

**THE THIRD ANNIVERSARY OF THE TELECOM
ACT: A COMPETITION AND ANTITRUST REVIEW**

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

REVIEWING COMPETITION AND ANTITRUST ISSUES RELATING TO THE
TELECOMMUNICATIONS ACT

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**THE THIRD ANNIVERSARY OF THE TELECOM
ACT: A COMPETITION AND ANTITRUST RE-
VIEW**

THURSDAY, FEBRUARY 25, 1999

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

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Mike DeWine (chairman of the subcommittee) presiding.

Also present: Senators Thurmond, Kohl, and Leahy.

**OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR
FROM THE STATE OF OHIO**

Senator DEWINE. Good afternoon. Welcome to the Antitrust Subcommittee hearing on the third anniversary of the Telecommunications Act of 1996. As most of you know, this subcommittee has been very actively monitoring the progress of competition under the Telecommunications Act, and we have been working hard to try to promote competition in telecommunications markets throughout our country. This is our fifth hearing on the telephone aspect of the industry, and we have had two other hearings focusing on the video aspect.

It won't surprise anyone when I say that we continue to be frustrated, frustrated by the slow pace of competition in the industry. Although we have seen some competition, it is mostly for business customers. We have yet to see large-scale competition in local residential markets. Instead, we have seen a blizzard of litigation and an increasing amount of consolidation.

Despite these problems, there is some reason for optimism. Recent developments indicate that the markets may be about to open up in ways that we perhaps did not anticipate when we passed the Telecommunications Act 3 years ago.

The Internet has emerged as an enormous economic force, and the developing market for broadband services is forcing telecommunications providers to rethink their strategic visions so that they can provide these services. The recently approved AT&T/TCI deal will, in the near future, allow AT&T to provide a bundle of local and long distance phone services, video services, and high-speed data services. If AT&T is able to offer such bundled services, it will increase pressure on the regional Bell operating companies,

the RBOC's, and other telephone companies to provide similar services all over the country. In fact, SBC/Ameritech and GTE/Bell Atlantic have announced publicly that if their mergers are approved, they plan to begin providing local phone service out of their region as a first step toward providing these bundled services nationwide.

In addition, we have reason to hope that we are approaching the end of the litigation and the regulatory deadlock that has been hampering the industry for 3 years. The Supreme Court recently resolved to a great extent the issue of how much authority the FCC has to implement certain important aspects of the Act. We are hopeful that the various phone companies will view this decision as a confirmation of the ground rules for competition and not as an invitation for further litigation.

Additionally, we are told that a number of Bell companies are making tangible progress in their efforts to obtain section 271 authority. The results of these processes in New York, Texas, South Carolina and elsewhere should provide a great deal of guidance for the RBOC's as they attempt to gain approval to provide long distance service in those regions.

For these reasons, as I have said, there is some reason for some more optimism. The market does appear finally to be moving toward the competition that we all desire. Accordingly, this is not the right time to be considering major changes to the Act itself. Any such changes, in my opinion, might scramble the marketplace just when competition is starting to take hold. We need to stay the course and continue to push hard for competition within the framework of the Act wherever and whenever we can.

Still, there are some things that can be done right now to promote more competition. Senator Kohl and I are going to work with Senator McCain, Senator Hollings and the Commerce Committee to develop legislation that will ensure all telecommunications providers have equal and nondiscriminatory access to buildings. This will help assure that new entrants have a fair shot at winning customers in residential and in commercial multidwelling units. This legislation will be done in a fair, balanced manner that protects the legitimate interests of the building owners while ensuring at the same time that this barrier to competition which is clearly a problem today is, in fact, addressed. I look forward to working on that legislation.

In addition, today Senator Kohl and I introduced a bill to impose time limits on the FCC review of telecom mergers. This bill will not limit the scope of the FCC review, nor attempt to dictate to the FCC how to evaluate these mergers. Rather, it will simply impose a deadline for FCC action. As the subcommittee has stated before, these mergers will have a major impact on competition and they require careful scrutiny from the FCC.

