on that, Mr. Blumenfeld?

Mr. BLUMENFELD. Yes. Thank you, Mr. Cannon. One of the concerns that I have in this debate is that Mr. Barr always talks about the interlata relief portion of Tauzin-Dingell, but the other portion of Tauzin-Dingell specifically removes the existing obligation of telephone companies to unbundle network elements where those network elements will be used by competitors to provide any of the services that are covered by this new deregulation—data services using that term generically. In other words, what the legislation does is the exact opposite of the point of the act, which was to force the unbundling of the network in order to encourage the deployment of new technologies and advanced services, both of which are the essence of the act.

Because of the convergence that you have described and then Mr. Barr has described and which I completely agree with, the effect long term of the second part of Tauzin-Dingell, which eliminates the obligation to unbundle existing network and new network ele-

ments for use by data competitors, will eliminate entirely competition over the telephone network, that is, competition within the telecom sector that in any way requires access to the existing telephone network. And the more there is convergence, the more that will be true, leaving the situation that Mr. Barr does explain of him and his colleagues competing against the cable companies, as if it were true that the cable companies are today capable of providing that bundle of services, which they are not.

At my house, I have DSL service from Rhythms NetConnections. When I go on the Verizon website, I can't get DSL service from Verizon. I tried to get DSL service from my cable company, StarPower. They can't provide it to me, either. So if we were in this situation of two competing monopolies, I live in Northwest D.C. on the D.C. side of Chevy Chase, I wouldn't have DSL service at all. That's why two competing monopolies is not enough.

Mr. CANNON. Thank you. In situations of obscure areas, Mr. Chairman, I think we need 10 minutes of questioning time, but seeing that we have only five under the current rules, I yield back what remains.

Chairman SENSENBRENNER. Which is none. [Laughter.]

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. We need days. Mr. Chairman, let me thank you for holding this hearing and the authors of the legislation that is before us. Particularly, I am gratified that the Judiciary Committee has carved out its stakeholder's position on these very important issues. I would hope that as we deliberate, and I understand that the clock is ticking very fast and so we'll probably have a short span of time to review these issues, that we do not get characterized as a good cop/bad cop, and that, in fact, we can find some way to address the multitude of concerns and still wind up walking the same pathway together.

In particular, I think that's important when we talk about the 1996 act that we all thought was going to put us in the right focus and right direction. What I'd like to do, Mr. Blumenfeld, is come directly to you, and you note that Members have been coming in and out. There have been hearings in various parts of the House, all over today, and so you may have gone over this, but if you would indulge me, what went wrong with the 1996 act from your perspective? I certainly do not expect for you to give us the treatise, but just as we are focusing on these issues.

Mr. BLUMENFELD. I think, first of all, that the '96 act was about as good a cut, frankly, as was possible at a legislative solution to these issues, and I think that the FCC and the States have done a remarkable job in an area of great complexity and difficulty. At the same time, I think it has always been true that the regulatory tools and the regulatory processes by themselves are slightly too blunt as instruments to be entirely effective in convincing companies to open up their monopolies, that is, convincing them to act in a way that they strongly believe is contrary to their economic incentives, and that we need the additional incentive provided by the antitrust laws to be able to do that.

The *AT&T* case resulted in a divestiture because of the government's belief that you will not successfully write rules that force a

vertically integrated monopoly to open up its network to its competitors because it would be forcing them to act in a way that's contrary to their own interest. Therefore, the only way to accomplish it is by divesting the company with the network from the company that is, in that case, in long distance and equipment manufacturing.

The '96 act tried to say, let's try not to have to do that. The logical next divestiture would be the network company, on the one hand, and a services company on the other. The service company would have competed against other service companies. That would be an analogous divestiture. The '96 act tried to say, if the problem is that a vertically integrated company has the incentive, because it's in competitive markets, and the ability, because it owns the network, to disadvantage its competitors, let's write rules that prevent them from exercising that ability. Let's write rules——

Ms. JACKSON LEE. If I might, it sort of tracks the administrative law process versus the court process, if you will.

Mr. BLUMENFELD. Exactly.

Ms. JACKSON LEE. And you think that there are missing elements to get where we need to go because there is not an incentive to do this voluntarily.

Mr. BLUMENFELD. Exactly, and——

Ms. JACKSON LEE. Can I go on to the next?

Mr. BLUMENFELD. Yes.

Ms. JACKSON LEE. You see the frightful position we are in with the shortness of the time. Opponents of the present legislation, H.R. 1697 and H.R. 1698, suggest that it conflicts with *Goldwasser*, which suggests that violations of the act did not constitute violations of the antitrust laws, and it goes on. Can you just give me a response to that, please, in answer to that?

Mr. BLUMENFELD. Yes. Very briefly, the point is that *Goldwasser* is exactly wrong in its fundamental premise, which is that conduct which violates—I'm sorry, the obligations set forth in the act could not possibly be found from the antitrust laws themselves. That's——

Ms. JACKSON LEE. And I will——

Mr. BLUMENFELD. That's just wrong.

Ms. JACKSON LEE. Let me pursue that with you, because I've got to get a question in for Mr. Barr. This is terrible that the time is short, but we're respectful of the Chairman at this point.

Mr. Barr, first of all, let me say that we understand the value that the baby Bells have in our respective communities and we're very appreciative of their long history, but tell me this. What would you do to change, or to make H.R. 1697 and H.R. 1698 palatable? Aren't you aware of the fact, or comment on the fact that we are losing a lot of the upstart companies on broadband and so competition is decreasing, a lot of bankruptcies, and so the broadband access is sort of going in your direction. How do you respond to that, and also with the bill dealing with Dingell-Tauzin, any comments on how it impacts closing the digital divide?

Mr. BARR. Well, I think there's a——

Chairman SENSENBRENNER. In 25 words or less, because the gentlewoman's time has expired.

Ms. JACKSON LEE. I thank the Chairman. Your changes to H.R. 1697, H.R. 1698, and digital divide.

Chairman SENSENBRENNER. The gentlewoman's time has expired. Mr. Barr?

Mr. BARR. First, on the build-out, Tauzin-Dingell has a mandatory build-out. I don't think that's the best way of assuring broad access, but it does address that situation.

The other two bills, H.R. 1698 and H.R. 1697, I don't think the case has been made for them and I think that the provisions that try to make it a per se violation of antitrust laws, to have regulatory violations, would be very destructive, and I think the market share test would lead to less competition for residential customers, and I think Mr. Blumenfeld has essentially said that he believes that the Bells are going to continue to get into long distance, that there is competition in the States where we've been permitted to enter long distance because we've gotten our system. So the process is working, and I don't think the record of the act is that bad. I think competition is taking hold faster than it did in long distance and faster than it did in the cable market.

Chairman SENSENBRENNER. The gentlewoman's time——

Ms. JACKSON LEE. Thank you. We look forward to sending questions. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman, and I thank you for conducting this hearing today. I hope it's one of many on this very, very important issue to——

Chairman SENSENBRENNER. Well, as you know, we have 30 days, so there are only so many hearings we can hold.

Mr. GOODLATTE. Well, there may be other opportunities, but I do have an opening statement that I would ask be made a part of the record.

Chairman SENSENBRENNER. Without objection. Without objection, all Members' opening statements may become a part of the record.

Mr. GOODLATTE. Thank you. And in addition, earlier, an article cited by Mr. Malone from the Wall Street Journal, "Bell Rivals Double Local Market Share," was made a part of the record. I have the actual Federal Communications Commission release of the data on which that article was based and I'd ask that that be made a part of the record, as well, showing the dramatic——

Chairman SENSENBRENNER. Without objection.

Mr. GOODLATTE [continuing]. Dramatic and rapid increase in competition in the local voice market.

[The information of Mr. Goodlatte follows:]



Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See NCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).

News media Information 202 / 418-0500
 TTY 202 / 418-2555
 Fax-On-Demand 202 / 418-2830
 Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

FOR IMMEDIATE RELEASE:
 May 21, 2001

NEWS MEDIA CONTACT:
 Mike Balmori at (202) 418-0253
 Email: mbalmori@fcc.gov

FEDERAL COMMUNICATIONS COMMISSION RELEASES LATEST DATA ON LOCAL TELEPHONE COMPETITION

Total Lines Reported by New Entrants Climbed to 16.4 Million

Washington, D.C. – The Federal Communications Commission (FCC) today released summary statistics of its latest data on local telephone service competition in the United States. Providers file such data twice a year under the Commission's local competition and broadband data gathering program. This program was adopted in March 2000 to assist the Commission in its efforts to monitor and further implement the pro-competitive, deregulatory provisions of the Telecommunications Act of 1996.

The information released today was filed by qualifying providers on March 1, 2001, and reflects data as of December 31, 2000. Noteworthy data include:

1. **New Entrant Phone Lines Continue Robust Increases**
 - CLECs reported about 16.4 million (or 8.5%) of the approximately 194 million nationwide local telephone lines in service to end-user customers at the end of the year 2000, compared to 8.3 million (or 4.4% of nationwide lines) at the end of 1999.
 - CLEC market share grew 93% over the one-year period of January to December 2000.
2. **States with Long Distance Approval Show Greatest Competitive Activity**
 - CLECs captured 20% of the market in the State of New York – the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2 million lines the prior year – an increase of over 130%, from the time the FCC granted Verizon's long distance application in New York in December 1999 to December 2000.
 - CLECs captured 12% of the market in Texas, gaining over a half-a-million (644,980) end-user lines in the six months since the Commission authorized SBC's long distance application in Texas – an increase of over 60% in customer lines since June of 2000.
 - CLEC market share in New York and Texas (the two states that had 271 approval during the reporting period ending in December 2000) are over 135% and 45% higher than the national average, respectively.

3. Residential vs. Business Competition

- About 60% of CLEC local telephone lines served medium and large business, institutional, and government customers. By contrast, almost 20% of incumbent local exchange carrier (ILEC) lines served medium and large business customers.
- CLECs served 4.6% of the residential and small business customers at the end of the year 2000, compared to 2.3% for the year ago period.
- CLEC share of the residential and small business customer market grew nearly 45% during the six-month period of June 2000 to December 2000.

