Mr. GORTON. Madam President, I wish to repeat once more that I understand there are additional amendments to be proposed by the Senator from Tennessee [Mr. THOMPSON], the Senator from Arizona [Mr. KYL], the Senator from Utah [Mr. HATCH], the majority leader, the Senator from Kansas [Mr. DOLE], and the Senator from Alabama [Mr. SHELBY], from this side of the aisle and perhaps additional amendments on punitive damages on the other side of the aisle. We have no unanimous consent on the subject yet. I hope that Members who want to speak to the subject of punitive damages and introduce amendments on the subject of punitive damages will do so as promptly as is convenient to them.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AUTOMOTIVE TRADE WITH JAPAN

Mr. BYRD. Madam President, America's trading relationship with Japan is now reaching a historic, serious phase in what has been a long history of innumerable initiatives and negotiations to gain access for American products into her market. Strong action will very likely need to be taken by the administration, and the support of the Senate and American industry will be important.

The United States and Japan are nearing the end of over a year and a half of negotiations on automotive trade, aimed at reducing our $66 billion trade imbalance with Japan by opening major elements of her closed domestic market to our products. The issue, access to Japan's automobile market, including to her dealerships for American cars, and to the lucrative auto parts market, is reaching a critical juncture. The issue this time involves, once again, more than the securing of commitments by the Japanese in a written agreement to try to do something to open her market. It goes to the heart of America's strategy on how to gain the actual results of opening the Japanese market.

The question is whether we, including both the executive branch and the Congress, along with American industry are all prepared to stick to our guns and take action against Japanese imports if the auto market in Japan remains essentially closed to our cars and our spare parts. Specifically, are we willing to take retaliatory action and impose trade sanctions on her products, under section 301 of the 1974 Trade Act? I say to my colleagues that now is the time to change the paradigm in our trading relations with Japan. If we are not prepared to take retaliatory actions under the law, in a situation which is about as perfectly suited as is possible to the intent of the law as it was written, then we may be looking at a continuation of these deficits in perpetuity.

Madam President, if anyone doubts the persistence of unfair barriers in Japan to her marketplace, then they ought to take a look at the 1995 National Trade Estimate Report on Foreign Trade Barriers, which provides an annual inventory of the most important foreign barriers affecting U.S. export of goods and services, foreign direct investment, and protection of intellectual property rights. The latest report dedicates some 44 pages of material to the subject on Japan alone, far more than to any other country, far more than to the second place, the European Union, most of the important countries of Western Europe combined, which takes up 28 pages, and double that of China, with which country we run our second largest annual trade deficit—44 pages, much of it dedicated to the automobile trade.

How important is the auto trade for America's current account balance and for the American economy? The answer is: as important as any single sector can be. America's trade deficit with Japan in 1994 reached another record high, at $65.7 billion, up 10 percent from 1993, when it totaled $59.3 billion. Of that amount, the bilateral automotive trade deficit accounted for about $37 billion, or 56 percent of the total, so most of our deficit with Japan can be attributed to cars and to auto parts. More than that, the auto trade deficit with Japan constituted some 22 percent of our entire trade deficit with the world. The policy announced by our Trade Representative, Ambassador Kantor—according to his testimony before the Finance Committee on April 4, 1995—is that this deficit is the result of unfair Japanese practices, that it is unacceptable, that he will use every tool at his disposal to correct it, and that, in general, he will use a practical, market-based, results oriented approach to dealing with these non-market barriers. I strongly support this approach, and I believe that the Senate as a whole does as well.

As far as the impact on the American economy is concerned, a strong auto sector is crucial. Two million, two hundred thousand people in the United States are employed in the parts industry alone—such vital industries as aluminum, steel, glass, rubber, electronics, semiconductors, machine tools, and many others. This is on top of the some 700,000 people employed by the Big Three auto manufacturers themselves, the Nation's largest manufacturing industry. Sales of cars and trucks constitute some 4.4 percent of our gross domestic product.

Negotiations with Japan have reached a crucial stage regarding the auto industry's attempts to deregulate the Japanese auto parts market. Negotiations on access to the Japan auto business began as a result of the agreement reached by this administration with the Government of Japan in July of 1993, the so-called Framework for a New Economic Partnership. This framework established a general set of results to be used in specific negotiations, and refocused the criteria for progress away from the process of removing trade barriers to actual results in the way of real economic progress in market penetration. After 18 months of negotiations on automobile negotiations—including access to the motor vehicle market by breaking into Japan's dealerships, the purchase of original parts by Japan's automakers from United States suppliers, and the regulation of the auto parts aftermarket, which is repair parts—Ambassador Kantor has concluded that ''there has been virtually no progress.'' One result has been the initiation by the Trade Representative, on October 1, 1994, of a section 301 investigation of Japan's replacement auto parts market, which is virtually closed.

The difference between the United States and Japanese markets in this area could not be more dramatic and more symbolic of our troubled trade relationship: A Department of Commerce study in 1991 estimated that Japanese vehicle manufacturers controlled about 80 percent of the parts market, while in the United States the situation is the reverse, and independent replacement parts producers account for 80 percent of the market. So, while the United States market is wide open, the Japanese market is closed. To make the situation more unfair to us, the Japanese closed market allows their manufacturers to run the prices up on their own consumers for repair parts. Another U.S. Government survey has concluded that their aftermarket repair parts cost, on average, some 340 percent higher than comparable parts in the United Sates.

This tremendous windfall of billions of dollars in extra profits helps subsidize the Japanese car industry, so that it can compete more effectively in the international market, subsidizing lower costs for Japanese cars here in the United States, Europe, and elsewhere. Therefore, it's a triple whammy: Our parts manufacturers cannot sell effectively in the Japanese market; Japanese consumers get gouged; and the whole thing results in cheaper, more competitive Japanese cars worldwide.

The ''Karetsu'' system of interlocking and cozy exclusive relationships among suppliers, manufacturers, and dealers serves as an effective blocking action against market penetration, and I am advised that the powerful Japanese Government bureaucracy serves to abet this exclusivity in supporting a regulatory framework not conductive to easy access. Japan's competition law, known as the Antimonopoly Act, which prohibits unfair trade practices has, according to the 1995 Foreign Trade Barriers report, a ''weak and ineffective'' enforcement history. The

Japan Fair Trade Commission, which is supposed to implement that law, has ''not shown any serious inclination to use its enforcement powers to eliminate the anticompetitive practices in sectoral markets that are excluding foreign goods and services from the Japanese market.'' This is a system totally incompatible with the principles of free international trade.

As to new American cars, it is nearly impossible for Japanese businessmen who operate dealerships and showrooms to agree to sell American cars. I understand that many of these dealers would like to do so, but they fear retribution from Japanese car manufacturers and are warned against taking American business. Hence, the marketplace for new American cars in Japan remains extremely narrow and difficult to penetrate. What are the results? While Japanese automakers hold some 22.5 percent of the American market, the share of the Japanese market held by the Big Three United States automakers is less than 1 percent.

The Japanese economy is, in many ways, a sanctuary market, closed to the world, but depending to a large extent on robust exports. Trade agreements are, more often than not, written agreements which are frustrated by a maze of business practices, Government regulations, and other hurdles for importers to jump. The problem is that other nations, particularly in Asia, are engaging in the same practices, and if the Japanese market is not pried open, these trade imbalances will be mirrored elsewhere, as they are today with China. We see the same kind of practices in Korea.

Therefore, the stakes in fair trade with Japan have worldwide ramifications and affect the very future of American participation in a trading system which enjoys access to a wide open American market. We need to demand reciprocity, which would allow our products to compete freely. If our products fail to attract buyers because they fall short on the merits, fine, then that is our fault. But this is not what is driving the large deficits with Japan, and our industries and economy will suffer as they are suffering, and as they have suffered.

I was very pleased to see the dramatic accord that was achieved by our Trade Representative with China on the matter of intellectual property rights, and I would note that it was achieved only at the 11th hour and with the certainty of definite retaliation by the United States, absent achieving an accord. Given the history of trade practices with the Japanese, I fear that only a believable threat, or actual retaliation, may be sufficient to get equitable results in the Japanese auto market.

In the new world that is emerging after the collapse of the Soviet Empire, it is important to see the overall United States-Japanese relationship as one of give-and-take across the board. The United States still maintains armed forces in Japan and that relationship has been excellent, with Japan providing needed host-nation financial support. It is an excellent burden-sharing arrangement. While our security relationship has been in balance, and a close relationship remains intact, the trading situation has generated unneeded frictions.

Today, American national security and economic security go together, hand-in-hand. Japan has a deep-vested interest in the health of the American economy, and economy increasingly dependent on trade. Eleven million Americans are now employed in export-industry jobs, a doubling of the number from just 10 years ago. It will be more and more difficult to maintain robust deployed forces in the Pacific, as we should, without a strong American economy.

Persistent massive trade deficits with Japan and other Asian nations runs counter to this, and they erode our ability to sustain the kind of a Pacific rim presence that both we and our allies in the Pacific, particularly Japan, believe is in our overall interest of stability and peace. And so it is important for the Japanese Government to make every effort to ensure that our trade relationship enjoys the same healthy substance of a two-way street.

The deficit in the United States-Japanese automotive parts trade reached a record $12.8 billion in 1994, deteriorating 15 percent from 1993, at the very time that negotiations were ongoing on this matter. The Japanese sold a record $14.3 billion in auto parts in the United States, compared to a meager $1.5 billion in United States auto parts which managed to squeeze into the Japanese market. It is a major element in our deficit picture, and something has to give.

It is precisely in this situation that the 301 law is available to the Trade Representative, and I certainly expect that he will probably have to use it and he should have no compunction against using it. This means that when the section 301 investigation of unfair practices in the auto parts market is concluded—at the latest by October 1, 1995—if the current stalemate continues, the United States should not hesitate to retaliate. According to a New York Times article of April 13, 1995, an administration ''task force has already been established to draw up a list of Japanese products that would be subject to 100-percent tariffs unless Japan takes what one senior official today called 'enormous leaps' during meetings scheduled over the next several weeks.'' These officials indicated such a list would be announced this month. I note that the next round of negotiations with the Japanese is scheduled to take place this week, on tomorrow, Wednesday, May 3, 1995, and I hope that our negotiator there, Ambassador-designate Ira Shapiro, will tell the Japanese that stonewalling will result in retaliatory action, with strong Senate action, if needed, to follow up on the retaliatory measures that might be announced by the administration.

I point out, Madam President, that there is extensive support across the board in American industry for the strong action that might be required against Japanese products in the event that the results sought by the administration are not obtained. I include in the RECORD a list of 27 major United States companies and associations that deal with Japan which support our negotiations on this matter. It includes the Business Roundtable, the major auto companies, and associations representing those manufacturers who have a stake in the health of the auto and auto parts industries, such as glass, iron and steel, and electronics. It includes the major labor organizations, including the United Auto Workers and the AFL–CIO. There is obviously very broad consensus across American business and labor organizations that the time for action is past; so we have only now left to us.

It is clear that, while there may be every good intention on the part of Japanese policymakers and other sectors of Japanese society and business to open the Japanese market to American automobiles and products, what really counts in the long run are results, and actions to do so. Performance, not promises, is only what we are seeking, and one must be prepared to take strong action to encourage such performance.

Madam President, automobiles and parts have been the central problem in Japan's trading relations with the rest of the world for many years. If we can solve the problem, and break the ''keiretsu'' psychology and practices which close Japan's markets, a new era between our two nations will emerge. If we fail, our relationship will continue to deteriorate.

Mr. President, I ask unanimous consent that a group of supporting documents be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

ORGANIZATIONS SUPPORTING UNITED STATES-JAPAN AUTO AND AUTO PARTS TRADE NEGOTIATIONS

Aluminum Association.
American Automobile Manufacturers Association.
American Electronics Association.
American Federation of Labor Congress of Industrial Organizations.
American Forest and Paper Association.
American Iron and Steel Institute.
American Textile Manufacturers Association.
Association of Manufacturing Technology.
Automotive Parts and Accessories Association.
Business Roundtable.
Chrysler Corporation.
Copper and Brass Fabricators Association.
Ford Motor Company.
General Motors.
Guardian Industries.
International Insurance Council.
Joint Automotive Supplier Government Action Council.
Motion Picture Association.

Motor Equipment Manufacturers Association.
National Association of Manufacturers.
National Glass Association.
Pharmaceutical Research and Manufacturers Association.
Semiconductor Industry Association.
Specialty Equipment Market Association.
United Auto Workers.
United States Business and Industrial Council.
US-Japan Business Council.

NATIONAL CONSUMERS LEAGUE,
Washington, DC, April 25, 1995.

The PRESIDENT,
The White House, Washington, DC.

DEAR MR. PRESIDENT: On behalf of the National Consumers League, I want to express our support for the Administration's position in the Framework negotiations with Japan and our interest in opening the Japanese market to competitive American automotive products. The vehicles and parts made in this country meet a wide variety of safety and environmental standards. The production facilities in which they are made meet standards for their operation as well. The workers in these plants benefit from protective health and safety laws and many have won further protection through union representation. All of these conditions contribute to beneficial results for Americans who are consumers of the products made by the industry and consumers of its environmental impacts.

The companies that meet these conditions should be able to supply markets abroad on the same terms as foreign companies find in this market. All foreign producers of vehicles and auto parts have unrestricted access to the U.S. market. We understand that the Clinton Administration is seeking just such access to the Japanese market for U.S. automotive products and we fully support that objective.

American industries that contribute to the social and economic well-being of the nation, as does the automotive industry by meeting a variety of legal and regulatory standards and affording workers a voice in their work lives, deserve the support of the U.S. government in gaining the ability to sell their products internationally. American consumers and Japanese consumers would benefit from the elimination of Japanese barriers to access to that market for the quality products made by American workers.

Sincerely,

LINDA GOLODNER,
President.

CATERPILLAR, INC.,
April 7, 1995.

The PRESIDENT,
The White House, Washington, DC.

DEAR PRESIDENT CLINTON: I'm writing as Chairman of the U.S.-Japan Business Council which represents the interests of leading U.S. manufacturing and service firms. The purpose of my letter is to commend your Administration for the aggressive leadership it's providing on behalf of U.S. automobile and auto parts producers as they attempt to compete in the Japanese marketplace.

As your trade negotiators have recognized, the fundamental problem in the U.S.-Japan economic relationship is that Japan's markets in a host of industrial and service sectors remain more restrictive than those in the United States and other major economies. It's equally clear that the U.S. trade deficit with Japan will persist—despite sharp appreciations of the yen and a sizable reduction in the U.S. budget deficit—until Japan reforms its regulatory and market entry practices.