4. Mode of Competitive Entry and Other Data

- CLECs provided about 35% of their end-user customer lines over their own local loop facilities. Incumbent telephone companies provided about 6.8 million resale lines as of the end of the year 2000, compared to about 5.7 million lines six months earlier, and they provided about 5.3 million UNE loops as of the end of the year 2000, an increase of 62% during the six months.
- At least one CLEC was serving customers in 56% of the nation's zip codes at the end of the year 2000.
- About 88% of United States households reside in these zip codes. CLECs reported lines in all states except Hawaii, and also in the District of Columbia and Puerto Rico.
- The 77 providers of mobile wireless telephone services that reported information served over 101 million subscribers at the end of the year 2000, compared to about 91 million subscribers at the end of the prior six months period.

As additional information becomes available, it will be routinely posted on the Commission's Internet site. The Commission recently accepted comments on whether certain modifications should be made to the reporting system.

The data summary is available in the FCC's Reference Information Center, Courtyard Level, 445 12th Street, S.W., Washington, D.C. Call International Transcription Services, Inc. (ITS) at (202) 857-3800 to purchase a copy. The data summary can also be downloaded from the **FCC-State Link** Internet site at www.fcc.gov/ccb/stats.

- FCC -

Common Carrier Bureau contact: Industry Analysis Division at (202) 418-0940; TTY (202) 418-0484.

Mr. GOODLATTE. It's my view that what we have here is a conflict between the Conyers-Cannon bill, which is re-regulatory in nature, takes us backward, takes us into the old economy, and the opportunity to move forward and to continue to deregulate. Deregulation was the hallmark of the Telecommunications Reform Act of 1996. Unfortunately, it didn't go as far as it needed to go in terms of freeing up everybody to compete in these areas.

We've seen that there is competition in the local market. In fact, with the fact that 40 percent of residential users being effectively subsidized, that part of the market is really off the table. Nobody's going to go in and compete with somebody when they're losing money in that portion of the market. And in the area where all the money is, the business market, the competition is now up to 35, 40 percent. That's a pretty hefty chunk when you consider that the Bells have to use that market to subsidize those other 40 percent.

But where we don't have that competition is in the roll-out of broadband services, and it seems to me that it is deregulation that—and I have a good example of that here today. Mr. Harvill, you wrote a letter to Speaker Hastert and Congressman Hyde, in fact, the entire Illinois Congressional delegation, in which you opposed the so-called Tauzin-Dingell bill because it puts at risk the requirement that incumbent local telephone companies share their lines with competitive data local exchange carriers. As a Member of that Commission, you helped write the order regarding the line collocation and unbundling, is that correct?

Mr. HARVILL. That's correct.

Mr. GOODLATTE. In addition, your letter states that local competition is the fastest and most effective way for consumers to obtain broadband services at competitive prices. I certainly agree with that statement. Would you argue that your order regarding collocation and unbundling is a critical part of ensuring that competition for Illinois?

Mr. HARVILL. Very much so.

Mr. GOODLATTE. All right. Well, I have an affidavit here which, Mr. Chairman, I would also ask be made a part of the record—

Chairman SENSENBRENNER. Without objection.

Mr. GOODLATTE [continuing]. From Dr. Niel Ransom of Alcatel USA, Incorporated, filed in the Illinois court by Alcatel, which is the manufacturer of the line card equipment used in Illinois phone systems.

Chairman SENSENBRENNER. Let me ask Mr. Harvill, are you familiar with this affidavit or do you wish to have Mr. Goodlatte furnish it to you?

Mr. HARVILL. I'm not familiar with it, but—

Mr. GOODLATTE. We will be happy to furnish it to the gentleman.

Chairman SENSENBRENNER. Would somebody run it down for Mr. Harvill to look at.

[The information of Mr. Goodlatte follows:]

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION
DOCKET NO. 00-0393**

**AFFIDAVIT OF DR. NIEL RANSOM
OF ALCATEL USA, INC.**

1. My name is Niel Ransom. I am a resident of Rolesville, North Carolina, employed as the Chief Technology Officer (CTO) for Alcatel USA. As an authorized representative of Alcatel USA ("Alcatel"), I am filing this affidavit with the Illinois Commerce Commission ("ICC") regarding the ICC's March 14, 2001 Order in Docket No. 00-0393 ("Order") pertaining to Illinois Bell Telephone Company and the Illinois Commerce Commission Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service.
2. Alcatel builds next generation networks, delivering integrated end-to-end voice and data networking solutions to established and new carriers, as well as enterprises and consumers worldwide.
3. Alcatel USA filed comments with the Federal Communications Commission ("FCC") on October 12, 2000 regarding the FCC's Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98. Alcatel USA also filed reply comments with the FCC on November 14, 2000 regarding the FCC's Second Further Notice of Proposed Rulemaking proceeding on Deployment of Wireline

Services Offering Advanced Telecommunications Capability in CC Docket No. 98-147 and Implementation of Local Competition Provisions of the Telecommunications Act of 1997 in CC Docket No. 96-98.

4. I have attached the above mentioned FCC filings to this affidavit, which I incorporate into this affidavit by reference. In the FCC filings, Alcatel commented on the use of foreign or non-authorized line cards (or "plug-ins") in Litespan[®] Next Generation Digital Loop Carrier ("NGDLC") systems. Manifestly, as Alcatel's FCC filings explain, it is not technically feasible to install line cards not manufactured or licensed by Alcatel in its systems. Furthermore, as is the case with other internal system components, it is not possible to directly access or interconnect with these line cards. Access is only possible through the derived (or "virtual") facilities and service lines supported by the systems. Therefore, Alcatel believes that a line card should not be treated as a separate "unbundled network element" and neither physical nor virtual line card collocation is appropriate.
5. In our FCC filings, Alcatel noted a variety of reasons why it is not technically feasible to install line cards designed for other systems into our system, including, but not limited to, board and system physical hardware designs, powering requirements, thermal dissipation, software interoperability, and restricted proprietary, copyright-protected intellectual property. If one were to attempt to place a line card designed for other systems in our system, the card in all likelihood would not physically fit correctly into the card guides nor interconnect properly with our backplane electrical pins. If, by chance, one were able to physically get another manufacturer's card plugged into the backplane, it would not inter-operate with our system and element

management software, as would be required for service provisioning, surveillance and maintenance. Were another manufacturer to attempt to design a compatible line card for our system, installing it would void our system's warranties, and there is a very high probability that it would cause damage to the system and disrupt service. Developing a new line card to operate into our or other manufacturers' systems requires detailed knowledge of the proprietary internal design of the system and associated changes by the system's manufacturer to the software of the system's controller and element management system.

6. I would also like to point out some issues that I see with respect to the Order's requirement that Ameritech Illinois make available to competitive providers nondiscriminatory access, at just and reasonable rates, to Project Pronto UNEs, as indicated on page 25 of the Order.
7. Of first note is the Order's creation of the UNE "Lit Fiber Subloops between the RT and the OCD in the CO consisting of one or more PVPs (permanent virtual paths) and/or one or more PVCs (permanent virtual circuits) at the option of the CLEC." A significant issue here is that the Alcatel Litespan system that Ameritech Illinois had planned to deploy does not have the ability to provide this capability. The Litespan system terminates the ATM fiber on the system on a ATM Bank Control Unit ("ABCU"), which provides one PVP to its associated Channel Bank Assembly ("CBA"). All ADLU line cards that are plugged into that CBA must have all of their Permanent Virtual Circuits ("PVCs") provisioned to that one PVP. The PVP is carried through the ABCU over a single OC-3c fiber path to/from the OCD in the Pronto network architecture. Within a system using multiple CBAs to provide DSL service,

each CBA has its own unique PVP. The CBAs are daisy chained, according to a proprietary internal format, to share the OC-3c fiber path to/from the OCD.

8. If Ameritech Illinois were required to offer the Lit Fiber Subloop UNE at the PVP level, each CLEC would have to be given its own, dedicated CBA. This would drastically reduce the economic efficiencies compared to sharing CBAs.
9. I also would like to comment further on the issue of line cards owned by the CLEC and collocated in the NGDLC equipment at the RT. (As I noted above, it is not technically feasible to install line cards not manufactured or licensed by Alcatel in our systems.) The RT's CBAs are cabled directly to cable binder groups serving individual SAls. As a result, when an ADLU card is installed in a CBA, all of the lines supported by the card are cabled to the SAl. If the cards were individually owned, significant inefficiencies could arise, because unassigned lines on one CLEC's ADLU line card could not be used by other CLECs or by Ameritech-Illinois. I further note that the Alcatel Litespan ADLU cards are combination cards, supporting both POTS and ADSL. Not only would ADSL efficiency be significantly reduced, the system capacity for basic services would also be substantially decreased.
10. I should also point out that installation of the ADLU card itself does not establish service; nor are there any physical points of access on the cards for interconnection to other carriers. The system's software is needed to provision the card, monitor its call states, and perform other surveillance and maintenance functions. The software's Right to Use (the intellectual property right) has been licensed to and purchased by Ameritech Illinois. It cannot be modified or used by others. Thus, the only technically feasible points of service interconnection are at the OCD in the central office on one

end and, at the other end, beyond the RT, at either the SAI (if the CLEC has its own connecting distribution facilities), or at the end-user customer NID.

11. On behalf of Alcatel, I therefore respectfully request the Illinois Commerce Commission to review our FCC filings, along with this affidavit.
12. This concludes my affidavit.

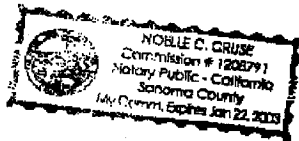


M. Niel Ransom
CTO
Alcatel USA

April 10, 2001

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Sonoma } ss.On April 10, 2001 before me, Noelle C. Gruse, Notary Public
Date Name and Title of Officer (a.k.a., "Notary Public")
 personally appeared Maurice N. Ransom
Name(s) of Signer(s)
☐ personally known to me
☒ proved to me on the basis of satisfactory evidence


to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Noelle C. Gruse
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

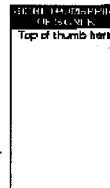
Description of Attached DocumentTitle or Type of Document: Affidavit of Daniel RansomDocument Date: 4/10/01 Number of Pages: 5

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by SignerSigner's Name: Maurice N. Ransom

- ☒ Individual
☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General
☐ Attorney in Fact
☐ Trustee
☐ Guardian or Conservator
☐ Other: _____

Signer Is Representing: _____



Mr. GOODLATTE. The affidavit states that the order of the Illinois Commission, your order that you claim is so critical to ensuring fast and low-priced broadband service, which is an admirable goal, is not technically feasible. So I have to ask, if the maker of the equipment says that they can't do what you ordered them to do because it's technologically not feasible, how do you expect broadband service to be delivered at all, much less fast and at low prices, and doesn't this regulatory requirement that you've imposed, in fact, delay the roll-out of high-speed Internet services while companies attempt to redesign their systems, and wouldn't that delay result in higher costs to the phone company and, ultimately, to the consumer?