Your Administration has managed to negotiate several results-oriented trade agreements with Japan in such areas as government procurement of medical and telecommunications equipment, insurance, flat glass, and financial services under the U.S.-Japan Framework Agreement. The members of the U.S.-Japan Business Council, many of whom will benefit once these agreements are implemented, commend your trade team for this achievement.

But the fact that no agreement has been reached in one of the most important sectors of our trading relationship with Japan—autos and auto parts—is troublesome . . . especially given the broad range of industries and jobs involved in the automotive sector . . . electronics, semiconductors, steel, chemicals, and machine tools.

Although U.S. auto and auto parts companies are now competitive and committed to the Japanese market, they and other foreign producers continue to be denied full and comparable access to the Japanese automobile distribution system, as well as markets for original equipment and replacement parts.

Meanwhile, the bilateral trade imbalance in motor vehicles and parts, which typically accounts for some 60 percent of the U.S. trade deficit with Japan, hit a record high of $36.7 billion in 1994. Forecasts suggest even greater deficits in this sector in 1995.

On behalf of the U.S.-Japan Business Council, I urge your Administration to continue working toward a comprehensive agreement that will result in increased access and sales opportunities for U.S. automobile manufacturers and parts producers in the original equipment and replacement parts markets in Japan and the United States.

Sincerely,

DONALD V. FITES.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS ON THE UNITED STATES-JAPAN AUTO NEGOTIATIONS

The NAM's membership has a clear and substantial interest in a U.S.-Japan relationship characterized by a two-way free flow of goods, services and investment. The NAM thus supports the ''framework for a new economic partnership'' between Japan and the United States. As part of this framework, it is appropriate that Japan has committed to implement policies ''intended to achieve a highly significant reduction'' in its persistent and large trade surplus with the United States. The framework addresses both structural imbalances between the U.S. and Japanese economies as well as those sectors of the Japanese economy where market forces have, in the past, clearly not been allowed to operate freely.

The NAM recognizes the importance of successfully resolving the current bilateral automotive negotiations by ensuring significant and sustained market access and sales opportunities for foreign vehicles and parts in the Japanese market. The NAM thus supports the efforts of the U.S. and the Japanese Governments to reach speedy agreement to achieve such access.

The NAM also urges the U.S. Government to reassert that the full implementation of all previously negotiated agreements with Japan in other sectors remains a priority objective.

THE BUSINESS ROUNDTABLE,
Washington, DC, April 13, 1995.

Hon. MICHAEL KANTOR,
Office of the U.S. Trade Representative, Washington, DC.

DEAR AMBASSADOR KANTOR. As you know, The Business Roundtable has long been a major supporter of the efforts of the U.S. government to open foreign markets to international trade and investment. In this connection, U.S./Japan trade policy developments have been of particular concern to us.

The difficulties that U.S. business has had in expanding its sales and investments in Japan have been a continuing frustration. While progress has been achieved in some sectors, such as semiconductors, other areas have seen insufficient improvements.

In particular, the automotive sector has experienced significant difficulty penetrating the Japan market, and the trade imbalance in this sector alone represents nearly 60% of the total trade deficit between the U.S. and Japan. The Roundtable believes that a successful auto negotiation with the Japanese will have ramifications beyond Japan and could help to facilitate further market opening initiatives in other Asian countries.

The purpose of this letter is not to provide you with the specifics of the auto sector trade problem faced by U.S. exporters; the U.S. auto and auto parts industries can do this far more effectively than we can. Rather, it is to underscore the importance of negotiations in this sector. We are also not the ones to advise you on the precise shape of a successful agreement on auto sector trade with Japan. That said, we believe that fundamental to any successful negotiation is the need for agreements to include a basis on which the results can be evaluated. Without an acceptable basis to gauge the impact of an auto sector trade agreement, there will be a significant risk that subsequent activities/discussions to any agreement will devolve into continuous argument regarding implementation process rather than achieving actual results.

We know that the auto sector negotiations with Japan have been, and will continue to be, difficult. For this reason, we think that it is important for you to know that The Business Roundtable fully supports the pursuit of U.S. rights under the rules of the World Trade Organization, aggressive use of U.S. trade laws and whatever other action may be necessary to achieve meaningful access to the Japanese market in this critical sector.

In closing, thank you for your tireless efforts to open foreign markets to U.S. exports, and we encourage your continued resolve in these negotiations.

Sincerely,

JERRY R. JUNKINS,
Chairman, President & CEO, Texas Instruments, Chairman, The Business Roundtable International Trade and Investment Task Force.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
Washington, DC, April 18, 1995.

Hon. MICKEY KANTOR,
U.S. Trade Representatives, Washington, DC.

DEAR AMBASSADOR KANTOR: I am writing to urge the Administration to continue its efforts to reach a results-oriented agreement with Japan on autos and auto parts. The discrimination and inequity present in the existing trading relationship can no longer be papered over.

American workers in a wide range of industries and occupations would benefit from the reduction of the U.S. deficit in automotive trade with Japan and the elimination of discriminatory practices by Japanese companies directed at U.S. firms. Union members in the rubber, glass, steel, aluminum, textile, machine tool, chemical, electrical, electronics and other industries would directly benefit from increased access to the Japanese auto market for competitive American

products. Unionized workers in other industries, including entertainment, telecommunications, construction, aerospace, paper and even-more, would gain additional jobs if the Japanese market were truly open and discrimination against U.S. producers was ended.

The AFL–CIO believes that international trade can benefit American workers, but that trade must be fair and equitable. That is not the case with U.S. auto trade with Japan today. During the past nine years, the U.S. deficit in auto trades with Japan nearly hit $300 billion. If that deficit could be reduced substantially, the Clinton Administration's effort to establish equity in that trading relationship through the Framework negotiations could lead to the creation of many thousands of American jobs. We will judge the success of the Framework's auto talks by their impact on the jobs of American workers, not by the quantity of words in any agreement. Under a good agreement, we expect the U.S. automotive trade deficit with Japan to decline rapidly.

The commitment of the Clinton Administration to ''result-oriented'' negotiations must be fulfilled either through effective, verifiable agreements or reciprocal treatment of U.S. imports from Japan. If an acceptable agreement cannot be reached in the next few months, the U.S. must impose sanctions on imports from Japan that are commensurate with the damage to American workers caused by Japan's barriers to U.S. products. It is time to demonstrate the Administration's commitment to settling this long-running trade disaster.

Sincerely,

LANE KIRKLAND,
President.

ALUMINUM INDUSTRY SUPPORTS U.S.-JAPAN NEGOTIATIONS

THE ALUMINUM ASSOCIATION STRONGLY SUPPORTS MARKET ACCESS WITH JAPAN

WASHINGTON, D.C., April 13, 1995.—The Aluminum Association announced today its strong support for a swift and positive conclusion to the U.S.-Japan automotive trade negotiations. The aluminum industry, longtime advocates of free trade, urged the removal of barriers and the opening of Japan's parts and vehicle market to foreign cars and parts.

U.S. aluminum companies are historic free-traders. They produce 19 billion pounds of metal each year, making them the world's largest aluminum industry. The U.S. aluminum market is the world's largest, most sophisticated and most open, yet major barriers to market access in Japan remain. The aluminum industry strongly supports the U.S. Government's efforts to remedy this persistent problem.

The auto and auto parts industry and its unhindered access to Japanese markets and manufacturers is extremely important to our industry. In 1993, the aluminum industry shipped about 4.2 billion pounds of aluminum to the transportation market. This makes it the industry's second largest market.

Aluminum Association President David N. Parker, called for an effective, results-oriented agreement on the negotiations and remarked that the ''talks mirror our industry's long time efforts to achieve open markets for aluminum.''

Aluminum represents over 200 pounds of an average vehicle, a growth of over 55 percent in the last decade. Aluminum plays a significant role in lightweighting both domestic and foreign vehicles. Industry experts expect its percentage of the average car to increase rapidly as demand for fuel efficient vehicles which retain size, safety, and environmental friendliness grows. Select cars have already shown that as much as 500–1,000 pounds of aluminum can be used successfully to achieve high performance or fuel efficiency.

The Aluminum Association represents primary and secondary producers of aluminum, as well as semi-fabricated products. Member companies operate approximately 300 plants in 40 states.

AISI ISSUES POLICY STATEMENT ON UNITED STATES-JAPAN AUTO TALKS: STEEL GIVES STRONG SUPPORT TO GOAL OF TIMELY AND MEANINGFUL MARKET ACCESS IN JAPAN

WASHINGTON, D.C.—The American Iron and Steel Institute (AISI) today issued the following policy statement in strong support of U.S. government efforts to achieve a prompt, ''results-oriented'' resolution of the U.S.-Japan bilateral automotive negotiations.

''Steel producers in North America have an important, direct stake in—and indeed, have contributed substantially to—the renewed competitiveness of North America's auto industry in recent years. That was a main reason steel producers throughout North America strongly supported NAFTA—because we saw it benefiting our major customers in the North American auto industry.

Given the auto industry's continued importance to the North American economy (4.6 percent of total U.S. GDP). AISI's U.S., Canadian and Mexican member companies remain deeply concerned by North America's large and persistent trade deficit with Japan in the automotive sector.

The fact is, as competitive as the North American auto industry has become, it still requires free and open markets and fair and reciprocal market access worldwide to reap the full benefits of its restored status as a world class industry. Unfortunately, North America's producers of motor vehicles and auto parts do not have such equality of market access currently with respect to Japan.

It is therefore essential that the ongoing U.S.-Japan bilateral automotive negotiations produce a successful and timely resolution of this critical problem by achieving significant and sustained market access and sales opportunities in Japan for North American and other non-Japanese producers of vehicles and parts. Thus, AISI strongly supports the U.S. government's ''results-oriented'' efforts to reach agreement as quickly as possible on meaningful market access in Japan for this vital North American industry.

As part of the U.S.-Japan ''framework agreement''—under which the automotive talks are occurring—Japan has committed to implement policies ''intended to achieve a highly significant reduction'' in its trade surplus with the United States, which exceeded $65 billion last year.

This enormous and unsustainable trade imbalance, two-thirds of which is in the automotive sector, requires prompt corrective action—by achieving measurable results in the auto sector as soon as possible, and ensuring full implementation of all previously negotiated agreements with Japan in other sectors.''

STATEMENT OF THE AMERICAN TEXTILE MANUFACTURERS INSTITUTE ON UNITED STATES-JAPAN AUTOMOBILE TRADE

The American Textile Manufacturers Institute (ATMI) strongly supports the Clinton administration's efforts to open the Japanese market to U.S. automobile and automobile parts. ATMI is the national trade association for the domestic textile industry. ATMI member companies operate in more than 30 states and account for over 80 percent of all textile fibers consumed by U.S. mills.

The American textile industry is a major supplier to the U.S. automobile industry. Textile goods produced for use in automobiles include not only upholstery and floor coverings, but sidewalls (the interior sides of cars), head linings (the interior roof material), hood linings (material on the underside of the hood), trunk linings, convertible tops and vinyl hardtops, tire reinforcement, hose fabric and transmission belts. In fact, the average truck contains 18 square yards of textile fabric, while the average car contains 29 square yards.

In 1993, automobiles and trucks accounted for more than 1.2 billion square yards of fabric consumption in the United States, or 1.2 billion pounds of fiber. By weight, this represents nearly 10 percent of the total fiber consumption in the U.S. Clearly, the auto industry is an important customer of the American textile industry.

The opening of foreign markets to U.S. textile products and to items containing U.S. textile products is a vital part of our industry's global competitiveness strategy. In this light, ATMI endorses the efforts of Ambassador Kantor to open Japan's market to U.S. autos and auto parts and urges the administration to continue to seek adequate market access in the current negotiations with the government of Japan.

NEARLY TWENTY INDUSTRIES JOIN IN CALL FOR JAPAN GOVERNMENT TO OPEN CLOSED MARKETS TO U.S. PRODUCTS

WASHINGTON, D.C.—A diverse group of the nation's largest industries joined together today to call on the Japanese government to open its market to reduce its record $66 billion merchandise trade surplus with the U.S.

''Japan's chronic trade surplus is choking its economy and playing havoc with the world's currency markets,'' said Andrew H. Card, Jr., President and CEO of the American Automobile Manufacturers Association (AAMA). ''After more than 25 years of foot-dragging, it's time for the Japanese government to join with other industrialized nations to practice free trade in its own market.''

Autos and auto parts accounted for $36.8 billion of the U.S. trade deficit with Japan last year and is predicted to reach $39 billion in 1995.

The latest round of U.S.-Japan trade negotiations is scheduled to conclude in Washington on Tuesday.

Nearly twenty industry representatives—from aluminum and steel producers to pharmaceutical manufacturers—joined Card in calling for greater access to Japan's ''sanctuary'' markets.

''The whole world is watching the outcome of these negotiations. If Japan fails to undertake decisive reform to open its automotive sector, there are numerous developing economies waiting in the wings—China, Korea, Indonesia, Vietnam—which will be tempted to follow Japan's sanctuary market as a model, rather than to adopt a free and open model which provides benefits to all participants in the world open-trading system,'' Card said.

Other groups joining AAMA at the press conference include the: Aluminum Association, American Electronics Association, American Forest and Paper Association, American Iron and Steel Institute, Automobile Parts and Accessories Association, Copper and Brass Fabricators Association, Pharmaceutical Research and Manufacturers of America, Association of Manufacturing Technology, International Insurance Council, Motor and Equipment Manufacturers Association, Specialty Equipment Manufacturers Association and the United Auto Workers Union.

Other groups calling on Japan to open its markets include the: American Textile Manufacturers Institute, Joint automotive Supplier Government Action council, Motion

Picture Association of America, National Association of Manufacturers, National Glass Association and U.S.-Japan Business Council.

During the press conference, Card pointed to a new report by the American Chamber of Commerce in Japan which outlines trade barriers across 35 industrial sectors.

With regard to autos, the ACCJ report concluded that the Japanese manufacturers intend to continue discouraging dealers from franchise agreements with U.S. automakers.

The ACCJ report recommends that the Japanese Government: Open Japan's auto market; provide free access to Japanese dealers; simplify regulations and procedures; and open Japan's parts market to foreign suppliers.

AAMA is the trade association headquartered in Washington, D.C. whose members are Chrysler, Ford and General Motors.