Mr. HARVILL. Let me begin by saying this. This is four pages and I haven't had an opportunity to look at it. However——

Chairman SENSENBRENNER. Mr. Harvill, would you prefer to answer Mr. Goodlatte's question in writing, which we can put into the record?

Mr. HARVILL. I will do that, but I——

Chairman SENSENBRENNER. Without objection, Commissioner Harvill's written answer will appear.

[The response of Mr. Harvill follows:]



STATE OF ILLINOIS
Illinois Commerce Commission

TERRY S. HARVILL
COMMISSIONER

June 19, 2001

160 NORTH LA SALLE STREET
SUITE C-800
CHICAGO, ILLINOIS 60601-3104
TEL: (312) 814-2859
FAX: (312) 814-1818

The Honorable F. James Sensenbrenner, Jr.
United States Representative
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Congressman Sensenbrenner:

During the May 22, 2001, Committee on the Judiciary Hearing regarding H.R. 1697 and 1698, respectively, Congressman Goodlatte inquired about certain aspects of an affidavit of Dr. Neil Ransom of Alcatel USA, Inc. In his affidavit, Dr. Ransom criticized a recent Illinois Commerce Commission ("ICC") decision pertaining to SBC/Ameritech-Illinois' Project Pronto. Since I was unfamiliar with the contents of the affidavit, you graciously allowed me the opportunity to address his concerns in a subsequent written response. To this end, please find my response to his inquiry below.

As part of its Project Pronto loop upgrade, Ameritech has chosen to deploy a technology called Next Generation Digital Loop Carrier ("NGDLC"). NGDLC is capable of supporting both voice and DSL services, just as Ameritech's existing copper loops are. However, while existing copper loops can only support DSL services to a maximum distance of 18,000 feet from the central office, NGDLC, by utilizing fiber, eliminates this distance limitation. As a result, NGDLC expands the availability of DSL services to a greater number of consumers. Another component of NGDLC are line cards, which plug into slots on NGDLC equipment housed in Ameritech's remote terminal. Unlike the line cards used in Ameritech's current DLC infrastructure, which support voice services only, the NGDLC line cards support both voice and data services. Additionally, NGDLC line cards also determine what "flavor" of DSL service can be provided over the line.¹ Prior to halting DSL deployment in Illinois, SBC/Ameritech-Illinois stated that it planned to utilize line cards capable of supporting only one flavor of DSL (i.e., ADSL) in its NGDLC. Rather than allow the incumbent

¹ Various "flavors" of DSL provide consumers with choices regarding the quality of service they desire in DSL service. For example, Asymmetrical DSL ("ADSL") provides unspecified data speeds for both downloads and uploads, while Symmetrical DSL ("SDSL") provides for a constant, specified data speed for both downloads and uploads.

Congressman Sensenbrenner
June 19, 2001
Page 2

local exchange carrier to unilaterally determine what flavors of DSL services will be available to millions of consumers, the ICC chose to allow the marketplace to decide by allowing competitors to request that Ameritech insert line cards capable of supporting other flavors of DSL services. Once implemented, the ICC believed, this decision would promote competition in the advanced services market as well as increase the types of DSL services available to consumers.

Dr. Ransom's affidavit is predicated on a flawed interpretation of the ICC's ruling with regard to line cards. Dr. Ransom assumes that the ICC's ruling requires Ameritech to insert incompatible line cards in its NGDLC equipment,² when, in fact, it does not. On the contrary, the Commission has acted to mitigate Ameritech's concern of inserting incompatible line cards in the NGDLC equipment. In its original decision pertaining to line cards, the ICC stated

[w]e require CLECs to limit the collocation of line cards to those that provision [unspecified bit rate] UBR [quality of service] Qos products, until such time as Ameritech Illinois' data affiliate begins offering a product based upon a different Qos, at which time the CLECs' should be allowed to offer products based upon the same Qos. [Docket No. 00-0312/0313 consol. Arbitration Decision on Rehearing at 37].

As demonstrated by this passage, the ICC's decision considered the technical feasibility of inserting various line cards in NGDLC equipment and never intended, nor allowed, the utilization of incompatible line cards. In essence, Dr. Ransom interpreted the ICC's decision as requiring Ameritech to put a square peg in a round hole. This interpretation, if true, would defy common sense.

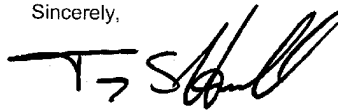
In fairness, I can understand why Dr. Ransom misinterpreted the Commission's conclusion regarding line cards. Dr. Ransom's affidavit pertained specifically to Docket No. 00-0393, which is the second proceeding in which the ICC was required to rule on line cards. Since the ICC order in Docket No. 00-0393 did not contain the language pertaining to the limitation cited above, Dr. Ransom's interpretation is understandable. However, when one considers the ICC's previous decisions, such as the one in Docket No. 00-0312/0313, cons., with regard to line cards, it is apparent that the Commission would not allow a situation as described by Dr. Ransom to occur. Nevertheless, the ICC has voted to rehear this issue in Docket No. 00-0393 and most likely will provide greater clarity to this issue in order to avoid further misinterpretations.

² Affidavit of Dr. Neil Ransom of Alcatel USA, Inc., paragraph 4 ("...foreign or non-authorized line cards...") ("...line cards not manufactured or licensed by Alcatel..."); paragraph 5 ("...line cards designed for other systems...").

Congressman Sensenbrenner
June 19, 2001
Page 3

If you require additional information or have further questions, please feel free to contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "T. S. Harvill". The signature is stylized with a large, sweeping "H" and a long, horizontal stroke at the end.

Terry S. Harvill
Commissioner

Mr. GOODLATTE. That being the case, we will move on to Mr. Barr and give him the opportunity for my few remaining seconds to comment any further on the Blumenfeld decision.

Mr. BARR. The *Goldwasser* decision?

Mr. GOODLATTE. *Goldwasser*, I'm sorry. [Laughter.]

Mr. GOODLATTE. The *Goldwasser* decision criticized by Mr. Blumenfeld.

Mr. BARR. Right. As I say, *Goldwasser* is not an outlier by any stretch of the imagination. It represents the black letter law in this area. Recently, specifically on the issue of the Telecommunications Act, three district courts have reached the same result. The issue is being considered right now in the 11th Circuit. If there's a difference there, the issue will ultimately go to the Supreme Court, and I'm confident that they will agree with the *Goldwasser* court that, again, on the third prong of what *Goldwasser* was talking about, the fundamental issue is, who decides?

When this antitrust law says they want some kind of reasonable accommodation or access and Congress has passed a statute to provide that and said the FCC should make those rules through a legislative rulemaking process, the idea of throwing that to 800 judges is just preposterous. You know, I'm pretty familiar with the antitrust laws. I don't see anything in there that says 45 days is mandated by the antitrust law. But if the FCC says 90 days is reasonable, I just don't see throwing that out to judges in the country and juries to come up with different rules as to what's reasonable or not.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Will the gentleman yield? Mr. Barr, since we have son of *Goldwasser* coming up from the 11th Circuit, do you think that the prudent thing for Congress to do is to hold back on dealing with this entire subject until we do have a determination by the Supreme Court on exactly the extent to which the antitrust laws apply?

Mr. BARR. Well, I think it would be imprudent to address *Goldwasser* and the relationship between antitrust and section 251 at this stage. But I don't think that all telecommunications legislation should be held up for that.

Chairman SENSENBRENNER. The crux of this entire debate is whether the Telecommunications Act does require antitrust consideration being used in determination of whether or not telecommunications activities are monopolistic or not. And it seems to me—you know, I think you're right. I agree with you that having 850 Federal courts reach differing conclusions on this will be a hodgepodge that flies directly in the face of the 1996 act, which was designed to have a uniform playing field in this area. But I think this Committee felt that implicit in the 1996 act was not a preemption of standard antitrust considerations in determining what was monopolistic and what was not.

You know, carrying this on to the whole issue of broadband, the RBOCs have got monopolies that are regulated over their local phone service. State public utility commissions get involved in that. They are attempting to use their assets that are regulated, meaning the phone wires into all of our houses, to go into an area that is unregulated, and I think the complaint by the long distance car-

riers and the cable carriers is that that's not fair and that's monopolistic. So it's up to Congress to determine that question one way or the other. Tauzin and Dingell have one solution to the problem. Cannon and Conyers have another solution to the problem.

But incumbent on that, isn't a determinative ruling by the United States Supreme Court, which is binding on all Federal courts, at least those that decide to follow precedent, a way of attempting to give Congress a roadmap on what our legislative options are rather than speculating on what courts would do?

Mr. BARR. I don't think so. I think that we're talking about two different markets. I think you put your finger on it, which was we have discovered spectrum on our pipes that can be used in a different market, and that market is already a competitive market and it's a market that people should be encouraging competition in, and I think Congress could move in that direction, and I think that the issue here that's being discussed is looking through the rear view mirror at the section 251 obligations on the local exchange assets and trying to impose an additional layer of enforcement on the theory that the things aren't working now and that these poor CLECs don't have any redress, and it's nonsense.

You know, their claims have been looked at. We are getting into—the ILECs are getting into long distance. They have plenty of forums to go to get these claims resolved. There are millions of objective measurements out there as to whether we're performing our job. This should not be in dispute. Look at the numbers. If we fail, we pay. And I think that there's no case that has been made for the approaches that are being taken in this legislation that would just open the floodgates of litigation.

Chairman SENSENBRENNER. The gentleman from Alabama has been very patient and is recognized for 5 minutes.

Mr. BACHUS. Thank you, Mr. Chairman.

First, let me say that if Congress had not wanted the Bells in the long distance service, they wouldn't have passed legislation to allow them in. At the time that we did that, we put requirements on them and a year ago, we could be having this hearing and wondering if they're working. Can we all agree that the market's opening today?

Mr. BLUMENFELD. I think it is certainly right that the markets are opening gradually under the auspices of the act, particularly the processes that have been put in place to give reality to this section 271 checklist.

Mr. BACHUS. Mr. Blumenfeld, I agree with your opening. You say gradually. Now, they doubled this last year, did they not?

Mr. BLUMENFELD. Yes, they have, but going from two to four is also a doubling and that's still gradual.

Mr. BACHUS. Well, but doubling is—can you think of anything that's growing faster than the doubling of a market in a year?

Mr. BLUMENFELD. I think that new markets tend to grow—can tend to grow very quickly, but you're starting with very small numbers.

Mr. BACHUS. And it is growing very quickly.

Mr. BLUMENFELD. I think there's no question that local competition is much more significant now because of the act than it was before the act.

Mr. BACHUS. Right, and if it's growing and yet we add another procedure, I think it would be more honest for us, if we didn't want the Bells in it, just to take them out.

Mr. BLUMENFELD. I don't think, Congressman, that we're adding another procedure. All that we're saying is that Congress meant it when it said that the antitrust laws continue to apply and that the *Goldwasser* court, when they said the act is more specific legislation that must take precedence over the antitrust laws, was just wrong. The antitrust laws are independent obligations that always apply, whether or not there's an act.

Mr. BACHUS. Let's go into that. I mean, you've raised that. The legislation H.R. 1698 deems violation of sections 251, 252, 271, 272 as violation of the antitrust laws. Now, you know who enforces the Communications Act, don't you? Who is that?

Mr. BLUMENFELD. Well, it's actually enforced by a combination of the FCC, the District courts, and the State commissions, depending on what provision we're talking about.

Mr. BACHUS. Well, but the FCC enforces whether an entity is complying with the act or not, right?

Mr. BLUMENFELD. It's one of the agencies that enforced it, yes.

Mr. BACHUS. I mean, at least now, with the court's interpretation, they've said the Congress legislated and set up this regulatory thing and that was the FCC.

Mr. BLUMENFELD. Yes, that's correct, and it was true under the '34 act, that is, prior to the '96 amendments, that the FCC regulated, among other things, interconnection among carriers in sections 201, 202, 203, 204—

Mr. BACHUS. Well, you know, if—

Mr. BLUMENFELD [continuing]. But the antitrust laws always applied there. No one ever thought—well, the Bell system always argued that they didn't, but the courts always found that the antitrust laws still applied, despite the fact that there was a regulatory regime that also applied, just the same way that in any body of laws, if the securities laws apply to certain conduct, even though the criminal laws also apply to some of that overlapping conduct.

Mr. BACHUS. Let me ask you this. Now, the FCC doesn't enforce the—they're not the enforcement agency for the antitrust law.

Mr. BLUMENFELD. That's correct.

Mr. BACHUS. Let me switch gears with you. What about the data market? Cable serves 75 percent of the market. The remaining 25 percent is split between DSL, wireless, and satellite. Shouldn't all the providers of broadband be regulated in the same manner? You've advocated we regulate the Bells.

Mr. BLUMENFELD. I've advocated that we continue to enforce the act, which contemplated that among the other new uses to which the network would be put would be data and Internet related. COMPTTEL has previously submitted an indication that in their study, the terms "Internet" and "broadbands" or "data" were mentioned no less than 500 times during the floor debates on this act. The Verizon, then Bell Atlantic, annual report of 1996, the Chairman's letter spends probably a quarter of its time talking about the growing importance of data and the country is moving to DSL.

Mr. BACHUS. I understand that. The growth is in data, we all agree on that. And the cable is supplying 75 percent of that service.

Mr. BLUMENFELD. But I have to say that the Bell companies argue that they're at a huge disadvantage against this giant cable—

Mr. BACHUS. I'm not talking about—that's their argument. My point to you is the cables are unregulated.

Mr. BLUMENFELD. Well, cable is actually not unregulated. Cable is regulated at the local level. So if we want to talk about 850 different regulators—

Mr. BACHUS. But you—

Mr. BLUMENFELD [continuing]. There are probably several thousand regulators—

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BACHUS. I guess my question—could I just ask, do you disagree that they ought to be subject to the same regulation?

Mr. BLUMENFELD. I think that the telephone companies should be subject to the rules that are in the '96 Telecom Act, even if they compete for some services with cable companies who are subject to a completely different regime of regulation, but also at both the State and the local—I'm sorry, the Federal and the local level.

Chairman SENSENBRENNER. I have one other series of questions in order to have the record complete. We've heard a lot today and elsewhere that the RBOCs do not make a lot of money on residential service, and this is one of the reasons why CLECs and other competition do not wish to offer residential service to consumers. I have also been told that most State public utility commissions do not allow a phone company to find out whether a person who has applied for lifeline-type service is actually below the poverty level, and in California, 32 percent of the total residential phone lines are on the lifeline low-rate service.

I assume that while the percentages might be a little different in Illinois, Mr. Harvill, that the lowered revenue as a result of lifeline service being provided by Ameritech there is taken into account by your Commission in terms of determining what type of rate of return Ameritech gets on its regulated services, so they're still guaranteed their rate of return on their regulated services even if a lot of people who really shouldn't be paying the lifeline rate because their incomes are high have applied for it and they can't be questioned on whether they're really poverty-stricken folks. Am I correct in that assumption?

Mr. HARVILL. Let me clarify that in one way. Ameritech Illinois has been subject to alternative regulation in Illinois for 6 years. As such, they've been subject to price cap regulation as opposed to rate of return regulation. I think right now, we're in the process of reviewing the alt reg case before the Illinois Commerce Commission and it's a question as to whether or not it will continue or stop. More than likely, I'm assuming it will continue. I have no reason to believe that it wouldn't.

At the same time, I think it's very clear that under that alternative regulation program that Ameritech has been under for 6 years, both the company has done extraordinarily well—we're talking returns on equity of close to 40 percent—and consumers have done pretty well. There have been numerous annual rate reductions associated with the formula that's been utilized. So we don't really look at it in terms of that.

Ameritech Illinois has argued that, yes, there should be some rate rebalancing done in the context of this review. That's something we're taking under consideration. And if there are, indeed, services that are below water, more than likely the Commission will be very cognizant of that fact and raise them to where they are actually above water.

Mr. BLUMENFELD. Mr. Chairman? I'm sorry—

Chairman SENSENBRENNER. Yes, Mr. Blumenfeld?

Mr. BLUMENFELD. If I might just make one comment, I have litigated rate cases and cost cases against the ILECs in numerous States throughout the country, in all of which this claim is made that there are many services provided below cost that are subsidized by other services.

There are two things that are important to recognize. First of all, if you look at the history of telecommunications, every time, going back 40 years, there's been an effort to enter any segment of the market, the incumbent provider always argued that that happened to be the exact segment of the market that was providing a subsidy to all of the other segments that were below cost. And then as a different segment came up for competition, that became the exact segment that was providing a subsidy for all of the other segments that were below cost. So this is a constantly shifting target.

Secondly, when you look at the telephone companies' own cost studies, their own incremental cost studies, which, in the context of these alternative regulation cases, they submitted in order to show what price floors they would have for each of these services, their own incremental cost studies showed in almost every single case across the country, that I was involved in, at least, and, therefore, where I know the data, that there are none of their services are being provided at prices that are below the incremental cost of the service, which includes a reasonable return, that is, the return that's attainable in a competitive market.

Chairman SENSENBRENNER. And that includes lifeline service, Mr. Blumenfeld?

Mr. BLUMENFELD. Lifeline service is different in that, frequently, there is a subsidy from a public fund source back to the telephone company that makes up the differential between the lifeline charge and the total charge, and the California example that you mentioned is interesting because California did a controlled study on this cheating question, that is, since there's self-certification, how much cheating is there, and they found that with the two control groups, that there turned out to be a remarkably small amount of cheating. That is, the number of families that qualified under a rigid screen were essentially the same as the number of families that self-reported. So they concluded to continue with self-reporting because, in fact, the sort of the social opprobrium of self-reporting yourself as being below the poverty line was an effective check at keeping people from getting lifeline service who didn't merit it.

Chairman SENSENBRENNER. Mr. Barr, you look like you're suppressed. [Laughter.]

Mr. BARR. Thank you, Mr. Chairman. Even the FCC and the Supreme Court recognize that this is a serious problem and that there are substantial cross-subsidies in the marketplace, and that unless they are addressed, competition will go where there's margin and,

quote, “leave the ILEC holding the bag,” as the Supreme Court said.

I didn’t understand what Mr. Blumenfeld was talking about, because obviously, when someone goes in to compete for a particular product, they’re looking for margin, and if there’s margin in a local product, it is subsidizing a product in which there is no margin. So the fact that it’s moving around—the subsidy can be found in products that have margin shouldn’t be a surprising fact. That is the nature of cross-subsidy.

The notion that we somehow are compensated for this in the rate of return simply doesn’t exist as the market is opened to competition. Where do we get that recovery? As the FCC pointed out, being able to assure a rate of return becomes non-viable and non-sustainable as the market is opened to competition. Where do we pick up that revenue? If they try to add it to a product, all that does is make it a more attractive product for somebody to come in and cherry pick. So we’re not compensated for this, and this is one of the major problems of the Telecom Act.

Mr. BLUMENFELD. If I may, just very briefly, Mr. Chairman, now we’re at the nub of what makes a monopoly a monopoly, because now we’re not using subsidy in the economic sense of providing a cost shifting to a service that would otherwise be below cost. Now what we’re saying is some services are more profitable than other services——

Mr. BARR. Excuse me. I was talking about below cost——

Mr. BLUMENFELD. I know——

Mr. BARR [continuing]. And I was saying that the FCC itself——

Chairman SENSENBRENNER. Should I flip a coin on who gets the last word? [Laughter.]

Mr. BLUMENFELD. We can just speak simultaneously, I think, and then just——

Chairman SENSENBRENNER. I’ve noticed that. [Laughter.]

Chairman SENSENBRENNER. I think it’s time to shut this hearing off. I’d like to thank you all——

Mr. BACHUS. Mr. Chairman?

Chairman SENSENBRENNER. Yes, Mr. Bachus?

Mr. BACHUS. Could I ask one follow-up question as a result of your question?

Chairman SENSENBRENNER. If you do not tip over the beehive.

Mr. BACHUS. Mr. Blumenfeld, you mentioned you’re an antitrust lawyer or your firm handles antitrust legislation?

Mr. BLUMENFELD. Yes, sir.

Mr. BACHUS. So, actually, you’re not a disinterested witness.

Mr. BLUMENFELD. I don’t think that anyone who’s knowledgeable enough to appear before the Committee is entirely disinterested.

Mr. BACHUS. I see.

Mr. BLUMENFELD. I never pretended to be disinterested. I’m interested.