SEMICONDUCTOR INDUSTRY ASSOCIATION,
San Jose, CA, April 19, 1995.

Hon. MICHAEL KANTOR,
U.S. Trade Representative,
Washington, DC.

Hon. RONALD H. BROWN,
Secretary of Commerce, Department of Commerce, Washington, DC.

DEAR AMBASSADOR KANTOR AND SECRETARY BROWN: The Semiconductor Industry Association strongly supports your efforts to achieve a substantial measurable increase in imports into Japan's automotive and automotive parts markets. These efforts are both necessary and appropriate. There can be no acceptable alternative to having outcomes in the Japanese market reflect the competitiveness of American auto and auto parts producers. This has not yet been allowed to occur.

Your efforts serve not only the broad national interest but are of real economic interest to our industry as well. Semiconductors are a key component in modern automobiles, with applications including engine controllers, air bags, and antilock brakes. There is a direct impact on U.S. chip companies from both the very low levels of U.S. automobile exports to Japan and the reluctance of Japan automobile companies to use American components.

In 1994 over $1.7 billion of semiconductors were used in American automobiles. This figure could have been substantially higher if it were not for the fact that of the 10 million vehicles produced by the three American firms in the U.S., only 33,000 were exported to Japan.

U.S. firms have been working for years to increase their share of the $1.3 billion Japanese automotive chip market through the U.S.-Japan Semiconductor Agreement. The foreign automotive semiconductor share in Japan of about 10 percent, while much higher than five years ago, remains well below the dominant shares that U.S. firms have achieved in other world markets. The limited foreign penetration to Japan's auto semiconductor market is also in contrast to the significant progress which is being made in a number of other electronics sectors in Japan.

The implementation of market access agreements with Japan requires extraordinary efforts on the part of both American suppliers and Japanese purchasers, and by both governments, but the benefits can also be extraordinary. The U.S.-Japan Semiconductor Agreement has led to an additional $2.5 billion in annual U.S. sales in Japan and to unprecedented cooperation between American and Japanese companies and industries.

While SIA intends to continue to work through the U.S.-Japan Semiconductor Agreement to further programs in semiconductor market access, an agreement on auto parts is fully complementary and very much in the interest of not only the U.S. economy, but of harmonious relations between the United States and Japan.

We wish you well in this vital endeavor. A successful autos and auto parts agreements would promote the change in attitudes towards imported components that is required for success in increasing access to the Japanese market. SIA fully supports your efforts to quickly achieve an effective results-oriented agreement with the Government of Japan on auto and auto parts.

Sincerely,

A. A. PROCENSINI,
President.

AMERICAN FOREST & PAPER ASSOCIATION,
Washington, DC, April 11, 1995.

Hon. IRA SHAPIRO,
General Counsel, Office of the U.S. Trade Representative, Washington, DC.

DEAR IRA: The American Forest & Paper Association, on behalf of the U.S. forest products industry, is highly supportive of your efforts to open the Japanese market to U.S. suppliers of autos and auto parts.

The long-standing problems of market access in this sector—including kieretsu relationships between auto producers and suppliers, denial of access to the producer-owner distribution network, and the use of government standards to exclude imports—are all-too-familiar features of our own problems in penetrating the Japanese market. We believe that a comprehensive, negotiated solution to the auto/auto parts problems will have important implications for the resolution of similar problems in other sectors, such as ours, where the same pattern of exclusion is evident.

At the same time, we believe that the firm stand which USTR has taken in these negotiations sends a very clear signal to the Government of Japan that the Administration will take the steps necessary to ensure compliance with existing agreements. With both the wood and paper agreements designated to a Super 301 watchlist, we anticipate that the result of your efforts in the auto sector will be to heighten Japanese awareness of the need to refocus its ''encouragement'' of imports in a direction which leads to concrete results.

Sincerely,

MAUREEN R. SMITH,
Vice President, International.

Mr. HOLLINGS. Madam President, let me commend our distinguished senior Senator, former leader and President pro tempore of the body. Senator BYRD's words are music to this Senator's ears, because in all of the almost 5 months now of the so-called ''contract,'' not one word has been stated until Senator BYRD has spoken about competitive trade policy.

That is exactly what we need. Right to the point, as the distinguished Senator has pointed out, the Japanese are subsidizing their sales—what we call ''loss leaders,'' in the retail business. They subsidize and sell automobiles there for less than it costs them back in Japan.

I could not get the updated figures right now to be accurate, but I remember over a year ago a Toyota Cressida that sells for $21,800 in Washington, DC, sells for $31,800 back in Tokyo.

We had other comparable prices, and I would be glad to bring us up to date. The point is, in the year 1994 just passed, Business Week reported that, once again, Japan had taken over a larger share of the American domestic automobile market. Specifically, they had inched up another 1.2 percent in spite of the competitiveness and quality production of the American automobile industry. We have all been bragging. Detroit is finally putting out real cars, quality production, and we are now demanding, instead of foreign cars, American cars for a change. But with it all, Japan has still taken over more of the market.

Five years ago, I had the vice presidents of Chrysler, Ford, and General Motors orchestrated almost to bring an antidumping case against Japan. While I had the agreement of Chrysler tentatively and Ford tentatively, General Motors bugged out. They said it was not good for business. They better wake up and understand what is good for business.

Yes, our leader here is making a very cogent observation, but we will have to go back to another colleague of ours who adopted the expression, ''Where's the beef?'' Our Vice President.

We have been talking for years—years on end. I testified 35 years ago with similar language about the textile industry. In 1980, 15 years ago, the deficit in the balance of textile trade of the entire European market with Japan was some $4 billion—not with just Japan but with the Pacific rim. We had a deficit, also, in the balance of textile trade of $4 billion.

In the ensuing 15 years now the Europeans have shown they know how to deal with Japan. They do not have this weeping and wailing about fair trade and level the playing field and whining and crying and moaning and groaning—business is business. Through the enforcement of their antidumping laws, they have reduced it to less than $1 billion. And our deficit in the balance of textile trade has gone from $4 billion to $32 billion. Add in that $28 billion in textile manufacture, and we have millions of jobs.

Politicians are running all over the Hill talking about jobs, jobs, create jobs, jobs, jobs. We are exporting them as fast as we possibly can.

A fundamental is involved, Madam President. They use the Friedrich List or German model, which Alexander Hamilton initiated in the founding days of this Republic whereby the wealth of a nation is measured not by what it can buy but by what it can produce. The decisions are made on the basis of whether or not it strengthens the Japanese economy or weakens the Japanese economy. The Japanese use government, along with trade policies and private sector to take over—in this instance, market share. That is why year upon year, end upon end, we send over our trade representatives. They moan, they groan, they whine, they

cry. We continue to keep our markets open.

The only time anybody made any progress at all was under the voluntary restraints agreement, and we slowed it down somewhat. However, we still have not really denied them access to our market.

Adam Smith, free trade is strictly passe in the global competition. Forget it. Forget it. We have little Boy Scouts, and the Golden Rule, do unto others as they do unto you. That does not apply in global competition.

I can say here and now we have to protect the economic backbone, the manufacturing capacity and capability of our Nation or, as Akio Morita said years ago, that power that loses its manufacturing power ceases to be a world power.

That is the road that we are on in this country of ours. I am glad the distinguished Senator from West Virginia is emphasizing this. It is well stated, and I hope we can get an administration that will answer the question of our former Vice President Mondale, ''Where's the beef?''

If they begin to put in some beef like they did with China, then we can get an agreement like we did with China. If we put some beef behind the words of the distinguished leader from West Virginia, we will get a result. Business is business and it is not politics, and we have got to begin to understand that.

One other item, and then I will yield, Madam President. It is a very, some might say, splendored thing, but the question of telecommunications, the information superhighway, is one of the most complex subjects or issues that we can possibly deal with.

The problem is that everyone wants to deregulate and let market forces control. Certainly this Senator does, and all the Senators that I know of with respect to our Commerce Committee holding the particular hearings.

The problem is we have a monopoly on the one hand and a responsibility for universal service on the other hand. With respect to universal service, Madam President, we do not want to make the same mistake we did with airlines whereas today, now, 85 percent of the medium- and small-sized towns and communities of America are subsidizing the 50 percent long hauls, and all the airlines have gone broke.

Universal service is splendid, outstanding, wonderful communications from our seven Bell companies. The local service operators, we want to continue that universal service and require, thereby, on the one hand, everybody coming in to contribute to a universal service fund, and on the other, not allow our Bell companies to be cherrypicked and take off the good business, high-concentrated service, so to speak, and leave the rural and less populated areas for others to serve.

That is one of the tasks in regulating service. Otherwise, we have to regulate the unbundling of the monopoly. The monopoly is there, and we know twofold: No. 1, that monopoly gets a 46 percent return on their guaranteed cash flow. Now, man, oh man, oh man. It did not come to my attention until just now. Later in the RECORD I will insert whereby the return of all investment to the leading industrial sectors of the United States of America—and now we will take long distance—the return they receive is 19 percent. The average is less than the 19 percent return on their investment. The highest of any in the United States of America are seven Southern Bell. They get a 46 percent return.

Now, if I am president of a Bell company, why should I be pursuing the Congress to get over the business where I am getting a 46-percent return into a business that gets, say, 19 percent or lesser return? Business is business.

I do not want my stockholders to lynch me and throw me out. So necessarily, I am not, although I talk pretty-like on the one hand about the superhighway and everything else like that, let the competition begin, I really do not care if we never pass a bill because I have a guaranteed cash flow of 5.6 billion bucks. I keep Wall Street happy with that. I spend about $2.7 billion in upgrading the system. And I have $1.7 billion in my back pocket here—cash. I can go to any bank, not only in the United States, but into Tokyo or wherever, and with $1.7 billion cash in my back pocket, I can finance anything.

So what I am saying in essence is that what we have to do is break up that monopoly. These monopolistic Bell companies, we intended for them to be monopolies. The law required it. But having given it to them, we know now, under the modified final judgment, they know how to get past every rule and every regulation. I found it out all during the 1960's and 1970's when, on the Communications Subcommittee, I worked with them. We tried our dead-level best to, by gosh, deregulate and open up AT&T and the Bell companies, and we could not do it.

We had to finally do it with the Department of Justice, the Antitrust Division, and a consent decree. That modified final judgment is what finally did the trick, because we had 12 rulings and findings by the Federal Communications Commission and they kept appealing them. And even though we would find against them, nothing was enforced. This crowd knows how to use every word we write in the law and how to get around it and how to appeal it. And therein is another complexity.

Now we have an astounding development. The astounding development is that with all the hearings and everything we have had, and how they have stonewalled us, we finally had, just about 3 weeks ago, Ameritech, a Bell company, along with the Justice Department, along with AT&T, the long distance carrier, along with the Consumer Federation of America, agreed to a consent order to open up competition up in the mid-Northern section of the United States of America.

I could hardly believe my ears, but they agreed to it. In fact, the Bell companies have jumped all over their friend, Ameritech, and said, ''Oh, no, no; this is not a precedent. This cannot be done. It is terrible. What did you do? You are a traitor,'' and everything else. They have really been giving poor Ameritech a fit.

Be that as it may, I have in my hand a memorandum of the U.S. Department of Justice ''In Support of its Motion for a Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech.'' This explains the complexities of all the requirements necessary in doing those two things, bringing about competition in the main; but the two things: Maintaining the universal service on the one hand, and unbundling a monopoly on the other.

That is why some of these Senators can run around and say I want to build more deregulatory policy. That is political cover for saying I want you to give me a day certain. If they get a day certain and the monopoly is not broken up, then no one will enter the particular local exchange. The local exchange monopoly will be used to take over all the other competitive services and satellites, long distance, PCS, and all the rest of the communications, and you are going to end up with monopolistic conduct and not open competition. It is very, very complex. The best document I could possibly find is the one by our Assistant Attorney General, the Honorable Anne Bingaman, and her colleagues here, on behalf of the United States of America.

I ask unanimous consent that this explanation of these complexities of this issue of deregulating communications and bringing about competition be printed in the RECORD at this particular point.

There being no objection, the document was ordered to be printed in the RECORD, as follows:

[In the United States District Court for the District of Columbia, Civil Action No. 82–0192 (HHG)]

UNITED STATES OF AMERICA, PLAINTIFF, *v.* WESTERN ELECTRIC COMPANY, INC., ET AL., AND AMERICAN TELEPHONE & TELEGRAPH COMPANY, DEFENDANTS

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF ITS MOTION FOR A MODIFICATION OF THE DECREE TO PERMIT A LIMITED TRIAL OF INTEREXCHANGE SERVICE BY AMERITECH

Anne K. Bingaman, Assistant Attorney General.

Willard K. Tom, Counselor to the Assistant Attorney General.

David S. Turetsky, Senior Counsel to the Assistant Attorney General.

Jerry S. Fowler, Jr., Special Counsel to the Assistant Attorney General.

Donald J. Russell, Chief, Telecommunications Task Force.

The United States has moved for a modification of the Decree in this case to permit a limited trial of interexchange service by Ameritech. As explained in the Preliminary Memorandum filed with that motion, the

trial would begin only when Ameritech faces actual local exchange competition and there are substantial opportunities for more such competition; would be limited to certain geographic areas within the states of Illinois and Michigan; and could be terminated if Ameritech violates the order governing the trial or if it can no longer establish the absence of any substantial possibility that continuation of the trial would impede competition. The United States, Ameritech, and AT&T have stipulated that the proposed order filed with the motion is in the public interest and have consented to its entry under Section VII of the Decree.

The Preliminary Memorandum outlined briefly the terms and conditions of the proposal. This Memorandum provides a more detailed explanation of the purpose, history, and structure of the proposed modification and the reasons why it should be approved.

I. PURPOSE AND GENERAL STRUCTURE OF THE PROPOSED MODIFICATION

The proposed modification is both more limited and more profound than most requests for removal or modification of the Decree's line of business restrictions that have previously come before the Department of Justice and the Court: more limited because it proposes only a circumscribed trial of an otherwise prohibited service, not a permanent lifting of the restriction for some category of service; more profound because it would take *affirmative* steps toward understanding and achieving the conditions that might render unnecessary one of the most fundamental and important restrictions of the Decree.