Mr. BACHUS. Oh, and I’m not accusing you of representing that. I just point out that this legislation, as many of us said, would result in a lot of lawsuits, and that would certainly benefit antitrust lawyers.

Chairman SENSENBRENNER. You know, let me state that, first of all, I’d like to thank all four of you for your patience and your ex-

cellent testimony and answers to our questions. You were not selected as disinterested witnesses. I think if we wanted somebody truly disinterested, we would get somebody from the Federal Communications Commission, in which case I would hear about that from the Chairman of another Committee. [Laughter.]

Chairman SENSENBRENNER. But I think that you have shed an awful lot of light on a lot of the questions that we have had. This debate will resume in the couple of weeks with four other witnesses who are equally interested in the outcome of this debate.

And if there's no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 5:53 p.m., the Committee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Today the Committee holds a hearing on H.R. 1698, the "American Broadband Competition Act of 2001," also known as the Cannon-Conyers bill, and H.R. 1697, the "Broadband Competition and Incentives Act of 2001," also known as the Conyers-Cannon bill. Last week, Speaker Hastert announced his intention to refer to this Committee H.R. 1542, the "Internet Freedom and Broadband Deployment Act of 2001," also known as the Tauzin-Dingell bill. Shortly after the recess, we will hold a hearing on that bill.

We are considering all of these bills because of our jurisdiction over the antitrust laws. On this Committee, we do not look to regulation to solve economic problems. Rather, we believe in removing roadblocks to open competition so that markets will solve economic problems.

It is with that in mind that we turn to the problem of broadband. I want to ensure that all Americans get high speed broadband service as quickly as possible while at the same time maintaining competition and choice in that market. Both of the bills before us today as well as the Tauzin-Dingell proposal seek that same goal.

The question is which, if any of them, will work? Contrary to what some have suggested, I have not decided that question for myself. Rather, I want to hear all of the evidence. In the last couple of months, I spent a full day at AT&T headquarters in New Jersey and a full day at SBC headquarters in Texas trying to learn more about this question. I have also scheduled these two days of hearings. I am still learning.

Above all, whatever legislation we pass must lead us to a world in which individual consumers with choices freely decide market outcomes. At a minimum, we must reverse the Seventh Circuit's recent decision in the *Goldwasser* case. That decision directly contradicts the clear congressional intent that the antitrust laws should continue in force in this industry. *Goldwasser* simply reads the antitrust savings clause out of the law, and it must be corrected.

All who follow this issue should be on notice that the Judiciary Committee has always exercised its jurisdiction in this area, and it will continue to do so this year. This sector of our economy achieved its current vibrancy because of the application of the antitrust laws. Only through the continued application of the antitrust expertise of this Committee will that free market vibrancy continue. I fully intend to see that it does.

With that, I will turn to Mr. Conyers for his opening statement, and in doing so, I would like to thank him and his staff for their contributions to our jurisdictional efforts in this area.

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

At the outset, I want to thank the Chairman for calling this hearing, and for his outstanding leadership in protecting the Committee's historic jurisdiction over competition in the telecommunications industry.

To me, this is not a difficult issue to comprehend. If you don't like the unregulated monopoly control of your local telephone market which leads to high prices, shoddy

service, and less innovation, then you'll hate the Tauzin bill which will create a mirror image of that monopoly control in DSL broadband.

First a little history. The Bell System was created as a monopoly by the government, and protected against competition by the consumer. It was sued by the Justice Department three times for antitrust violations, and was judged to be an illegal monopoly by the federal courts in 1984 when it was broken into seven regional bells plus AT&T.

In 1996 Congress again found the bells to have monopoly control over the essential facility of the local loop. A Republican Congress then said that it was critical to competition that the monopoly's facilities be opened to competitors.

Five years after passage of the 1996 law, we have seen the fruits of competition in almost all areas of telecommunications with the notable exception of the local loop.

What was Seven Bell companies and GTE, has been reduced by merger to 4 behemoths. These companies control in excess of 90% of the wires into our Nation's homes and business.

While innovation has flourished and prices have been slashed in the area of long distance, the reverse has occurred in the local network. The road to local competition has been littered with scores of bankrupt companies and tens of thousands of lost jobs.

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

That's why I say that if you don't like the unregulated monopoly control of your local telephone market which leads to high prices, shoddy service, and less innovation, then you'll hate the Tauzin bill.

That bill effectively eliminates the 1996 requirements in sections 251 and 271 that the local monopoly facilities be opened to competitors. It's a license to monopolists to exclude.

The bills introduced by myself and Mr. Cannon take a different approach. It says that the monopolists don't get this right to exclude if they control over 85% of the market—market control that would be sufficient for any court in an antitrust case utilizing "essential facility" analysis.

They reiterate the bipartisan consensus that emerged in 1996 that antitrust laws are preserved, and that a liberal regulatory apparatus will not insulate a monopolist from antitrust scrutiny. And the bills provide greater incentives—not found in the Tauzin approach to broadband rollouts, and the bills provide for a rapid resolution of disputes.

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 to preserve those basic rules of competition.

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

Mr. Chairman:

Thank you for holding this important hearing this afternoon. And allow me to thank our witnesses for being here; I look forward to hearing their views on broadband legislation.

We all know the benefits of broadband for our economy, for our education system, for science and research and even for social activities. For me, there are few issues that are of greater long-term concern than high-speed Internet access.

Competition in broadband data services is one key to addressing that issue. And despite claims to the contrary, that was a core goal of the 1996 Telecomm Act.

Clearly, the '96 Act is having a positive effect on access to broadband. Competition has already produced hundreds of new high-speed on-ramps to the information superhighway, built by competitors to the local telephone monopolies. As recently as yesterday, the FCC released a study finding that 88% of homes in America had access to high-speed data lines at the end of last year.

But that is by no means enough.

I sponsored the two bills before us today, together with the distinguished ranking member from Michigan, because I am concerned about potentially anticompetitive practices in the telecommunications field. I am also concerned about potential legislation by some of our colleagues that would undermine the progress made by the competitive industry. In short, we hope to fortify competition in the marketplace to prevent a new Bell broadband monopoly—one that controls the whole internet pipeline from the home to the content provider.

Mr. Chairman, it's been five years since the Telecommunications Act passed. Still, in most parts of the country, more than 90% of local phone access lines are controlled by the RBOCs. More troubling is the appearance of a pattern and practice where the Bells use the advantage of incumbency to systematically box out broadband competitors like Covad, Rhythms, and McLeod.

Our committee has historically ensured the application of the antitrust laws to monopolistic practices in the telecommunications marketplace when appropriate. It was this committee that insisted upon the express anti-trust savings clause in the 1996 Telecomm Act. I applaud the Chairman for his swift actions to protect our traditional jurisdiction over telecommunications monopolies. And I urge my colleagues here to consider the consequences of allowing the Energy & Commerce Committee to run roughshod over the competitive protections we included in the 1996 Act. My concern is that it will ultimately reduce the relevance of the Judiciary Committee in the future with regard to telecommunications matters.

Let me clarify one point: in crafting this legislation, we specifically chose NOT to reopen the 1996 Telecom Act. Proposals to modify the Act like the one recently introduced by the distinguished Chairman of the Commerce Committee do little more than chill the capital markets and threaten nearly \$700 billion in private investment.

Rather than stifling investment, we should be encouraging the markets to support broadband companies. To do so, we must preserve the core ideals of the '96 Act rather than eliminate the incentives for the Bells to open up their loops to competition.

I hope our friends on the Commerce Committee will come to recognize that increased deployment of broadband will come, NOT from unleashing monopolies, but instead by supporting competition. I believe the bills before our committee today will do just that.

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

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I appreciate you holding this hearing today. I am hopeful that it will be the first of many on this important subject.

It was less than a year ago that this Committee held the second hearing on legislation I introduced in this area with my colleague Congressman Boucher. We introduced this legislation because we believed then, and still believe now, that the Telecommunications Act of 1996 needed clarification. With the explosive growth of the Internet, many new and highly competitive markets were created that we never even dreamed of when we wrote the Act five years ago. Congressman Boucher and I agree that while the requirements in the '96 Act need to remain in place for the local telephony market, the new markets created by the Internet should be allowed to grow and develop free from regulatory burdens that were never intended for them.

At that time, just a year ago, many in the audience, and many on this Committee, opposed our legislation. They argued that the Act did not need modifications. They argued that new legislation was unnecessary. My, how times have changed.

Times have changed because the legislation before us today will most certainly modify the Telecom Act. But unlike our bill, which sought to protect the new economy from old economy regulations, the Conyers-Cannon bill takes those old economy regulations, applies them to the new economy, and then stacks on even more regulation. At a time when the new economy is struggling, should the Congress even be considering legislation to create additional regulatory burdens?

While this bill is a dream come true for those who favor more regulations and more litigation, it says "keep on dreaming" to those in inner cities and rural America who want high speed Internet services. The Conyers-Cannon bills will do absolutely nothing to make our telephone system any more competitive, and it will ensure that high speed Internet service never gets anywhere near our rural areas or inner cities. But it does acknowledge that the Act is not working properly, so I'm glad we're all finally in agreement on that.

Mr. Chairman, I look forward to hearing from our witnesses this morning. Thank you again for holding this hearing.

PREPARED STATEMENT OF THE HONORABLE RICK BOUCHER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF VIRGINIA

Thank you, Mr. Chairman. Today's hearing provides an excellent opportunity to highlight the need for the passage of legislation along the lines of that recently reported from the House Energy and Commerce Committee which will speed the deployment of broadband services and stimulate the growth and development of the Internet.

We also have an opportunity today to reflect on the lack of need for the measures contained in H.R. 1697 and H.R. 1698, which would worsen existing regulatory disparities, retard investment, and badly hobble the further deployment of broadband services.

The Tauzin-Dingell legislation, which I am pleased to co-author, is urgently needed. By deregulating DSL services, it will dramatically strengthen the financial case for the deployment of this broadband offering to homes and businesses. The major reason that the cable industry has captured more than 70 percent of the last mile broadband market is that cable is essentially unregulated, while DSL services are burdened with extensive regulations that dampen the willingness of telephone companies to invest in their deployment. The Energy and Commerce Committee legislation largely resolves that regulatory disparity.

The Tauzin-Dingell measure also will stimulate competition and investment in the offering of Internet backbone services by enabling Bell companies to offer data across LATA boundaries, while reserving to the Section 271 process their right to offer voice-based long distance services. This provision is essential to assure adequate Internet backbone services in many rural regions of the nation and to promote competition in the offering of backbone services with attendant benefits in end user pricing.

The provision will also stimulate DSL deployment by providing an ability for the telephone company to maximize its investment in DSL as it carries the traffic from the originating user through the Internet backbone. For all of these reasons, the Tauzin-Dingell measure makes much needed reforms.

I oppose H.R. 1697 and H.R. 1698. These measures proceed from the incorrect assumption that telephone companies enjoy dominance in the market for broadband services. In fact, in that market, the telephone companies are the competitors, with a mere 30 percent market share, while the dominant provider, the cable industry, with the remaining 70 percent of the market, escapes any of the provisions of the legislation.

Under H.R. 1697, Bell companies would be barred from receiving the benefits of legislation permitting them to offer new interLATA services unless competitors occupied more than 15 percent of both the business and residential markets for local telephone services. The assumption of the authors of this provision is that the Bell companies have acted to keep competitors out of these markets and that they should be denied the benefits of legislation giving them interLATA data or similar rights until they have opened their local markets.

The truth is that their local markets are open. Competitors have exactly the same access to both the business and residential markets. They have broad rights and privileges under the Telecommunications Act of 1996 to serve either market. And today, between 35 and 40 percent of the small business market for local telephone service is in the hands of competitors. Only about 5 percent of the residential market is served by CLECs.

The reason for this disparity is that the business market is profitable, with average monthly rates in excess of \$33, while the residential market is not generally attractive. In fact, approximately 40 percent of residential customers pay less than the approximately \$18 cost to the company of providing the service. Many lifeline and other discounted rates are in the range of \$8 per month. In rural and urban areas, the costs of service are almost always above the monthly rates paid by customers. And so competitors do the obvious—they serve the profitable small business market and shun the unprofitable business market.

The bill would seem to require the impossible—that competitors be forced to serve more than 15 percent of the residential market in a circumstance where competitors would rather stake their claim in the lucrative business market.

I also oppose H.R. 1698, which would make any violation of Sections 251, 252, 271, or 272 of the Telecommunications Act of 1996 per se antitrust violations. This provision is contrary to well-established antitrust doctrine which does not automatically turn regulatory violations into antitrust violations. In fact, in many instances, the availability of a regulatory remedy has been a bar to antitrust actions for the conduct subject to regulation.

Absent some extraordinary showing of need, which is completely absent in the current circumstance, this Committee should not depart from the well-settled accommodations in our law between regulatory and antitrust principles.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF TEXAS

Chairman Sensenbrenner and Ranking Member Conyers I would like to thank you for this opportunity to discuss the current state of the telecommunications industry in light of the passage of the Telecommunications Act of 1996.

This hearing will allow for the House Judiciary Committee to reflect on the state of telecommunications in our nation by looking from the perspective of the Ranking Member's legislation H.R. 1698, the "American Broadband Competition Act of 2001" and H.R. 1697, the "Broadband Competition and Incentives Act of 2001."

Broadband or high speed Internet access is facilitated by a series of technologies that allow users to send and receive information at volumes and speeds far greater than current Internet access over traditional telephone lines. In addition broadband has the potential of offering continuous connection without the need to dial-up and it would also incorporate two-way communications capability.

Broadband technology in a word is speed. Faster access to the Internet, faster downloading of information, faster mobility as users move from one website to another. Speed may be defined as an American obsession—for some of us popcorn from the microwave in 3 minutes takes an eternity. Most of use cannot remember how cumbersome the process was for getting hot freshly popped popcorn was just fifteen years ago. Thankfully our children and grandchildren have no idea what the world was like without microwave technology being easily accessible to practically everyone.

The importance of broadband has been established by the expansion of existing and potential applications under the topics of online inter active distance learning; health clinics; monitor of home security; and patient health.

The promise of broadband is offered by several technologies: cable, digital subscriber line (DSL), satellite, fixed wireless, and others. Currently, many offices and business have access to broadband technologies; the challenge faced by the telecommunications industry is how to make this same access affordable for average consumers.

I along with other current and former members of the House and Senate served on the Conference Committee for the Telecommunications Act of 1996. It was our greatest hope that the Act would open the doors of competition, while adding stability to the market place as the new telecommunications market augmented with emerging data transmission technologies developed.

Leading the way to revolutionize telecommunications in the United States was a decision by the United States Justice Department, through its Antitrust Division instituted a massive antitrust cast against AT&T. This suit alleged that AT&T and its affiliates; Western Electric Company and Bell Telephone Laboratories had maintained an unlawful combination for many years among themselves and with the 22 Bell Operating Companies.

The Honorable Harold Green in a landmark consent decree moved to create local, state, and national competition for the domestic long distance telecommunication markets. The process of opening telecommunications markets fell under the supervision of the district court, which had the task of administering the Final Judgment.

Although this effort to bring competition to our Nation's telecommunication residential and business consumers began in the federal courts, it was clear that comprehensive regulation of the rapidly advancing telecommunications market was not suited to federal court supervision. This is the reason, the Telecommunications Act of 1996 was introduced, passed both Houses and was signed into law by President Clinton.

As a member of the Conference that worked on the 1996 law, I am clear on the purpose of this legislation, which was to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications customers. Further, this act was intended to encourage the rapid deployment of new telecommunications technologies. At that time it was evident that the telecommunications landscape was changing, but in what manner and how rapid could not be ascertained. On the horizon was the merging of telecommunications, video, and computers into one medium originally intended to only carry voice or analog transmissions.

Today, five years later the Internet and telecommunications technology has had significant impact on how many Americans learn, play, work, and live. This is the beginning that we all hoped for, but it is far less than what our intent was in formulating a legislative prescription to the changing nature of communication at the start of the "Digital Information Age."

The level of competition in the variety of services offered has been encouraging, however over the last several months the emerging Internet based "new" economy has seen difficult times, while the telecommunications section continues to grow.

The Telecommunications Act of 1996, signed into law on February 8, 1996, was the first major rewrite of our Nation's telecommunications policy originally spelled out in the 1934 Communications Act. This act passed with overwhelming majorities in the House and the Senate.

This legislation becoming law deferred the power of legislative discretion to the Federal Communications Commission, and to the states.

We are here today, because it is still not clear whether all of the intended goals of the act will be reached. The Congress retained purview of this important area as regulations were promulgated, which promoted a number of federal court battles.

In the hearing being held today, we are seeking to identify what if any action the Congress and specifically the Judiciary Committee should take in order to see the full intent of the Telecommunications Act of 1996 fulfilled.

I believe that two sections of the Act are in question: 251 and 252 are both contained in Part II of United States Code 47, titled Development of Competitive Markets.

Section 251 outlines the rules that implement the general duty of telecommunications carriers to interconnect with one another's facilities and equipment. Each local exchange carrier (LEC), has the duty to sell on reasonable and nondiscriminatory terms; to provide number portability to the extent technically feasible to provide dialing parity to competing providers; to afford access to rights-of-way, and to establish reciprocal compensation arrangements for the transport and termination of telecommunications (47 U.S.C § 251(b)).

Incumbent local exchange carriers are given a heavier burden under this section in the directives outlined under § 251; they must negotiate in good faith to create agreements necessary for fulfilling the subpart (b) duties; they must provide for "requesting telecommunications carriers" appropriate interconnections; they must provide unbundled access to network elements at any technically feasible point on just, reasonable and nondiscriminatory terms; they must offer to aspiring competitors at wholesale rates any services that they sell at retail; and they must give reasonable public notice of changes in their services that would affect others.

Under § 252 procedures for negotiation, arbitration, and approval of agreements are spelled out. It directs that "upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, and incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . without regard to the standard set for in subsections (b) and (c) of this section.

The Telecommunications Act of 1996 also identified its relationship to the federal antitrust laws, by stating in section 601(b)(1) found at 47 U.S.C.A. § 152 the following, "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." Stated for further clarification is § 601 (c)(1), "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.

The legal challenges that have followed the promulgation of regulations based on this act are the result of numerous challenges in the federal courts. Most notable of those efforts to better define the rules of the new telecommunication age was "Richard Goldwasser, Plaintiffs-Appellants, v. Ameritech Corporation, Defendant-Appellee, which was brought before the United States Court of Appeals for the 7th Circuit.

Consumers brought this case under the provisions of § 2 of the Sherman Act. This section has two elements that must be satisfied; the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

On the face of it, being a monopoly is not grounds for sanction under established federal court precedence: *United States v. Aluminum Company of America*, 148 F.2d 416, 429 (2d Cir. 1945); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979); *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79, 87 (7th Cir. 1949)..

These and other cases established that, “a monopolist is entitled to compete; it need not lie down and play dead.”

The plaintiffs were found to have standing by the court in that they were direct purchasers of Ameritech, and their complaint asserted that a variety of practices by that company had lead to prices for those services to be anticompetitively high in violation of Section 2.

They plaintiffs, were deemed to be customers of Ameritech who did not care, which competitors entered their market; they wanted competition to protect them from antitrust injury caused by Ameritech. They were found to be asserting their own rights and thus they had standing.

I would assert that Congress is in a similar position to assert its wishes in an arena that our direct actions have done so much to create, and therefore we also have standing. Further, I would offer that the standing that Congress has is a direct result of actions taken in the Federal Court system, which this committee has direct purview.

In the aforementioned case the court concluded that Congress could have passed a statute that simply lifted the regulatory prohibitions found in sources such as the Telecommunications Act of 1934, the MFJ, and other areas that barred companies in different parts of the telecommunications market from entering one another's domains.

In other words, Congress could have offered a direct solution to this problem, instead the Telecommunications Act of 1996 offered a system of negotiated agreements. Congress acted in an effort to support the development of competitive local telecommunication markets.

Congress appointed the FCC to be the watchdog of the process and the federal courts have been engaged by private interests to ensure that their particular concerns are addressed.

The questions that this committee must answer, and further the Congress and Administration are: Is the Telecommunications Act of 1996 failing?; Is the process of FCC review inadequate for the current domestic telecommunications industry; and finally Is the only solution additional legislation?

I look forward to the contributions of today's witnesses to our ongoing debate on this issue. I would like to thank the participants for allowing us to have their experience and insight to be part of our policy decision making process regarding the issue of telecommunications in our country. Thank you.