The proposal contemplates a three-stage process. First, the motion and proposed order present to the Court the rules under which the proposed trial would be conducted, and seek a determination that they are in the public interest. Second, before any interexchange service could actually begin, Ameritech would have to take certain steps to open local exchange service to competition, and the Department of Justice would have to determine that competitive conditions in the marketplace, in conjunction with the other safeguards in the order, ensure that there is no substantial possibility that commencement of the experiment could impede competition in interexchange service. (Proposed Order, ¶¶9–11.) Third, after interexchange service begins, Ameritech would be subject to certain post-entry safeguards, including all existing equal access requirements, and the Department would supervise the trial and could terminate it if conditions required. (Proposed Order, ¶¶15–17.) The Court would retain discretion to take any necessary actions at any point, including review of any determinations made by the Department. (Proposed Order, ¶51.)

This three-stage process recognizes that the transition to competition in local exchange services will be complex. No set of conditions for promoting such competition could hope to address in advance the dozens of complicated implementation issues that will have to be resolved before meaningful competition is a practical reality, rather than merely a theoretical possibility. As local competition develops, and as industry and regulators gain experience with ensuring the competitiveness of markets that depend on access to local exchange services when the principal local exchange carrier is a participant in those markets, it may be possible to relax some of the post-entry restrictions, and the proposed order makes provision for such modification. (Proposed Order, ¶17.)

The process that the proposed modification would establish will help the Department, the Court, the telecommunications industry, and the public to gain practical experience and develop real marketplace facts about (1) the extent to which telecommunications markets can become fully competitive so that Decree restrictions might become unnecessary and (2) short of such fully competitive conditions, what combination of competition and safeguards might be sufficient to enable the Regional Bell Operating Companies (''RBOCs'') to enter the market for interexchange services without harming competition in that market—all in a setting that does not threaten substantial harm to competition in the interexchange market. Equally important, the Department believes that the same process will itself hasten the development of competition for local exchange services. It will encourage the states that are working to open up local exchange services to competition. And it will establish a mechanism to identify, understand, and address the many implementation issues that will arise in the transition to competition in local exchange markets.

II. DEVELOPMENT OF THE PROPOSAL

A. Technological and competitive developments

Technological changes in recent years have raised the possibility that the scope of the natural monopoly in local telephone service may be subject to erosion.[1] For example, in many densely populated urban areas, Competitive Access Providers (''CAPs'') have laid their own fiber optic networks to serve large business customers. At present, those fiber networks are principally used to provide exchange access, either by supplying a direct link from the customer's premises to the point of presence (''POP'') of the interexchange carrier (''IXC''), or by supplying only the transport from the central office or tandem switch of the local exchange carrier (''LEC'') to the IXC's POP. Those same fiber networks, under the right circumstances, might be able to be used to provide ''dialtone''—i.e., local exchange service. Indeed, two CAPs—MFS and Teleport—have already obtained certificates from the Illinois Commerce Commission to operate as local exchange carriers in Chicago, and another CAP, U.S. Signal (formerly known as City Signal), has obtained such authority to serve Grand Rapids.[2] Similarly, as cable television systems make greater use of fiber optics, those systems may also be able to provide both dialtone and access.[3] Although competition from CAPs has just begun to develop (and competition from cable companies remains largely a theoretical possibility), these technological developments raise important questions about the possible future extent of such competition.

B. Ameritech's original proposal

Based in part on these technological changes, Ameritech filed with the Department and circulated for public comment a waiver request under Section VIII(C) of the Decree, seeking complete removal of the interexchange prohibition, or in the alternative, a waiver of the prohibition to conduct statewide trials of interexchange service in one or more states. It premised that request partly on the notion that the technological changes described above, plus developments in Federal Communications Commission (''FCC'') regulatory tools and policies, were enough to constrain any possible anticompetitive conduct.[4] At the heart of its request, however, was what it called its ''Customers First Plan''—its proposal that it would take certain steps and seek certain state regulatory changes that would open up the local exchange to competition.

To understand the significance of the steps outlined in the Customers First Plan, it helps to consider some of the principal barriers facing potential entrants into local exchange service. First, there are substantial legal barriers to entry in most markets. Until quite recently, the underlying assumption of telecommunications regulation was that local exchange service is a ''natural monopoly'' that should be provided by one entity, subject to government regulation. Thus, states strictly prohibited entry into local telephone service by competitors, often granting monopoly franchises to a single company in each market.[5] Even where states have taken steps to end prohibitions on entry by competitors, potential entrants have sometimes had difficulty obtaining required certification from state regulators.

Second, even as legal and regulatory barriers come down, a substantial barrier remains if entrants must replicate the entire network of the LEC in order to provide local exchange service. *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 544–45 (D.D.C. 1987) (''The conditions that caused these monopolies to emerge in the first place . . . preclude any thought of a duplication of the local networks.''), *aff'd in relevant part*, F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

Third, a fundamental characteristic of telephone markets—the existence of network externalities[6]—requires that any entrant be able to offer its customers the ability to make calls to and receive calls from the incumbent's customers. Because a large portion of the value of telephone service for a particular user depends on that user's ability to contact other users, the incumbent's ubiquity is an insurmountable barrier to competition, absent mechanisms for effective interconnection of networks.

Ameritech's original Customers First Plan had three basic components. First, Ameritech promised not to oppose certification of local exchange competitors and to waive any exclusive franchise rights it had ''if the interexchange restriction is removed, and if state and federal regulators adopt the other reforms proposed [by Ameritech].'' *Ameritech Memorandum in Support of Motions to Remove the Decree's Interexchange Restriction* (''*Ameritech's Customers First Memo*'') at 36 (filed with the Justice Department on Dec. 7, 1993) [Appendix, Tab 6]. Second, Ameritech offered what it characterized as ''unprecedented interconnection at the local level,'' *id.* at 4, which would ''enabl[e] [competitors] customers to originate and terminate calls on the same basis as Ameritech customers, without dialing access codes or waiting for a second dial tone,'' *id.* at 37. Third, the Plan, Ameritech claimed, ''thoroughly unbundle[d] Ameritech's network for resale.'' *Id.* at 38. This unbundling was designed to ''enable competitors either to provide for themselves, or to procure from Ameritech, any facilities or functions they require, either one at a time or in any combination,'' thus obviating the need for competitors to replicate Ameritech's entire network. *Id.*

In sum, Ameritech argued, the Customers First Plan ''does away with legal barriers to entry by rejecting 'first in the field' regulation, and . . . tears down economic barriers to competition by allowing full interconnection and resale.'' *Id.* at 40.

C. Inadequacies of Ameritech's original proposal

The Customers First Plan as originally proposed represented an innovative and significant step in the right direction, because it acknowledged and sought to remove many of the barriers to local competition. But the Department recognized, and stressed in subsequent negotiations with Ameritech, that the plan neither resolved all the issues involved in breaking down those barriers, nor contained adequate safeguards against Ameritech's impeding competition in the interexchange market before those barriers

Footnotes at end of article.

were fully identified and eliminated. It thus fell short of Ameritech's claims in numerous respects, of which the following are illustrative.

To begin with, the original proposal assumed that local competition would automatically flow from eliminating the legal bar to such competition and from the theoretical availability of interconnection and unbundling. ''No more needs to be done to enable and encourage competition for local exchange service.'' *Ameritech's Customers First Memo* at 40 [Appendix, Tab 6]. The Department concluded otherwise, however. The terms and conditions of interconnection and unbundling are critical. For example, Ameritech argued that its unbundling proposal obviated the need for competitors to replicate the ''loop'' that connects the subscriber's premises to Ameritech's central offices. With unbundling, such competitors could connect Ameritech loops to their own ''ports'' (i.e., switches and other non-loop elements of local exchange service) by running trunks from their central offices to Ameritech's central offices. But if loops are priced too high in relation to the retail price of the bundled local exchange service, it will be uneconomic for even the most efficient competitor to connect Ameritech loops to the competitor's ports in order to offer service in competition with Ameritech. One therefore cannot simply *assume* that competition will occur; the Department must instead apply its traditional expertise, evaluating the competitive state of markets in light of actual market conditions and experience.

Similarly, Ameritech argued that the network externality problem would be solved if Ameritech agreed to interconnect with other carriers, to terminate traffic originating from a competing carrier and destined for a customer on Ameritech's network, and to send traffic to other carriers when Ameritech subscribers wished to call competitors' subscribers. But the Department recognized that if Ameritech's prices to terminate calls from subscribers of competing recognized that if Ameritech's prices to terminate calls from subscribers of competing networks to called parties on Ameritech's network are unreasonably high, competition could be seriously hindered. Indeed, in a decision rendered just last month, the Illinois Commerce Commission found that:

''. . . Illinois Bell's proposal to charge new LECs tariffed switched access rates to complete local traffic on its network would result in a situation in which wholesale compensation rates would be above retail market rates for a wide variety of calls. In other words, carriers would pay more in terminating compensation to Illinois Bell than it currently receives in revenues from its local usage customers. . . . [S]everal witnessed independently demonstrated that in most cases Illinois Bell would charge a new LEC more in access charges than it would charge its own local residential or business customer for the entire usage service, making it impossible for a new LEC to establish a competitive price. . . .''[7]

Implementation issues of this kind are inevitable, and no one knows for certain whether, or how soon, entry into the local market will occur on a significant scale. Every scenario for the emergency of competition assumes continuing dependence upon Ameritech, at least for interconnection and in many cases for loops and perhaps other network elements as well. This continuing dependence means that competition will involve complex business relationships and numerous pricing and technical issues, any one of which can make competition infeasible. The Department therefore concluded that Ameritech's original proposal that it be granted interexchange authority simultaneous with the formal lifting of legal entry barriers and adoption of regulatory reforms permitting unbundling and interconnection was unrealistic. That proposal offered no assurance that consumers would actually have alternatives available to them upon the adoption of such reforms, or that competitors would be able to enter sufficiently quickly or pervasively to prevent anticompetitive conduct by Ameritech. The potential harm to competition was particularly great in light of Ameritech's own argument that the ability to offer a full range of ''one-stop shopping'' services confers a great competitive advantage. If true, giving Ameritech such ability at a time when competitors cannot realistically offer local exchange services would tend to extend Ameritech's monopoly from local exchange services to the interexchange market. It is thus critical that actual marketplace conditions be examined to test the true economic feasibility of local competition before Ameritech is allowed to offer interexchange services.

A second major flaw of the original proposal was its failure to address the issue of number portability. Customers are reluctant to switch to competing providers if it entails the inconvenience of losing their existing telephone numbers. For example, a Gallup poll of residential and business customers in 1994 found that 40–50% of residential customers and 70–80% of business customers who otherwise would consider switching local telephone service providers if alternatives existed were unlikely to consider such a switch if they had to change telephone numbers in order to do so.[8] The Department therefore concluded that number portability was an important issue that needed to be addressed if local competition were to play the role envisioned by Ameritech's plan.

Third, the original Customers First Plan did not address competitors' access to poles, conduits, and rights of way. Entrants who wish to lay wire networks face formidable obstacles in obtaining rights of way, problems that the incumbents historically have avoided through use of public condemnation powers and that new entrants might be able to avoid by obtaining access to existing poles and conduits. Discussions between the Department and Ameritech led Ameritech to agree to make access available to the extent such access was in Ameritech's control, so as to provide the best possible opportunity for the Ameritech trial to succeed.

Fourth, the original Customers First Plan gave Ameritech excessive latitude to market its interexchange service through its local exchange operations—through which the overwhelming majority of existing customers get their local phone service and which is usually the first place that new customers call when they need to get phone service. The Department concluded that this latitude would have provided Ameritech's interexchange business a tremendous advantage over other interexchange carriers, attributable only to its position as the monopoly provider of local exchange service.

Fifth, although the original proposal would have prohibited Ameritech from using the Customer Proprietary Network Information (''CPNT'') gained in the course of providing access to competing interexchange carriers, it would have allowed Ameritech to use CPNI gained in providing local exchange and intraLATA toll service in marketing its own interexchange service. The Department concluded that this would give Ameritech a significant advantage based on its current position as the monopoly provider of local exchange service.

Sixth, the original proposal did not require that Ameritech provide interexchange services through a subsidiary separate from its local operations. Although separate subsidiary requirements are imperfect instruments, the Department believes they will nonetheless be useful, both to regulators trying to ensure that Ameritech does not cross-subsidize or discriminate, and to the Department in supervising the trial and evaluating its results.

Seventh, Ameritech's original plan included departures from equal access. For example, it would have allowed Ameritech to put interexchange routing functions in its local switch for its own interexchange traffic but not for that of competing IXCs. The Department concluded that, in the absence of a truly competitive marketplace, this would make it virtually impossible to prevent cross-subsidization and discrimination.

D. Revision of Ameritech's proposal

The proposed modification presented to this Court differs substantially from Ameritech's original proposal, suffers from none of the deficiencies identified in that proposal, and offers far more procompetitive potential and far fewer anticompetitive risks than that proposal. It is the product of thousands of hours of work over the past year by the Department as well as by Ameritech, state regulators, potential competitive local exchange carriers, long distance carriers, consumer groups, and others who filed several rounds of public comment on several versions of the proposal and engaged in intensive discussions with the Department. The Assistant Attorney General for Antitrust participated directly in many of these discussions and in the crafting of language for the proposed order, reflecting her strong personal commitment to the purpose of the 1982 Decree and to competition in telecommunications markets. thus, although Ameritech's original proposal shares with the current proposal the important concept of taking steps to open the local exchange to competition as a predicate for removing the interexchange line of business restriction, the two proposals are otherwise far different. The current proposal is in every sense a joint product of the Department of Justice, Ameritech, and all of the parties that filed comments or participated in these discussions. The principles embodied in the current proposal have the support of AT&T, a decree party and major competitor in the interexchange market; Sprint, also a major interexchange competitor; CompTel, a trade association representing more than 150 competitive interexchange carriers and their suppliers; America's Carriers Telecommunication Association (''ACTA''), a trade association of smaller interexchange carriers; MFS Communications, Time-Warner Communications, and Electric Lighwave, Inc., three providers of competing local exchange service in various parts of the country; the Association for Local Telecommunications Services, a trade association of competing providers of local exchange services; and the Consumer Federation of America and Consumers Union, two major consumer groups.