MATERIAL SUBMITTED FOR THE HEARING RECORD



202 State Street
Suite 300
Madison, Wisconsin 53703-2215

608/267-2380
800/991-5502
Fax: 608/267-0645

E-mail: league@lwm-info.org
www.lwm-info.org

RECEIVED

JUN 17 2001

Committee on the Judiciary

June 11, 2001

The Honorable F. James Sensenbrenner
Chair, House Judiciary Committee
United States House of Representatives
Washington, DC 20515

RE: H.R. 1697, the Broadband Competition and Incentives Act of 2001

Dear Representative Sensenbrenner:

On behalf of Wisconsin cities and villages, I am writing to express the League's concerns about H.R. 1697, the Broadband Competition and Incentives Act of 2001, now pending markup before your Committee.

While the League shares Congressional concerns about the need for broader deployment of broadband technology in our nation's municipalities, we believe this legislation contains provisions that could interfere with the rights of local governments to be compensated for the use of local rights-of-way. We are also concerned that the legislation would prohibit municipalities from imposing telecommunication specific taxes on broadband service providers.

We believe that these rights-of-way and taxation issues are of such importance that they should be considered in the hearing process so that the Committee members will fully understand the broad implications of these proposals and their adverse effects on state and local governments. To date, the Judiciary Committee's hearings have not provided the opportunity to review the concerns of local governments on these matters.

Furthermore, the pending legislation, H.R. 1697, would reverse the spirit and intent of important provisions of the Telecommunications Act of 1996 protecting municipal property rights and taxation powers. When the House of Representatives debated these issues during action on the 1996 Act, provisions specifically respecting local government authorities in this regard were affirmed by a four-to-one vote in favor of the adoption of an amendment authored by Representatives Joe Barton and Bart Stupak.

Our biggest concerns about H.R. 1697 relate to provisions in Sections 201 and 203 of the bill. Specifically, Section 201(a) would prohibit any state or local government from imposing (1) "discriminatory taxes on broadband services"; and (2) "a tax or fee on telecommunications carriers or affiliates thereof, other than incumbent local exchange carriers or affiliates thereof, for the use of public right-of-way that is greater than the tax or fee imposed on incumbent local exchange carriers or affiliates thereof for their use of public rights-of-way."

This section raises serious challenges for local governments particularly since most of the properties that have already been or will be used by private telecommunication providers to deploy broadband services will be municipal streets.

Section 201 sets a "federal standard" that effectively dictates the terms of compensation for the use of local rights of way. Moreover, the provisions ignore the historical context of right-of-way agreements with incumbent local exchange carriers, issues that have been litigated extensively in the courts and before the Federal Communications Commission. The legislation appears to offer a federal compensation mandate which, in many cases, means discounted or no cost access to municipal rights-of-way. These issues need fuller examination so that there is a better understanding of the near-term and long-term implications of setting a federal compensation standard for local rights-of-way. We urge you to examine other ways to address the concerns of providers in this regard.

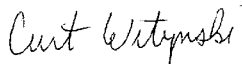
Depending on how the term "telecommunications carrier or affiliates" is construed, and the scope of limitations on public rights-of-way fees, we see the potential for placing cable franchise fees at risk, since many cable operators have telecommunication affiliates. Cable operators generally provide right-of-way compensation that typically exceeds right-of-way compensation paid by the incumbent local exchange carriers. This is especially true in Wisconsin.

We are also concerned about Section 203(a)(7) of the bill. In that section, a "discriminatory tax" is defined as "(A) a property tax that assesses broadband providers' property at a higher rate than other 'commercial property'; (B) a property tax on broadband providers that is based on anything other than tangible assets, thereby prohibiting any assessments based on intangibles such as going concern value or franchise value; (C) any tax that is not generally imposed on, and legally collectible from, 'commercial businesses'; or (D) any tax or fee that is imposed without 180 days' advance notice of the imposition of the tax." "Commercial property" and "commercial business" are then defined to include virtually any type of business or business property other than broadband service providers' business or property. See Section 203(a)(5)&(6).

These provisions would mean that broadband service providers would only be subject to state and local taxes that were applied generally to all businesses, such as sales and use taxes, and the same assessment methods for property taxes applied to non-utility and non-telecommunication businesses must be applied to broadband providers. This language could bar the application of utility, utility use, and any telecommunication specific taxes, some of which are applied in lieu of franchise or right-of-way fees, to broadband service providers. It would also likely eliminate the application to broadband providers of current forms of property tax assessment now applied to telecommunications and other utility assets. Since many states must satisfy tax uniformity directives of their constitutions and enabling laws, a special "federally-prescribed tax status" for broadband providers raises problems for other similarly situated businesses that don't enjoy this "federal sanction." As such, this special federal right for broadband providers could contaminate generally applicable taxes now in effect for a broader class of business taxpayers, which would otherwise include broadband providers.

For the foregoing reasons, we urge you to give these issues relating to H.R. 1697 your full consideration. Thanks.

Sincerely,



Curt Witynski
Assistant Director

HENRY J. HYDE, Illinois
 GEORGE W. GEEKAS, Pennsylvania
 HOWARD COBLE, North Carolina
 LAMAR S. SMITH, Texas
 ELTON GALLEGLY, California
 BOB GOODLATTE, Virginia
 STEVE CHABOT, Ohio
 BOB BARR, Georgia
 WILLIAM L. JENKINS, Tennessee
 ASA HUTCHINGS, Arkansas
 CHRIS CANNON, Utah
 LINSEY O. GRAHAM, South Carolina
 SPENCER BACHUS, Alabama
 JOE SCARBOROUGH, Florida
 JOHN A. HOCHSTETLER, Indiana
 MARK GREEN, Wisconsin
 RIC KELLER, Florida
 DARRRELL E. ISSA, California
 MELISSA A. HART, Pennsylvania
 JEFF FLAKE, Arizona

ONE HUNDRED SEVENTH CONGRESS
Congress of the United States
House of Representatives
 COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING
 WASHINGTON, DC 20515-6216

(202) 225-3951
<http://www.house.gov/judiciary>

JOHN CONYERS, JR., Michigan
 RANKING MEMBER
 BARNEY FRANK, Massachusetts
 HOWARD L. BERNAN, California
 RICK BOUCHER, Virginia
 JERROLD NADLER, New York
 ROBERT C. "BOBBY" SCOTT, Virginia
 MELVIN L. WALT, North Carolina
 ZOE LOFGREEN, California
 SHERLA JACKSON-LEE, Texas
 MAXINE WATERS, California
 MARTIN T. MEEHAN, Massachusetts
 WILLIAM D. DELAHUNT, Massachusetts
 ROBERT WELZER, Florida
 TAMMIE MALZOW, Wisconsin
 ANTHONY D. WEINER, New York
 ADAM B. SCHIFF, California

June 14, 2001

Honorable Terry Harvill
 Commissioner
 Illinois Commerce Commission
 160 North LaSalle Street
 Suite C-800
 Chicago, Illinois 60601

Dear Commissioner Harvill:

I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1698, the "American Broadband Competition Act of 2001" and H.R. 1697, the "Broadband Competition and Incentives Act of 2001" on Tuesday, May 22, 2001.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record by June 29, 2001.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,


 F. JAMES SENSENBRENNER, JR.
 Chairman

cc: Hon. John Conyers, Jr.

QUESTION FOR COMMISSIONER HARVILL

Question from Representative Smith of Texas

Wireless services are largely free of FCC regulation, and yet they've been expanding; they're offering 3G Internet access now. Doesn't this suggest that removing regulatory burdens is the best way to promote the rollout of, and competition for, advanced services?



STATE OF ILLINOIS
Illinois Commerce Commission

TERRY S. HARVILL
COMMISSIONER

RECEIVED
JUL 11 2001
CHIEF OF BUREAU
160 NORTH LA SALLE STREET
SUITE C-800
CHICAGO, ILLINOIS 60601-3104
TEL: (312) 814-2859
FAX: (312) 814-1818

July 2, 2001

The Honorable F. James Sensenbrenner, Jr.
United States Representative
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Congressman Sensenbrenner:

As you requested in your June 14, 2001 letter, the following is my response to the additional question asked by Representative Smith of Texas.

If you require additional information or have further questions, please feel free to contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "T. S. Harvill".

Terry S. Harvill
Commissioner

Response of Illinois Commerce Commissioner Terry S. Harvill

Question: Wireless services are largely free of FCC regulation, and yet they've been expanding; they're offering 3G Internet access now. Doesn't this suggest that removing regulatory burdens is the best way to promote the rollout of, and competition for, advanced services?

Response: As I stated in my testimony before the Judiciary Committee, as an economist, I believe that markets should be allowed to function freely when they are prepared to do so. That said, I would agree that removing unnecessary regulatory burdens is the best way to promote competition in any industry -- advanced services or otherwise. However, I am not aware of any FCC or ICC rule that imposes unnecessary regulatory burdens upon incumbent local exchange carriers ("ILECs") as it pertains to advanced services. To the contrary, the regulatory obligations that have been imposed on ILECs with regard to traditional voice and advanced services are part and parcel of a carefully crafted federal law that was created to promote competition in local telecommunications services -- the Telecommunications Act of 1996 ("TA96").

The underlying assumption in the above question is that companies providing wireless 3G Internet access are directly comparable to ILECs who provide advanced services over the telephone network. This is not the case. Wireless companies and ILECs have such different origins that any comparison between the two regarding the prevalence of competition or the degree of regulation is inappropriate. While it is true that the FCC has largely taken a "hands off" approach with regard to wireless services, the wireless market was competitive from its inception since service authority was granted to two competing wireless providers in each market. This competition from the outset provided market discipline without a "hands on" regulatory model. Local telecommunications, on the other hand, have traditionally been provided by a single provider. This monopoly model existed for many years prior to competition being introduced through the TA96. The market power which ILECs continue to wield -- a remnant of their monopoly origins -- allows them to leverage their incumbent power to block competitive inroads. In an effort to mitigate this market advantage and eventually allow competition to supplant regulation, the TA96 imposed regulatory obligations on ILECs to open their networks to competitors. The reward for meeting these obligations was for ILECs to be allowed into the long distance market. Although some parties may view this incentive structure as containing regulatory burdens, Congress, in this landmark Act, made it clear that these obligations were critical factors in bringing about competition.

One such obligation is that ILECs must provide competitive local exchange carriers ("CLECs") with unbundled local loops. CLECs fully compensate ILECs for the use of these loops and are entitled by law to all of the features and functionalities of said loops. This means that CLECs can provision traditional voice and/or data services over these loops -- and they have. Although the level of competition via unbundled local loops to date has been minimal in many states, including Illinois, CLECs have primarily

utilized this entry strategy to provide both voice and data services. Although the TA96 also provided for resale and facilities-based competition as possible CLEC entry strategies, CLECs have largely discovered that resale does not provide the margins necessary to compete, while over-building the ILECs local loop infrastructure, in many instances, is cost-prohibitive. Therefore, access to local loops, whether for voice or data, is critical to the success of local competition.