III. DETAILED EXPLANATION OF THE COMPETITION-BASED CRITERIA AND SAFEGUARDS IN THE PROPOSED MODIFICATION

At the heart of the proposed order is the premise that various steps are being taken by Ameritech and the state regulatory commissions in Illinois and Michigan, and that these steps will likely lead to competitive conditions that make it both safe and desirable to allow Ameritech, on a trial basis, to offer interexchange services in certain portions of those states (the ''Trial Territory'').[9] Because those competitive conditions have not yet been achieved, the proposed order contemplates a multi-stage procedure, under which the actual trial of such services will

not begin until Ameritech presents facts from which the Department can determine that such competitive conditions do, in fact, exist. The process by which that determination is to be made is set forth in paragraphs 9–11 of the proposed order. That process has two parts. First, Ameritech begins the process by certifying that certain required steps have, in fact, been taken to open local exchange service to competition, and by filing a compliance plan dealing with equal access, separate subsidiary provisions, and other post-entry safeguards. The Department will then investigate, take any necessary discovery, and make a determination, reviewable by the Court, as to whether there is sufficient competition and other sufficient assurances against harm to the interexchange market that the trial may safely begin.

The proposed order also contains a number of post-entry safeguards and gives the Department the responsibility of supervising the course of the trial. If Ameritech violates the order or otherwise engages in anticompetitive conduct, the Department can require it to cease such conduct, ask the Court to impose civil fines, or terminate the trial.

The required steps to foster local competition, the standard for the Department to determine that the interexchange trial should begin, the post-entry safeguards, and the Department's supervisory responsibilities are described below.

A. Steps to foster the emergence of local competition

Paragraph 9 of the proposed order lists a number of developments with respect to local exchange competition that must occur before Ameritech can apply for authority to begin interexchange services. By design, the order does not specify in every detail the precise terms and conditions on which these developments must take place—matters that are in the purview of the state regulators, and with which the regulators in the two trial states are already grappling in their efforts to foster competition. There are many issues that remain to be resolved, and it is for the states and the market participants, not the Department, to resolve them. On the other hand, the way in which those issues are resolved may have an extremely significant effect on competitive conditions, as may a variety of other technical and economic factors, some of which may be beyond the control of the regulators. The Department's traditional area of expertise, of course, is in evaluating the competitive structure and behavior of markets. Under the proposed order, therefore, the state regulators and the Department each discharge their traditional types of responsibilities: the states are already in the process of determining the terms and conditions under which the steps set forth in paragraph 9 will take place, and the Department, under paragraph 11 of the proposed order, will concern itself with the resulting competitive circumstances, and with whether those circumstances and other safeguards are sufficient to ensure that a trial of Ameritech interchange entry will not harm interexchange competition.

The specific steps required by paragraph 9 of the proposed order are as follows.

1. Unbundling of loops and ports

As discussed in Section II.B, unbundling of loops and ports is important to local competition because it obviates the need to replicate the LEC's entire network of distribution facilities. Outside of dense downtown areas, a portion of that network—the loop connecting the customer premises to the main distribution frame in the central office—may well exhibit natural monopoly (or at best, duopoly) characteristics for some time to come. Unbundling is intended to address the natural monopoly problem, but whether it does so successfully or not depends heavily on the pricing of the unbundled loops and on other terms and conditions such as the speed and reliability of provisioning and repair. (See Section II.C.) The proposed order recognizes this dependence and deals with it through a collaboration between the Department and the appropriate state regulatory authorities, whereby each entity acts within its sphere of expertise. Thus, the state regulatory authorities will regulate the pricing of loops and ports.[10] For Ameritech to be authorized to begin interexchange service, however, the Department will have to investigate and determine, among other things, that

''regulatory developments (including * * * the terms and conditions thereof) and market conditions offer substantial opportunities for additional local exchange competition. * * *''

(Proposed Order, ¶ 11(b)(ii).) Because the proposed order bases entry into interexchange service on an assessment of marketplace facts about competitive conditions at the time of decision, it is unnecessary to resolve the pricing issue—or most of the other myriad and perhaps unforeseeable implementation issues—in advance.[11]

2. IntraLATA toll dialing parity

The Court recognized, at the time of the Decree, the importance of dialing parity to a competitive telecommunications marketplace. *See United States v. Western Electric Co.*, 552 F. Supp. 131, 197 (D.D.C. 1982), *aff'd sub nom, Maryland v. United States*, 460 U.S. 1001 (1983). The proposed order requires that, before it applies to begin the interexchange trial, Ameritech must

''I have made the necessary technical, operational, administrative and other changes to implement dialing parity for intraLATA toll telecommunications no later than 21 days prior to the effective date of Ameritech's authority . . . on terms approved by the appropriate state regulatory authority.''

(Proposed Order, ¶9(b).) Thus, to begin the application process, Ameritech must make the necessary changes to ensure that dialing parity can be implemented prior to Ameritech's interexchange authority. Before the Department can approve commencement on the trial, it must ensure that Ameritech has taken the further step of having installed and tested the capability for providing such parity. (Proposed Order, ¶11(d).) The Department can thus ensure that Ameritech annually implements dialing parity no later than the time it begins interexchange service.[12]

3. Resale of local exchange service

Another prerequisite before Ameritech can file its application with the Department is that steps have been taken to allow non-facilities-based (i.e., resale) competition for all classes of service, including residential service. (Proposed Order, ¶9(c).)

Resale competition is not a replacement for facilities-based competition. Competition from exchange carriers that supply their own loops (e.g., cable systems) can help thwart discrimination in the pricing, provisioning, and maintenance of loop facilities, so long as adequate provisions are made to deal with the advantages that flow to the dominant carrier because of network externalities (i.e., the need to terminate calls on the dominant carrier's system, number portability, access to signalling resources and database information, etc.). Competition from exchange carriers that supply their own switching facilities but use Ameritech loops (e.g., CAPs connecting their switches to Ameritech loops to extend the geographic area they can serve) are dependent upon the appropriate pricing, provisioning, and maintenance of loop facilities. If those conditions are right, however, they can prevent discrimination in the provision of network features and functionality, excessive charges for exchange access, and so on. Pure resale competition, by itself, does none of these things. It brings competition only to the *marketing* of local exchange services, and it requires extensive regulations to ensure that the prices, terms, and conditions under which Ameritech offers the underlying service make resale meaningful available.

Nonetheless, resale competition is important for two reasons. First Ameritech will be able to offer interexchange services very quickly and easily once it has the authority to do so, by reselling such services just as hundreds of other companies resell interexchange services. The availability of commercially feasible resale opportunities is one way to ensure that interexchange carriers that are not in a position to enter local exchange service quickly and easily on a facilities basis will have opportunities similar to Ameritech's to offer a full range of services.

Second, the availability of resale will tend to reduce the barriers to facilities-based entry, because a company that already has a subscriber base as a reseller will be able to make investments in switches and other facilities with less risk. Just as unbundling of loops and ports makes it possible for competing exchange carriers to offer services outside the dense downtown areas where they can justify installing their own loops, so full resale of the entire local service (loops *and* ports) makes it possible to offer services before there is enough traffic to justify investment in a switch (or in trunks to connect more distant Ameritech central offices to an existing switch). Once a subscriber base is built, more investment may be justified. Such reductions in barriers to entry will enhance the prospects of the ultimate success of the trial.

The requirement that there be adequate resale opportunities is thus directly tied to the requirement of paragraph 11 that competitive circumstances and the safeguards and supervisory provisions of the order ensure the absence of any substantial possibility that Ameritech could use its position in the local exchange market to harm competition in the interexchange market. The important point is that the ability of the interexchange market to function competitively not be harmed.

As with the other provisions already discussed, it is left to the states whether non-facilities-based competition should be achieved by directly reselling Ameritech bundled services, or by renting Ameritech loops and Ameritech ports on their separate pricing schedules and selling the combined package as a service, or both.

4. Pole attachments and conduit space

A fourth prerequisite is that Ameritech have implemented reasonable and nondiscriminatory arrangements for sharing of pole attachments and conduit space, and for competitors to secure access to entrance facilities, risers, and telephone closets, to the extent such arrangements are under the control of Ameritech. Inability to secure access to poles, conduits, entrance facilities, and so forth could be a significant barrier to a facilities-based competitor seeking to install its own loops. To the extent that this potential barrier is under Ameritech's control, Ameritech promises, by its consent to the proposed order, to eliminate it, thereby encouraging the competition that could serve as a predicate for Ameritech's entry into interexchange service. In many cases, of

course, such barriers may not be in Ameritech's control. But whether they are or not, the ultimate question remains that set forth in paragraph 11: to what extent do competition, the potential for more competition, and the other provisions of the order constrain Ameritech's exercise of market power to harm competition in the interexchange market? (*See* Section III.B.)

5. Interconnection

Effective interconnection arrangements are among the most critical issues for facilities-based competitors. As explained above (Section II.B), competitors must be able to offer their customers the ability to make calls to and receive calls from anybody else who owns a phone—most notably Ameritech's customers. Without such interconnection, the competitor's service essentially would be worthless. This basic need for interconnection gives rise to a host of complex issues, the resolution of which has important ramifications for competition. For example, arrangements must be made for networks to compensate each other for terminating calls that originate in another network. Unless properly structured, the reciprocal compensation arrangements can raise significant barriers to entry by potential local competitors.

Likeswise, the interconnection arrangements must be on terms that permit local dialing parity, so that customers of Ameritech's competitors can place local calls without suffering any inconvenience—such as dialing extra digits—that is not imposed on Ameritech customers. Local competitors must also have adequate access to various services necessary to the provision of local exchange service, such as unbundled signalling and 611, 911, E911, call completion, and TRS relay services, as well as data necessary to provide 411 (directory assistance) service.

The proposed order does not attempt to dictate the precise resolution of each of these issues. Some of these issues might be resolved among the carriers without intervention by state regulators. If the terms are acceptable to the competitive exchange carriers, the arrangements will satisfy paragraph 9(e).[13] If the carriers cannot agree, regulatory approval will satisfy paragraph 9(e), because it would not further the public interest in competition to give each competitor a veto power over Ameritech's ability to move forward with a trial.[14] In either case, the ultimate question will be the competitive effects of the arrangements, which will necessarily be considered in connection with the assessment of competitive conditions required by paragraph 11 of the proposed order.

6. Number portability

As discussed above in Section II.C, an important element in local exchange competition is service provider number portability—the ability of a subscriber to retain his telephone number when changing carriers. The proposed order distinguishes between two ways of achieving service provider number portability: true number portability and interim number portability. True number portability allows calls to be delivered directly to the subscriber's new exchange carrier without having to route traffic through the old exchange carrier and retains the full range of functionality (e.g., delivery of information necessary to provide caller ID functions) that would have been available to the subscriber in the absence of a change in service provider. Such true number portability is likely to involve some form of database look-up: for example, an IXC delivering a call into the Chicago area would use the signalling network to consult a database, which would supply to the service provider the information necessary to deliver the call to the correct exchange carrier.

In the absence of true number portability, a variety of means exist to provide number portability on an interim basis. An example is remote call-forwarding. A subscriber changing from Ameritech to a new exchange carrier would receive a new telephone number, the first three digits (''NXX code'') of which would be an NXX code assigned to the subscriber's new carrier. If a caller dialed the subscriber's old telephone number, the call would be routed to Ameritech's switch, since the old number would contain an NXX code assigned to Ameritech. Ameritech's switch would be programmed to complete the call by use of an additional circuit from its switch to the next exchange carrier's switch. Such interim forms of number portability may suffer certain drawbacks, e.g., the loss of data necessary to provide certain functions, such as caller ID; transmission delays as a result of the additional switching that may impair suitability for data transmission; and inability of the new exchange carrier to collect the access charge for terminating an interexchange or intraLATA toll call.[15]

The proposed order requires Ameritech to implement true number portability in the Trial Territory, except that if it is unable to do so as of the date 120 days before the anticipated implementation of intraLATA dialing parity, it may rely on interim number portability if it explains satisfactorily why it cannot implement true number portability as of that date and sets forth a plan acceptable to the Department for achieving true number portability.

Achievement of true number potability is not totally in the control of Ameritech. It will require cooperation from vendors of hardware and software, such as AT&T, as well as from other industry participants, such as IXCs, who will be delivering traffic destined for ported numbers. Ameritech has already issued a Request for Proposal for the technology and administrative services necessary to implement true number portability. The Illinois Commerce Commission has ordered an industry task force to be created, under the supervision of the Commission staff, to deal with the issue of number portability. *ICC Order*, *supra* note 7, at 110 [Appendix, Tab 7]. This task force will hold workshops, at which industry participants can react to that RFP, propose alternative specifications, and attempt to arrive at a workable solution. The first of those workshops was held on April 21, 1995.

As with many of the other steps in paragraph 9, the actual terms and conditions under which either true or interim number portability is offered are likely to have a major impact on whether there are substantial opportunities for other exchange carriers to compete. The proposed order requires that arrangements be made for allocating the costs of number portability that do not place an unreasonable burden upon competing exchange carriers, leaving to Ameritech, industry participants, and state regulators the task of working out the precise terms of such arrangements in the first instance.

Separate from service provider number portability is the issue of location portability—the ability to retain the same telephone number at a different location within a geographic area. It is not particularly significant for competition that location portability be available. If it *is* available, however, competition could be adversely affected if Ameritech's control over monopoly facilities allows it to offer such a feature while preventing its competitors from doing the same. The proposed order thus requires that, to the extent Ameritech is offering location portability to its own customers, and to the extent it is technically and practicably feasible, Ameritech make available to other exchange carriers, on nondiscriminatory terms and conditions, the capability to offer such portability.

Nondiscrimination in this context would not mean that exchange carriers offering switching services in competition with Ameritech would necessarily be afforded access to features in Ameritech's switch. To the extent that switching facilities are competitive, and location portability is a service offered through such facilities, competition should encourage all competitors to differentiate their services by offering new and better features. Nondiscrimination *would* mean, however, that Ameritech could not hinder competitors offering such services through discrimination in the terms in which they connected to Ameritech's network or through other means. For example, if location portability is achieved through wiring changes at the central office rather than through software features in the switch, an exchange carrier competing with Ameritech by connecting its own switches to Ameritech loops would be placed at a significant disadvantage if Ameritech denied equal access to such wiring changes. Similarly, it would likely be discriminatory for Ameritech to refuse to offer to switchless resellers, (i.e., those using both Ameritech loops and Ameritech ports, including switching services) the same location portability features it offers to its own subscribers; since Ameritech facilities are handling the entire call, there is no apparent reason why the same features could not be made available.

7. Number assignment

Telephone numbers are the most fundamental means of interface between end users and the telephone network, as well as between one network and another. A competitive local telephone network must have fair and equal access to number resources as an essential element of developing telecommunications services and competing for customers. To ensure the competitively neutral administration of number resources, the proposed order requires Ameritech to have made reasonable efforts to transfer any duties it has in administering those resources to a neutral third party. (Proposed Order, ¶9(h).) If its efforts to transfer its duties are not successful by the time Ameritech applies for authorization to provide interexchange service, it must explain in writing why they have not been successful and what further steps it plans to take, and must implement a nondiscriminatory procedure for assigning numbers. The efficacy of such arrangements will be considered by the Department in making its determination under paragraph 11.

B. Actual marketplace facts concerning the emergence of local competition

1. Procedures for department approval

Completion of the above steps would not result in immediate commencement of the trial of interexchange service. Instead, at that point Ameritech will apply to begin the trial if it believes competitive circumstances in the local market warrant. Ameritech will report to the Department that it has taken the required steps with respect to unbundling, intraLATA toll dialing parity, resale of local services, pole attachments and conduit space, interconnection, number portability, and nondiscriminatory number assignment. In addition, Ameritech must file a compliance plan.[16] After Ameritech has filed both the report and compliance plan, the Department will have thirty days to determine whether it needs any additional information from Ameritech. Within sixty

days after Ameritech has substantially complied with the Department's request for additional information or 120 days after the filing of both the report and the compliance plan, whichever is later, the Department will determine whether Ameritech may begin the trial. In making that decision, the Department will seek comments from the appropriate state regulatory authorities and interested persons. (Proposed Order, ¶11(a).) It may also take any other action reasonably necessary to make its decision, including conducting third-party discovery. (*Id.*, ¶¶11(a), 49.)

2. Procedures for court review

The Court may, in its discretion, review any decision of the Department, both with respect to commencement of the trial and otherwise. (*Id.*, ¶51.) If the Department approves commencement of the trial, such approval could not go into effect for at least 30 days (Proposed Order, ¶13), thus allowing a period of time during which interested persons could seek a temporary restraining order from the Court. The Court could then establish such schedule and procedures for such review as it deemed appropriate under the circumstances. If the Department does not approve commencement of the trial upon a particular application by Ameritech, Ameritech does not have a right of review within the structure of the proposed order. (Proposed Order, ¶51.) It does, however, retain the right to seek Court action independent of the proposed order, under sections VII or VIII(C) of the Decree. (*Id.*). Ameritech is thus no worse off under the unreviewability provision than it would be in the absence of the proposed order. to avail itself of the benefits of the proposed order, however, it would have to work further toward creating conditions that meet the standard of paragraph 11 rather than involve the Court in reviewing the Department's decision. This provision gives Ameritech a strong incentive to apply to begin the interexchange trial only when the test for doing so is actually met. The judicial system is thus spared the burden of premature applications that could otherwise lead to extensive judicial review, and Ameritech is given a reason to provide information to the Department as quickly as possible, even in advance of its application where appropriate.

3. Substantive standard for department approval

The substantive standard for commencing the trail of interexchange service is set out in paragraph 11(b) of the proposed order:

''To render an affirmative decision on Ameritech's application, the Department must find that

''(i) *actual competition* (including facilities-based competition) in local exchange telecommunications exists in the Trial Territory,

''(ii) the conditions specified in paragraph 9 have been substantially satisfied, and that regulatory developments (including but not limited to those developments set forth in Paragraph 9 and the terms and conditions thereof) and market conditions offer *substantial opportunities for additional local exchange competition*, as evidenced by, among other things, the increasing availability of local exchange telecommunications alternatives for such customers,

''(iii) the conditions described in (i) and (ii) above, together with regulatory protections, the Department's right to terminate Ameritech's interexchange telecommunications authority under Paragraph 16, the transport facilities restrictions of Paragraph 19, the compliance plan, the limited geographic scope described in Exhibit A, and the other provisions of this Order, are sufficient to ensure that there is *no substantial possibility that Ameritech could use its position in local exchange telecommunications to impede competition for the provision of interexchange telecommunications to business or residential customers in the Trial Territory*.''

(Proposed Order, ¶11(b) (emphasis added).)

Thus, the standard has three parts—actual competition, substantial opportunities for additional competition, and a determination that such competition and competitive opportunities, together with regulation, post-entry safeguards, and the fact that Ameritech's interexchange service would only be on a trial basis, make it safe and desirable to begin the trial. These three parts of the standard are related both to each other and to the ultimate objectives of the trial.

For the trial to be an ultimate success, it will have to help prove or disprove one or both of two propositions: (1) the competitive steps outlined above produce enough actual competition and opportunities for additional competition to ensure by themselves that there is no substantial possibility Ameritech could engage in anticompetitive conduct affecting the interexchange market, or (2) some combination of actual competition and opportunities for additional competition, together with regulation and post-entry safeguards, is sufficient to ensure the absence of such possibility.[17]

Paragraph 11 does not require that either of these propositions be proved before the trial begins; indeed, the purpose of the trial is to test these propositions. At the same time, it is important to ensure that the trial itself does not result in harm to competition in the interexchange market. Many of the same factors—actual competition, opportunities for additional competition, and post-entry safeguards—that would protect competition in the event permanent relief were appropriate will also serve to protect competition during the trial. Since the premise of the trial is that these factors will not be known to be sufficient at the beginning of the trial, however, the proposed order also provides for very close supervision by the Department, including a provision for the Department to terminate the trial if necessary. Before beginning the trial, the Department is to make a determination that all of these factors, including the provision for termination, together will be sufficient to negate any substantial possibility that Ameritech could use market power in the local market to harm competition in the interexchange market.

The three parts that make up that judgment are discussed in greater detail below. Because they are so closely related, actual competition and substantial opportunities for potential competition are discussed together.

a. Actual Competition and substantial opportunities for additional competition

Competitive outcomes can generally be assured if there is a sufficient level of actual competition—multiple competitors actually producing and selling the good or service. Theoretically, some markets can produce competitive outcomes even if they do not contain multiple competitors actually producing and selling the good or service. One situation in which such outcomes may occur is where firms not currently producing or selling the relevant product in the relevant area would start doing so quickly, and without the expenditure of significant sunk costs, in response to a small but significant price increase. If these firms are sufficiently numerous that the incumbent firm cannot maintain prices above the competitive level, then the market will behave competitively. *Cf. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*, §1.32 (April 2, 1992) [hereinafter ''*1992 Merger Guidelines*'']. Such a market is said to be ''contestable.''

It is hard to think of a market less likely to be ''contestable'' than local exchange service. Sunk costs in this industry are, in a word, gigantic. Perhaps recognizing this, Ameritech's original waiver request was supported by an affidavit and a reply affidavit that spoke not of ''contestability'' but of something Ameritech's expert called ''effective'' or ''as-if'' contestability. Affidavit of David J. Teece, ¶41 (Nov. 29, 1993) (filed with the Department of Justice in support of Ameritech's Original Proposal on Dec. 7, 1993) [Appendix, Tab. 13]; Reply Affidavit of David J. Teece at 3–8 (Apr. 6, 1994) (filed with the Department of Justice on Apr. 12, 1994) [Appendix, Tab. 14]. By this he meant that Ameritech's unbundling of loops and ports would allow competitors to treat those assets as if they were not sunk costs, freely entering and exiting the industry in response to competitive conditions by renting only what they needed at a given moment in time from Ameritech.

Such an argument, however, is highly speculative. It assumes that state regulators will get the prices of those loops and ports exactly right, precisely duplicating the prices that would obtain in a competitive market. (See Section II.C.) It further assumes that Ameritech could not discriminate in the provisioning or maintenance of loops or ports or in the terms and conditions of interconnection, and that competitors will not incur substantial sunk costs in other elements of their operation. In short, on the current state of the record, the Department regards the suggestion that unbundling would make local telephone markets behave ''as-if'' they were contestable as both unproven and implausible.

A market with only one firm could also behave competitively if longer-term entry (i.e., with sunk costs) into the market is so easy that the incumbent firm could not profitably behave anticompetitively (e.g., maintain a price above competitive levels or—more relevant here—use a monopoly position in that market to adversely affect competition in an adjacent market). For entry to be that easy, it would have to be ''timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.'' *1993 Merger Guidelines*, §3.0. Ameritech argues that unbundling, interconnection, and the other steps it is taking pursuant to state regulatory action and paragraph 9 of the proposed order will make entry that easy.

As a practical matter, however, it is impossible to evaluate that argument in the abstract, without the existence of some actual competition to guide the way. Once there are significant actual competitors, one can begin to ask questions such as:

How were those competitors able to enter? What certification and other regulatory requirements did they have to meet, and how long did it take? Is there any reason other competitors would not be able to do the same?

Is the availability of such competing service expanding? Are competitors encountering significant barriers to such expansion?

To what extent are competitors entering by renting loops from Ameritech as opposed to building their own loop plant, either for the whole of their local exchange business or as a way of extending the reach of their network? To the extent that competitors have to build some of their own facilities, how long does that take, and how many other competitors could do the same?

Are competitors able to serve a wide range of customers throughout the Trial Territory, or are they limited to niche markets?

To the extent that not all customers have competitive alternatives available to them, could Ameritech discriminate against just those customers that have no alternatives, or would anticompetitive behavior against those customers necessarily cause it to lose so many other customers that Ameritech could not profitably persist in the anticompetitive behavior?

The proposed order does not specifically state how much actual competition is necessary to satisfy paragraph 11(b). Nonetheless, the foregoing discussion suggests the implicit level: there must be enough actual competition to provide an empirical basis for answering these kinds of questions, and the answers must indicate that there are substantial additional opportunities for competition and that these opportunities will be sufficient, in combination with the safeguards and supervisory provisions of the order, to deter Ameritech from behaving anticompetitively. To provide such answers requires more than a single competitor serving niche markets but less than the level of actual competition that would suffice in and of itself to justify permanent removal of the interexchange restriction, without the safeguards and supervisory provisions that will accompany the trial (including the right of the Department to terminate the trial and the ability of the Court to review the Department's determinations).

The proposed order also emphasizes that there must be facilities-based competition in the Trial Territory. As discussed in Section III.A.3, resale competition is not a perfect substitute for facilities-based competition. Facilities-based competition can discipline a wide range of anticompetitive conduct that would be left untouched by resale. Thus, the Department will look closely at the extent of facilities-based competition in determining whether the standards of paragraph 11 are met.

b. Determination that the state of the market safeguards, and supervisory provisions make it safe to begin the trial

In addition to actual competition and ease of entry, the proposed order relies on supervisory provisions and post-entry safeguards, as more fully described in Section III.C. For example, the Department may terminate Ameritech's interexchange authority if it no longer believes that there is no substantial possibility that continuation of the trial would impede competition. (Proposed Order, ¶16.) To authorize commencement of the trial, then, the Department must determine that actual competition, substantial opportunities for additional competition, and these other supervisory provisions and safeguards are sufficient to ensure that going forward with the trial will not create any ''substantial possibility that ameritech could use its position in local exchange telecommunications to impede competition for the provision of interexchange telecommunications.'' (Proposed order, ¶11(b)(iii).) The assurance against harm to competition must protect both business and residential customers in the Trial Territory. (*Id.*)

4. Other factors the department may consider

The proposed order specifically highlights a number of additional factors that the Department may consider in making the determination under paragraph 11 to proceed with the trial.

a. Certification, licensing, franchising, and similar requirements

Implicit in the concept that there are substantial opportunities for additional local exchange competition is the premise that certification, licensing, franchising, and similar regulatory and legal requirements are not significantly impeding the development of such competition. State and local regulation serves important public policy objectives, such as protecting consumers from deception and ensuring that carriers have adequate financial backing. In states such as Illinois and Michigan, which have state policies favoring competition and in which there is already a recent history of granting certificates to competitors, it is the Department's expectation that such requirements would be narrowly tailored to achieve such public policy objectives without impeding competition significantly. Nonetheless, this factor is specifically mentioned in the proposed order as an issue for the Department to consider, because state and local government policies can have a major and even decisive impact on whether and how fast competition will develop.

b. Ordering, provisioning, and repair systems

There are two different provisions in the proposed order dealing with electronic access to ordering, provisioning, and repair systems. First, if Ameritech wishes to make such systems available to the Ameritech interexchange subsidiary, it *must* offer such access, on nondiscriminatory terms and rates, to unaffiliated carriers. (Proposed Order, ¶ 26.) Second, in making its decision under paragraph 11, the Department may take into account the extent to which Ameritech offers unaffiliated carriers access equivalent to that used in Ameritech's *local exchange operations* (whether or not Ameritech's interexchange subsidiary is given access). (Proposed Order, ¶ 11(c)(ii).)

The requirement in paragraph 26 is a matter of equal access—putting other carriers in a position equal to Ameritech's interexchange subsidiary—and is absolute. The requirement in paragraph 11 is more judgmental. It recognizes that there could be technical reasons why it would not be practicable for Ameritech to provide access to certain systems to anyone outside Ameritech's local exchange operations, including Ameritech's interexchange subsidiary. At the same time, it recognizes that lack of such access could have a considerable impact on the prospects for local competition, and thus specifically provides for the Department to consider the issue and take it into account.

C. Supervision and safeguards

When the interexchange trial begins, there will be actual local exchange competition and substantial opportunities for additional such competition, but no firm assurance that the competitive state of the market will suffice by itself to thwart any anticompetitive conduct that Ameritech might attempt in the interexchange market. Therefore, the proposed order contains supervisory provisions and post-entry safeguards, designed for use during the trial, to supplement such competition and ensure that there is no substantial possibility that Ameritech could use market power in the local market to harm competition in the interexchange market during the trial.

As competition develops, many of the post-entry safeguards may become unnecessary to ensure the absence of any such substantial possibility, and the proposed order provides for their removal as appropriate. (Proposed Order, ¶17.) The proposed order does not specifically provide for Ameritech's interexchange authority to be made permanent and the Department's supervisory role to be terminated, because Sections VII and VIII(C) of the Decree already establish the appropriate mechanism and standard for permanent relief.

The Department is required to conduct a comprehensive review of all aspects of the trial within three years of Ameritech's interexchange authority under the proposed order. (Proposed Order, ¶18.)

The specific supervisory provisions and safeguards are as follows:

1. Terminability of the trial

If Ameritech violates the order, or if the Department no longer believes that there is no substantial possibility that continuation of the trial would impede competition, Ameritech's interexchange authority can be terminated (Proposed Order, ¶16.), subject to review by the Court (Proposed Order, ¶51.). This termination provision ensures that, even if the opportunities for local exchange competition at the start of the trial and other safeguards turn out not to be sufficient to prevent Ameritech from taking actions that harm competition in the interexchange market, any such harm will be short-lived and insubstantial.