Recent efforts to remove regulatory obligations of ILECs (such as those contained in the Tauzin/Dingell Bill) could subject the telecommunications market to irreparable harm. For example, if passed, the Tauzin/Dingell Bill would remove the ILEC obligation to provision local loops as they relate to data services. Changing this key regulatory requirement mid-stream could subject the telecommunications industry (both voice and data) to considerable upheaval and severely weaken the incentive structure set forth in the TA96. This would be destructive to the pursuit of competition for both voice and data telecommunications services. Once again, it is imperative to make a clear distinction between regulatory obligations (which have associated rewards) and regulatory burdens.

Though the benefits of the TA96 may have been slow in materializing, we are now beginning to see its benefits via increased levels of local competition in some states. Moreover, the states reaping a majority of the benefits of competition are those states that have successfully implemented the aforementioned incentive structure of the TA96 (i.e., the 271 process). This is proof that, if allowed to take hold, the TA96 will be successful and any efforts to remove or weaken the structure contained therein should be rejected.

F. JAMES SENSENBRENNER, JR., Wisconsin
CHAIRMAN

HENRY J. HYDE, Illinois
GEORGE W. GEEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
BOB BARR, Georgia
WILLIAM L. JENKINS, Tennessee
ASA HUTCHINSON, Arkansas
CHRIS CANNON, Utah
LINSEY O. GRAHAM, South Carolina
SPENCER BACHUS, Alabama
JOE SCHIMMIG, Florida
JOHN N. HOSTETTLER, Indiana
MARK DINN, Wisconsin
MIC KELLER, Florida
DARRELL E. RISA, California
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

JOHN CONYERS, JR., Michigan
RANKING MINORITY MEMBER

BARNEY FRANK, Massachusetts
HOWARD L. Berman, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATTS, North Carolina
ZOE LORFORD, California
SHELIA JACKSON LEE, Texas
MAKANE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNTY, Massachusetts
ROBERT WEXLER, Florida
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California

June 14, 2001

Honorable Bill Barr
Executive Vice President and General Counsel
Verizon
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005

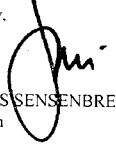
Dear Mr. Barr:

I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1698, the "American Broadband Competition Act of 2001" and H.R. 1697, the "Broadband Competition and Incentives Act of 2001" on Tuesday, May 22, 2001.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record by June 29, 2001.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,


F. JAMES SENSENBRENNER, JR.
Chairman

cc: Hon. John Conyers, Jr.

QUESTION FOR MR. BARR

Question from Representative Smith of Texas

In July 2000, SBC met its § 271 requirements and was allowed to offer long distance service in Texas. The FCC recently released figures on the impact of this. In the six months following SBC's entry into long-distance, CLECs now have 12 percent of the local market in Texas, an increase of over 60 percent in customer lines since June 2000. These figures demonstrate that competition for local service has significantly increased since the approval of SBC's § 271 application. If we prohibit the RBOCs from competing in long-distance until the CLECs hit 15 percent of local market share, we're doing a few things to the RBOCs. first, we're forcing them to wait patiently for the CLEC to get 15 percent; second, while they're waiting, cable companies are attracting new Internet customers. What are the implications on the broadband marketplace?

William P. Barr
Executive Vice President and General Counsel



Verizon Communications
1095 Avenue of the Americas
New York, NY 10036

Phone 212.395.1689
Fax 212.597.2587

July 24, 2001

Hon. F. James Sensenbrenner
Chairman
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-3951

Dear Chairman Sensenbrenner:

Attached is my answer to the additional written question from Representative Smith.

Thank you for the opportunity to appear at the Committee's hearing on the proposed broadband bills, and we look forward to working with you and your staff.

Sincerely,

A handwritten signature in dark ink, appearing to read "WP Barr", written in a cursive style.

Response to Question from Representative Smith

You are correct that RBOC entry into the long distance business stimulates local service competition. Delaying entry until the CLECs have achieved some arbitrary market share, therefore, would delay increased competition, and the benefits competition brings, both in the long distance market and the local marketplace.

In addition, this proposal would have a particularly perverse effect on broadband competition.

A year ago, the Department of Justice found that the Internet backbone market was "highly concentrated." The degree of concentration has only increased since then. Delaying Bell company entry will deny this important marketplace the increased competition it needs.

At least as significant is the effect delaying Bell company entry could have on local broadband service deployment. A high-speed Internet connection is only as fast as the slowest link. Many rural areas and other locations have no high-speed connections to the Internet backbone or hubs, and consumers in these areas cannot receive true broadband services even if the local networks were upgraded to provide them. Therefore, until these high-speed connections to the backbone are available, local service providers will not invest in these upgrades. Allowing the Bell companies to provide these links will remove this roadblock and allow local service deployment to proceed.

F. JAMES SENSENBRENNER, JR., Wisconsin
CHAIRMAN

HENRY J. HYDE, Rhode Island
GEORGE W. GOSAL, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
BOB BARR, Georgia
WILLIAM L. JENKINS, Tennessee
ASA HUTCHINSON, Arkansas
CHRIS CANNON, Utah
LINDSEY O. GRAHAM, South Carolina
SPENCER BACHUS, Alabama
JOE SCARBOROUGH, Florida
JOHN N. HOSTETTLER, Indiana
MARK URETA, Wisconsin
RC KELLER, Florida
DARRELL E. ISSA, California
MELISSA A. HART, Pennsylvania
JEFF FLAKE, Arizona

ONE HUNDRED SEVENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951
<http://www.house.gov/judiciary>

JOHN CONYERS, JR., Michigan
RANKING MEMBER

BARNEY FRANK, Massachusetts
HOWARD L. BERMAN, California
ROCK ROUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATTS, North Carolina
ZOE LOFUREN, California
SHELIA JACKSON-LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
TAMMY BALDWIN, Wisconsin
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California

June 14, 2001

Mr. Jeff Blumenfeld
Partner
Blumenfeld & Cohen
1625 Massachusetts Avenue, N.W.
Suite 300
Washington, D.C. 20036

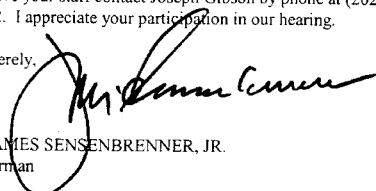
Dear Mr. Blumenfeld:

I appreciate your appearing before the Committee on the Judiciary to testify at the legislative hearing on H.R. 1698, the "American Broadband Competition Act of 2001" and H.R. 1697, the "Broadband Competition and Incentives Act of 2001" on Tuesday, May 22, 2001.

A Member of the Committee has asked that you answer additional written questions for the record. I have attached a copy of the questions. I would appreciate your answering the questions in writing and returning your answers to the Committee for inclusion in the hearing record by June 29, 2001.

If the Committee can provide you with any additional information, please do not hesitate to have your staff contact Joseph Gibson by phone at (202) 225-3951 or by fax at (202) 225-7682. I appreciate your participation in our hearing.

Sincerely,


F. JAMES SENSENBRENNER, JR.
Chairman

cc: Hon. John Conyers, Jr.

QUESTION FOR MR. BLUMENFELD

Question from Representative Smith of Texas

H.R. 1698 would classify violations of several sections of the Communications Act of 1934 as antitrust law violations. This could turn the FCC into an antitrust enforcement agency. At the same time, H.R. 1697 has the Department of Justice creating a broadband loan program. The reason we have all these government agencies is so that they can have an area of expertise and excel in that area. Can you tell me what expertise the FCC has in enforcing antitrust laws and what expertise the DOJ has in administering rural broadband deployment loans?

Response of Jeffrey Blumenfeld
to Question from Representative Smith of Texas

Observing that H.R. 1698 would classify as antitrust violations activities that might also violate the Communications Act, and that H.R. 1697 would involve the Department of Justice in a broadband loan program, Representative Smith of Texas asks what expertise the FCC has in enforcing antitrust laws and what expertise the Department of Justice has in administering rural broadband deployment loans.

As I read H.R. 1698, specifically Sec. 28 (a)(1) and (2), the Bill is addressed to federal courts adjudicating antitrust claims where the conduct at issue also implicates the Communications Act. The Bill reverses the *Goldwasser* decisions by instructing such courts they may not dismiss an antitrust action on the grounds that the conduct is or was subject to the Communications Act, and also permits such courts, in determining whether the defendant has engaged in anticompetitive activities, to consider conduct that violates the Communications Act. Sec. 29 of the Bill completes that picture by making it a *per se* violation of the antitrust laws to have violated the market-opening provisions of the Communications Act.

Thus, Representative Smith's concern as to the FCC's antitrust expertise is not raised by H.R. 1698. Sec. 28 is addressed to federal antitrust courts solely, not to the FCC, permitting the courts to take account of conduct that violated the Communications Act. Similarly, Sec. 29 permits federal antitrust courts to treat as *per se* violations of antitrust law an entity's violation of the Communications Act. Under each section, the FCC's role is limited to its traditional role of determining whether an entity violated the Communications Act. That role is not changed at all by H.R. 1698, which simply permits federal antitrust courts to take those FCC (or in the case of Sec. 29,

presumably, state PUC) determinations of Communications Act violations into account in the exercise of the courts' traditional jurisdiction over federal antitrust actions.

H.R. 1697, in Sec. 202, creates a loan program for rural and underserved areas to be administered by the Attorney General. Representative Smith is of course correct in noting that the Department of Justice has no particular expertise as yet in administering rural broadband deployment loans. But that does not end the inquiry. For example, telephony was brought to rural America, beginning in the 1930s, through a loan program administered by the Rural Electrification Agency, which presumably developed the necessary new expertise. And the involvement of the Department of Justice in such a program would bring the benefit of ensuring that the program did not play favorites among providers or among technologies, that is, that the program would be technologically neutral, as commanded in Sec. 202(d)(1) of H.R. 1697, and that it would be competitively neutral, in sharp contrast to the near-century of hidden subsidies in which only the incumbents were permitted to participate. Thus while the Department may not have any particular expertise in administering broadband deployment loan programs, its involvement would be very beneficial to Americans in the rural and underserved markets targeted by H.R. 1697.