During the comment process, a number of commenters suggested that it would be difficult for the Department to exercise this authority. In response to these concerns, a provision was included in the proposed order to require Ameritech's compliance plan to supply, prior to approval of its interexchange service, a credible plan for orderly withdrawal from the provision of interexchange telecommunications in the event Ameritech's authority to offer interexchange telecommunications is discontinued. (Proposed Order, ¶10(j).) Such a plan might include, for example, a procedure for balloting customers or for reverting them to their previous interexchange carrier. Moreover, the proposed order makes clear that financial hardship to Ameritech resulting from such discontinuance shall not be a ground for opposing such discontinuance. (Proposed Order, ¶16.)

2. Self-reporting

The proposed order requires Ameritech to develop a plan for detecting and reporting violations of the order or of the compliance plan, and to report any such violations and any corrective action taken. (Proposed Order, ¶¶10)i), 15.)

3. Orders to discontinue conduct

If the Department determines (a) that Ameritech is violating any of the terms of the order, its compliance plan, or additional conditions imposed on Ameritech in connection with approval of its interexchange service, or (b) any other conduct by Ameritech may impede competition for interexchange telecommunications in the Trial Territory, the Department may require Ameritech to discontinue such violations or other conduct. Ameritech bears the burden of proof in resisting such a requirement. (Proposed Order, ¶15.)

4. Civil fines

In the event of a violation by Ameritech, the proposed order gives the Department the authority to ask the Court to impose civil fines. (*Id.*)

5. Limited geographic scope

The proposed trial is limited initially to the portion of the Chicago LATA that is in the state of Illinois and to the Grand Rapids, Michigan, LATA. Focusing on the state of competitive conditions on a LATA-by-LATA basis ensures that the competitive analysis takes into account differences not just in state regulatory schemes, but also in demographic and other conditions. Chicago was chosen because there is widespread agreement that, of all the areas in the Ameritech service territory, the potential for competition—though still embryonic—is most advanced there. Grand Rapids was chosen because the first competing exchange carrier in Michigan, U.S. Signal (formerly known as City Signal), has been certified to serve a

portion of that territory and was the subject of a detailed interconnection order issued by the Michigan Public Service Commission. Thus, it seems appropriate for the Department to focus first on those two areas and to be prepared to act with respect to those areas within the period set forth in paragraph 11(a).

The inclusion of these two areas in the Trial Territory does not mean that the trials in those two areas necessarily must proceed simultaneously. Competitive conditions in one of the areas may justify proceeding with an interexchange trial before such conditions have evolved in the other area. Further, explicit provision is made for expansion of the Trial Territory in those two states, and each area in the two states will stand on its own merits, governed by the standard in paragraph 11b).[18] (*See* Proposed Order, ¶17.) As with other determinations under the proposed order, the Court may, in its discretion, review any decision to expand the Trial Territory, (*Id*., ¶51.) If the Department approves expansion, such expansion could not go into effect for at least 30 days (Proposed Order, ¶17), thus allowing a period of time during which interested persons could seek a temporary restraining order from the Court. A decision by the Department not to expand the Trial Territory would also be reviewable. (*See* Proposed Order, ¶51.)

Most important, the designation of those two areas as comprising the initial Trial Territory, and of those two states as being eligible for expansion of the Trial Territory within the framework of the order, is not meant in any way to discourage the ongoing efforts of the other Ameritech states (Indiana, Ohio, and Wisconsin)—or similar efforts underway or that may arise in the states in which other RBOCs operate—to bring the benefits of local competition to the consumers in their states, completely independent of any interexchange entry by Ameritech in those states. Local competition promises benefits to consumers separate from any benefits they may get as a result of interexchange competition from Ameritech. Moreover, the development of such competition can only hasten the day when interexchange entry by Ameritech—or other RBOCs—will be appropriately granted under Section VII or VIII(C), wholly apart from the proposed order now before the Court.

6. Types of services

Paragraph 7 of the proposed order limits Ameritech to providing certain enumerated types of interexchange services that have a clear nexus to the Trial Territory, i.e., services as to which the fact that competition exists in the Trial Territory is relevant even if competition does not exist elsewhere in the country. Thus, for most switched services, as to which the interexchange carrier is selected by the party placing the call, Ameritech could provide interexchange service originating from the Trial Territory. (Proposed Order, ¶7(a).) For services such as inbound 800 service, which is ordinarily carried by the interexchange carrier selected by the billed party at the terminating location, Ameritech could provide service terminating at subscribers' locations in the Trial Territory. (Proposed Order, ¶7(b).) Ameritech may also provide certain other types of services normally provided by interexchange carriers to their subscribers, such as calling card and private line services, with limitations to ensure an adequate nexus to the Trial Territory. (Proposed Order, ¶¶7(c)-(d).) There may also be other types of services that Ameritech may wish to offer in the future in order to stay competitive with the offerings of other IXCs. Because these services may not yet exist, it is difficult to enumerate them, much less to determine in advance whether any potential harm to competition is adequate addressed by the proposed order. Hence, a mechanism is provided to allow Ameritech to provide such services, subject to disapproval by the Department. (Proposed Order, ¶7(e).) Under the provision, Ameritech would have to give at least 30 days notice of such services, and the Department, after soliciting comments from interested persons, could disapprove the offering of such services. A relatively short notification and objection period is provided because it is anticipated that this provision will principally be used to respond to competitive offerings in the marketplace; however, a decision not to disapprove the services would be without prejudice to later withdrawal of authority under paragraphs 15 or 16 of the order if necessary.

7. Ownership of transport facilities

Paragraph 19 of the proposed order provides that Ameritech shall not own any of the transport facilities used to provide interexchange telecommunications. Instead it must contract for such facilities for a term not to exceed five years. This safeguard serves two purposes: to the extent Ameritech has not made substantial investments in facilities in the ground, it makes it easier to terminate the trial; and it reduces Ameritech's incentive to discriminate in favor of those facilities because it makes it harder for Ameritech to capture all of the benefits of such discrimination.

8. Separate subsidiary requirements

Paragraph 20 of the proposed order provides for the separation of the Ameritech subsidiary providing interexchange services from the Ameritech local exchange operations. The provisions generally track the more stringent approach taken by the Federal Communications Commission in its Computer Inquiry II proceedings and rules and in the requirement of separate subsidiaries for RBOC provision of commercial mobile radio services, rather than more lenient approaches relying on cost accounting instead of structural separation (such as the approach taken by the FCC in its Computer Inquiry III proceeding[19]). The more stringent structural separation approach is more appropriate for a trial of interexchange services, at least in the early stages before competition is fully developed and before additional information about the need for separate subsidiary requirements is gained from the trial itself.[20]

9. Equal access provisions

Under the proposed order, the equal access provisions of the Decree would remain in full force; the order would grant Ameritech only a temporary and limited modification of the line of business restriction of Section II(D)(1) of the Decree and would not relieve Ameritech of any other restrictions. (Proposed Order, ¶4.) In addition, a number of provisions are added to adapt the equal access concept to a situation in which an Ameritech subsidiary is one of the interexchange carriers interconnecting with the Ameritech local exchange operations. These provisions deal with equality in the type, quality, and pricing of interconnection, exchange access, and local exchange telecommunications (¶¶21, 25); technical information, standards, collocation, and other terms of interconnection (¶¶22–24); availability of service order, maintenance, and other telecommunications support systems (¶26);[21] billing services (¶27); location number portability (¶28); White Pages directory listings (¶29); and customer information (¶¶30–32).[22]

10. Marketing restrictions

The marketing provisions of the order (¶¶33–47) deal with two principal issues: (1) ''equal access''-type obligations preventing Ameritech's local exchange operations from assisting the Ameritech interexchange subsidiary in its marketing efforts, and (2) the circumstances under which Ameritech can make one-stop shopping arrangements (i.e., the ability of customers to get their local and long distance calling from one, full-service carrier) available to business and residential customers, respectively. The ''equal access'' obligations (¶¶34, 36, 38–39, 44) embody the basic principles of existing obligations, with modifications to ensure that those principles will be effectuated when Ameritech competes in the provision of interexchange services. The provisions regarding one-stop shopping (¶¶35, 41–43, 45–47) are intended to avoid giving an inappropriate competitive advantage to, or imposing an unfair handicap on, any carrier. The order would allow Ameritech to offer one-stop shopping to business or residential customers only when at least one other carrier is marketing services on a comparable basis.[23]

The proposed order does not set out specific conditions under which Ameritech can engage in ''bundle-pricing'' of its interexchange services with local exchange or intraLATA toll services (i.e., pricing whose availability is contingent upon the subscriber's election of Ameritech for both such services). Whether such bundle-pricing is appropriate, and the types of conditions needed to prevent harm to competition in interexchange services, depends on the state of competition. The issue of ''bundle-pricing'' has therefore been made an element of Ameritech's compliance plan (Proposed Order, ¶¶10(e)–(f)). Ameritech will tailor its proposal to the competitive circumstances then existing, and the Department will review it in light of those circumstances.

11. Compliance plan

The proposed order requires Ameritech to file a compliance plan prior to obtaining approval to begin its trial of interexchange services. (Proposed Order, ¶10.) The compliance plan reinforces the separate subsidiary, equal access, and marketing provisions of the order by requiring Ameritech to spell out detailed plans for implementation of those requirements. (Proposed Order, ¶¶10(a)–(d), (g).) It also provides the mechanism for determining the appropriate market and other conditions for Ameritech's offering of bundled pricing (¶¶10(e)–(f)) and for the Ameritech interexchange subsidiary's ownership, leasing, or control of any of the facilities it uses to provide local exchange telecommunications and exchange access services (¶10(h)). The compliance plan also will include procedures for Ameritech to detect and self-report violations of the order or the compliance plan (¶10(i)) and for Ameritech's withdrawal from interexchange service should it be required to do so (¶10(j)).

12. Other conditions

Ameritech's entry into interexchange services may also be conditioned on any other terms that may be appropriate to further the purposes of the order. (Proposed Order, ¶11(e).)

IV. THE PROPOSED MODIFICATION SHOULD BE APPROVED BECAUSE IT IS IN THE PUBLIC INTEREST.

A. The public interest standard applies to entry of the proposed modification

In reviewing the proposed modification, the Court should apply the ''public interest'' standard. The motion was filed by the United States under section VII of the decree, and Ameritech and AT&T have joined the United States in stipulating to the proposed order.

The Court of Appeals has held that a proposed modification satisfies the public interest test ''so long as the resulting array of rights and obligations is within the *zone of*

settlements consonant with the public interest *today*.'' *United States v. Western Electric Co.*, 993 F.2d 1572, 1576 (D.C. Cir.) (quoting *United States v. Western Electric Co.*, 900 F.2d 283, 307 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990)) (emphasis in original), *cert. denied*, 114 S. Ct. 487 (1993). The public interest test is ''flexible,'' allowing the government to choose among various decree provisions that could further the public interest in competition. When the government and the party whose decree obligations are at issue agree on a decree modification proposal, as is the case here,

''the court's function is not to determine whether the resulting array of rights and liabilities ''is one that will *best* serve society,'' but only to confirm that the resulting ''settlement is 'within the *reaches* of the public interest.' ''

993 F.2d at 1576 (citing and quoting 900 F.2d at 309; *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); and *United States v. Gillette Co.*, 406 F.Supp. 713, 716 (D. Mass. 1975)) (emphasis in original). Therefore, a court is to approve a consensual decree modification under the public interest standard unless ''it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'' 993 F.2d at 1577.

The Department welcomes this Court's careful review of the proposed modification under this standard. We are confident that the text of the proposed order, the explanation that we are providing in this Memorandum, and the comments of other interested persons will give the Court ample reason for entering the proposed order.

B. The proposed modification is in the public interest

The proposed modification both avoids harm to competition in the interexchange market and yields affirmative benefits to competition. Accordingly, it is in the public interest and should be approved and entered by this Court.

1. The proposed modification is structured to avoid harm to competition in the interexchange market

Far from giving the Court ''exceptional confidence that adverse antitrust consequences will result,'' the proposed modification gives the Court ample assurance that no adverse consequences will occur. As this Memorandum has explained, the order we ask the Court to enter would permit only a limited trial of Ameritech provision of interexchange services, and even that trial could not begin until the Department (and the Court if it reviews the Department's determination) is satisfied that local competition exists and will continue to develop in the Trial Territory. In addition, the interexchange services that the modification permits would remain subject to a variety of safeguards, including the power of the Court or the Department to terminate the trial at any time.

The proposed order thus ensures that competition in the interexchange market will not be harmed by the modification—a fact underscored by AT&T's stipulation that the proposed modification is in the public interest and by the support of Sprint, CompTel, and ACTA.

2. The trial will provide affirmative benefits to competition

Not only is the proposed order structured to prevent any *harm* to competition, but it also presents a valuable opportunity affirmatively *to advance* the public interest in competition.

First, as a prerequisite to its offering of interexchange service pursuant to this modification, Ameritech must take specific actions to remove barriers to local competition, including those relating to terms of interconnection, unbundling of loops, dialing parity, and number portability. The proposed modification thus complements the efforts of the state regulatory commissions in the Ameritech region to lower such barriers, as reflected in the comments of the staff of the Michigan PSC on an earlier version of the proposal:

''[T]he Department of Justice (DOJ) and the court should move forward in a measured fashion to permit more competition in the telecommunications marketplace. That action, however[,] should be such that it recognizes the need to balance the interests of the Regional Bell Operating Companies (RBOC), their local and toll competitors, and residential and business customers in the telecommunications marketplace. That balance can be achieve through an approach which minimizes the potential for anticompetitive actions on the part of the RBOCs. This coupled with the coordination and recognition of appropriate State law and regulatory agency actions to remove barriers to entry to the State or local telecommunications markets should set the stage for a trial waiver of the interLATA restrictions currently in effect.''—Michigan PSC Staff Comments on Draft Dated February 21, 1995 [Appendix, Tab 16].

Second, the trail will yield important information about RBOC provision of interexchange services. The Department, the Court, all segments of the telecommunications industry, and the public will be able to observe and analyze the effects of the stipulated conditions, and related regulatory and technological developments, on competition in local and interchange telecommunications markets. We will learn much about whether local competition will develop to such an extent that harm to interchange competition can be avoided, with or without other safeguards. We will also enhance our understanding of the importance of factors such as call set-up and transmission delays resulting from interim forms of number portability, consumer demand for one-stop shopping, the terms and conditions of interconnection, and the pricing of network elements in the development of such competition. If competition is not sufficient to be self-policing, we may learn how difficult and costly it is to monitor and prevent discrimination and cross-subsidization. We will also learn about what kinds of safeguards are effective and/or necessary.

No trial, or course, could provide all the answers. Nonetheless, this trial should substantially assist in determining whether and on what terms the Decree's interexchange restriction should be retained, modified or removed.

Third, the trial may yield important information about the possible benefits to interexchange competition from RBOC provision of interexchange services. The RBOCs have argued that the interexchange market, particularly for residential customers, is oligopolistic rather than competitive, and that RBOC entry will tend to disrupt that oligopolistic coordination, resulting in substantial benefits to consumers. While Ameritech has not yet presented sufficient evidence to substantiate this claim, actual experience may cast additional light on this argument.

CONCLUSION

The carefully crafted details of the proposed order grew out of intensive work by the Department and extensive consultation and negotiation with interested persons. We do not expect all commenters to be satisfied; in an arena filled with competing private interests, we can be assured that some will claim that the balance has not been struck precisely right. The issue, however, is whether the Department ''reasonably regard[s]'' the modification ''as advancing the public interest,'' 993 F.2d at 1576. On that issue, the terms of the proposed order demonstrate, and we believe the comments of interested persons as a whole will confirm, that the proposed modification advances the public interest. The Court should therefore enter the proposed order and allow this important trial to proceed, subject to the preconditions, safeguards, and continuing review for which the order itself provides.

Respectfully submitted,

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[1] *See, e.g.*, MCI Corp., *A Blueprint for Action: The Transition to Local Exchange Competition*, Tab 1 at 1 (March 1995) [Appendix, Tab 1]; William J. Baumol & J. Gregory Sidak, Toward Competition in Local Telephony 9 (1994); Affidavit of William J. Baumol at 5, submitted on behalf of AT&T as an attachment to AT&T's Opposition to Ameritech's Motions for ''Permanent'' and ''Temporary'' Waivers From the Interexchange Restrictions of the Decree (filed with the Department in opposition to Ameritech's original proposal on February 15, 1994) [that opposition cited hereinafter as ''AT&T Opposition to Original Proposal''] [Appendix, Tab 2].

[2] *See* Order, Dkt. No. 93–0409 (Ill. Commerce Comm'n, July 20, 1994) (MFS) [Appendix, Tab 3]; Order, Dkt. No. 94–0162 (Ill. Commerce Comm'n Sept. 7, 1994) (Teleport) [Appendix, Tab 4]; *In re City Signal, Inc., Application for a License to Provide Basic Local Exchange Service in the Grand Rapids Exchange*, No. U–10555, 1994 Mich. PSC LEXIS 267 (Mich. Pub. Serv. Comm'n Oct. 12, 1994) [Appendix, Tab 5].

[3] Teleport is planning to test the use of cable facilities owned by Tele-Communications, Inc., (''TCI'') to provide local exchange service to residential customers in the Chicago area. *See* Leslie Cauley, *Tele-Communications, Motorola to Join Teleport for Venture in Chicago Area*, Wall Street J., Oct. 12, 1994, at B5. Others are exploring similar possibilities.

[4] Specifically, Ameritech asserted that ''industry-wide developments . . . are themselves more than sufficient to warrant removal of the interexchange restriction.'' *Ameritech Memorandum in Support of Motions to Remove the Decree's Interexchange Restriction* at 3 (filed with the Department of Justice on Dec. 7, 1993) [Appendix, Tab 6]. The Department does not believe that the record is sufficient at this time to support this contention (either as to technological or regulatory developments), and does not base the present motion on any such contention.

[5] These prohibitions were also justified as a way to promote universal service, by requiring high-margin services to subsidize below-cost services and prohibiting new entrants from ''cream skimming'' those services. In recent years, progressive states have begun to explore alternative ways of ensuring universal service that would permit competition and allow consumers the benefit of the efficiencies and lower prices that competition brings.

[6] Positive network externalities characterize those ''products for which the utility that a user derives from consumption of the good increases with the number of our agents consuming the good. . . . [T]he utility that a given user derives from the good depends upon the number of other users who are in the same 'network' as he or she.'' Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 AM. Econ. Rev. 424 (1985). ''The utility that a consumer derives from purchasing a telephone . . . clearly depends on the number of other households or businesses that have joined the telephone Network.'' *Id.*

[7] *In re Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customers First Plan is Illinois*, Dkt. No. 94–0096, slip op. at 97 (Ill. Commerce Comm'n, Apr. 7, 1995) [hereinafter ''*ICC order*''] [Appendix, Tab 7].

[8] *A Blueprint for Action*, *supra* note 1, Tab 3 at 2 [Appendix, Tab 1]. A similar telephone survey was conducted in January 1994, by First Market Research Corporation, for a study sponsored by AT&T, MCI, and CompTel. That survey found that in the absence of number portability, the number of respondents interested in changing to a cable TV company for local telephone service in response to a 20% discount fell from 32.8% to 22.6%. Corresponding figures for a 10% discount and for no discount were a drop from 18% to 12.6% and from 8.7% to zero, respectively. Economics & Technology, Inc, & Hatfield Associates, Inc., The Enduring Local Bottleneck 108–10 (February 1994) [Appendix, Tab 8].

[9] Initially, the Trial Territory would consists of the portion of the Chicago LATA that is located in the state of Illinois and the Grand Rapids LATA in the state of Michigan. The two LATAs could begin their interexchange trials at different times, and the Trial Territory could have eventually be expanded to include other portions of those two states (but only those two states) if those portions met the competitive standards set out in the proposed order.

[10] Regulatory consideration of such issues is already well underway in the trial states. In Michigan, the Michigan PSC adopted on an interim basis a pricing scheme for unbundled loops that was proposed by City Signal, a CAP which in 1994 was granted a license to provide local service in the Grand Rapids LATA. Under the interim scheme, Ameritech will charge City Signal $8 for a residential loop and $11 for a business loop. The Commission will further address these issues in an upcoming generic proceeding, to commence June 1, 1995, and to be completed no later than nine months thereafter. *In the matter of the Application of City Signal, Inc., for an Order Establishing and Approving Interconnection Arrangements with Ameritech Michigan*, Case No. U–10647, at 85–95 (Mich. Pub. Serv. Comm'n, Feb. 23, 1995) [hereinafter *''City Signal Order''*] [Appendix, Tab 9].

In Illinois, the Illinois Commerce Commission heard extensive testimony on Ameritech's proposed pricing of unbundled loops and ports, disapproved certain aspects of that pricing, and required that Ameritech file new tariffs to ensure that the sum of prices for unbundled network functions not exceed the price of bundled functions and to reduce and equalize the contribution that those prices would make to common costs. *ICC Order*, *supra* note 7, at 60–61 [Appendix, Tab 7].

[11] The issue of ''sub-loop unbundling'' is dealt with in similar fashion. AT&T and others have contended that merely unbundling loops from ports does not go far enough. Instead, AT&T contends that local service should be unbundled into at least twelve basic network elements: distribution, concentration, feeding, end office switching, dedicated line transport, common transport, tandem switching, databases used in signaling, packet switching of signaling from the originating central office, packet switching of signaling at the destination, links from the packet switches to data processors and storage points, and operator services. Affidavit of Lawrence A. Sullivan, submitted by AT&T in its Opposition to Original Proposal, at 29–30 (filed with the Department of Justice on Feb. 15, 1994) [Appendix, Tab 10]. Advocates for this position argue, for example, that a provider of personal communications services (''PCS'') might be able to provide a witness connection from the home to a neighborhood node, and then use Ameritech facilities to get from the neighborhood node to the central office. Testimony of Dr. Mark T. Bryant on behalf of MCI before the Illinois Commerce Commission, at 10–11 (Dkt. No. 94–0048, Aug. 8, 1994) [Appendix, Tab 11]. Ameritech responds that such an approach could lead to the uneconomic stranding of significant amounts of its investment, to no real purpose since the facilities can be made available to competitors on a nondiscriminatory basis and since continued use of Ameritech facilities whose costs are already sunk would be in the interests of consumers. The proposed order does not require sub-loop unbundling, but makes clear that this resolution is without prejudice to the power of a state to require such further unbundling. (Proposed Order, ¶1(m).) Moreover, it makes clear that the Department may consider the competitive effects of such unbundling (or lack thereof). (*Id.*).

[12] State law or regulatory requirements intended to benefit competition in the intraLATA toll market may require Ameritech to implement intraLATA toll dialing parity before Ameritech has met the conditions in ¶11 of the proposed order. In that case, intraLATA toll dialing parity would come into effect before Ameritech commences interexchange service.

[13] The proposed order does not displace state regulation, however. (*See* Proposed Order, ¶ 3.) State regulators may choose to regulate arrangements even when consented to by the carriers involved.

In allowing paragraph 9(e) to be satisfied by consent of the other exchange carriers, we recognize that unequal bargaining power may lead a competitive exchange carrier to agree to unsatisfactory terms. That is precisely why the provisions of paragraph 9 are not a checklist that will lead automatically to Ameritech's entry into interexchange service. The ultimate issue will always be the competitive results of the negotiated arrangements, as tested against actual marketplace facts. (*See* Section III.B.) Thus, because the proposed order requires that the Department analyze market facts and assess competitive circumstances, the proposed order gives Ameritech the incentive to negotiate in good faith and arrive at a procompetitive agreement with competitive exchange carriers.

[14] Of course, the *reasons* advanced by a competing carrier as to why the proffered interconnection arrangements are inadequate may have a bearing on any assessment of competitive circumstances.

[15] *See, e.g., A Blueprint for Action*, *supra* note 1, Tab 3 at 5–19 (discussing shortcomings of interim number portability) [Appendix, Tab 1].

[16] The compliance plan, which deals principally with post-entry safeguards, is discussed in more detail in Section III.C, below.

[17] The Department is currently investigating claims that regulation and post-entry safeguards are sufficient to ensure that there is no substantial possibility that an RBOC could engage in anticompetitive conduct, without the market-opening measures contemplated in the proposed order, in connection with the Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and Southwestern Bell Corporation to Vacate the Decree. (Bell Atlantic has since withdrawn from that motion.) Ameritech is not advancing that proposition at this time, however, and the proposed trial is not designed to test such claims.

[18] The staff of the Michigan PSC, in its comments on an earlier version of the proposal, urged the Department to include the Detroit and Lansing LATAs in the Trial Territory. Revised Comments of the Staff of the Michigan Public Service Commission (Mar. 22, 1995) [Appendix, Tab 15]. The Department does not believe this change to be appropriate, because it is too early to tell how widely different areas of the state will vary in the availability of competitive alternatives and the ability of such alternatives to guard against harm to competition in the interexchange market. We stress, however, that the modification provisions of the proposed order establish sufficient flexibility to deal appropriately with whatever competitive conditions should arise.

[19] The FCC's order removing structural separation requirements was vacated and remanded by the Ninth Circuit. *California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3721 (U.S. April 3, 1995). Further proceedings on remand are pending at the FCC.

[20] Even under the FCC's Computer Inquiry II approach, certain kinds of services can be shared between the interexchange subsidiary and other affiliates. These are enumerated in ¶ 20(g). To the extent that any such sharing is carried out in a way that harms competition, the Department and the Court retain the power to take corrective action under ¶¶ 15–16, as well as to take that fact into account in evaluating the progress of the trail under ¶ 18.

[21] The proposed order calls for ''equivalent'' rather than identical order, maintenance, and support systems, to account for the possibility that access to such systems may involve the use of different interfaces because of the different requirements of different carriers' computer systems and because of Ameritech's need to protect the security of its systems. The access must, however, be equivalently convenient; the provision would not be satisfied by providing electronic connections to Ameritech's interexchange subsidiary but only fax machines to its competitors.

[22] Among the restrictions on access to customer information is a provision that the Ameritech interexchange subsidiary may not have access to customer proprietary network information (''CPNI'') as defined by the FCC, except in the same manner that CPNI is available to unaffiliated carriers. This would mean, for example, that unlike the Ameritech local exchange operations, the Ameritech interexchange subsidiary would have to obtain the affirmative consent of the local exchange operations' customers in order to get local and intraLATA toll usage patterns of those customers. At one point, Ameritech expressed concern that this restriction would put it at a marketing disadvantage compared to AT&T, which could target the marketing of one-stop shopping services to its more lucrative interexchange customers, based on their long-distance usage patterns, which would be available to AT&T without such affirmative consent because they would relate to services as to which AT&T was the subscribers' provider. Ameritech concluded, however, that it could overcome this disadvantage if it could start seeking such affirmative consent from Ameritech local exchange customers as soon as possible. Since nothing in the existing Decree would appear to prohibit the seeking of such consent before the trial begins or even before the proposed order is entered, so long as customers are not misled as to the actual extent of Ameritech's authority to offer interexchange service, Ameritech withdrew this concern.

[23] In some cases, such as the provision of interexchange and intraLATA toll services by the interexchange subsidiary (¶¶ 41, 45) and the provision of Centrex service to business customers (¶ 43), the proposed order provides for the offering of such services immediately upon the commencement of Ameritech's authority to offer interexchange telecommunications, because other carriers are already offering such services on a ''one-stop-shopping'' basis.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Madam President, I ask unanimous consent that my remarks appear as in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

TRADE POLICY

Mr. DORGAN. Madam President, I was very interested to hear the comments by Senator BYRD and Senator HOLLINGS today on the issue of trade. I think the three of us, with perhaps one or two others, are the only Members of the Senate who come and speak about the issue of trade. There is almost a conspiracy of silence in this Senate, in the entire Congress, and in this town, especially, on the issue of trade.

U.S. TRADE POLICY

We have the largest trade deficit in human history in this country now. We have a lot of hand wringing about the fiscal policy deficits, and they are dangerous and troublesome. We must deal with them. But no one speaks about the trade deficit and what causes it and what it means for our country. I hope one day soon that will change, because today's trade deficits will be repaid in the future with a lower standard of living in this country. We must get rid of these terrible, terrible trade deficits that are going to ruin this country's future.

Beginning on Friday this week, I am going to make about four presentations on the floor of the Senate over the period of the next couple of weeks, talking about the last 50 years. I want to start with post-Second World War trade strategy, which was really foreign policy, in which we were linked to other countries try to strengthen others around the world who had been suffering from the ravages of war. During that period of time, there was general expansion in world trade and general expansion of prosperity. Our allies prospered and so did we. We prospered in output. We saw higher wages. Our country generally, in the first 25 years, did well.

You look at the last 25 years and you will see, even as others began to compete with us very aggressively, we