However, careful scrutiny does not mean endless scrutiny. These mergers must be evaluated in a timely fashion so that the merging parties and their competitors can move forward. The longer these deals remain under review, the longer the market remains in limbo and the longer it will be before we see the vigorous competition that we all want.

Now, let me just put aside the competition and market issues for a moment to make a point about a group of people who are some-

times ignored when a merger is announced, the employees of the merging companies. These people, through no fault of their own, just because they happen to work for a company that is planning a merger, are often thrown into complete turmoil by the announcement of a merger. They don't know if they are going to lose their jobs. They don't know if they are going to move. They don't have any way to know what is going to happen to their company. We need to make it a priority to give these people some quick answers so they can plan how they are going to adjust to these mergers and how they are going to provide for their families.

For all of those reasons, we have introduced legislation that will impose some deadlines on the FCC, and we look forward to working with Senator McCain, Senator Hollings and the Commerce Committee on that legislation, as well.

Now, before I turn to the ranking minority member of the subcommittee, Senator Kohl, let me just state for the record that we have an outstanding group of witnesses today before us and we appreciate all of them being with us. By now, you may have noticed that we are asking them to testify as one panel. We would normally ask that Mr. Klein and Mr. Kennard testify on a separate panel, but in the interest of time and efficiency, and in the recognition of the stature of our former government officials, Senator Pressler and Mr. Hundt, we have asked them to all appear together, and we appreciate their patience and kindness in doing that. I would also like to thank Mr. Klein and the chairman, in particular, for their gracious acceptance of this somewhat unusual arrangement.

Let me turn now to Senator Kohl.

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Senator DeWine. This month marks the third anniversary of the Telecom Act, a law designed to make industry more competitive and give consumers more choices and lower prices, in part, by letting everyone get into everyone else's business.

We are here today to ask a few simple questions: Is the Act working? If so, how well? Is the average consumer beginning to see some benefits, or do we need to revise the law to promote more competition?

My own sense has evolved considerably. Two years ago, when Senator DeWine and I first took over this subcommittee, we saw little of the ballyhooed competition that the law's authors expected. But today, a full 3 years after we passed the Act, we are seeing some positive signs. There are now 10 times as many competing local phone companies as in 1995, and these startups have raised almost \$20 billion in investment capital from Wall Street. Convergence technologies, which will give consumers video, phone and Internet service, seem just over the horizon.

Whether this progress is the work of a better telecom law, better technology, or better entrepreneurialism is not exactly clear. But one thing is becoming clear, at least to me. Breaking open the Telecom Act could be a dangerous idea, one that will result in more harm than good. Rather, I believe we would be better off by fine-

tuning our telecom and competition laws where we can find consensus.

For example, we need to update the Satellite Home Viewer Act to allow local-into-local broadcasting. Only when satellite becomes a viable competitor to cable, we believe, will it clearly discipline cable rates and provide viewers with more choice. We made a mistake, I believe, when we deregulated cable prices before we had cable competition.

And we need to ensure that, if anything, the playing field isn't skewed against new entrants. So we are working with Senator McCain to craft building access legislation that would grant new providers access to apartment buildings on the same terms and conditions as incumbents.

Finally, companies, their customers and their employees are all too often left to the mercy of a time-consuming merger review process in which the two lead Federal agencies, the DOJ and the FCC, act in sequence rather than in tandem. Today, Senator DeWine and I are introducing legislation that will help move these reviews along. Our bill says to the FCC: approve it, reject it, or require conditions, but don't just sit on it. Move within a reasonable time period, because businesses need certainty and the folks who work for these merging companies need to plan for their future.

In contrast to those who want to take away the FCC's merger review authority altogether, we believe our proposal takes a middle-ground approach. But it would also make a significant change in the way the Commission reviews mergers. So before we decide whether to move this measure, we need to have a serious debate about the merger review process.

This is one reason why we are delighted to have Larry Pressler and Reed Hundt, who, along with Senator Hollings, helped craft the Act, as well as Joel Klein and Bill Kennard, its two thoughtful implementers, here with us today. Gentlemen, we look forward to your participation in this hearing.

Thank you so much, Mr. Chairman.

Senator DEWINE. Thank you, Senator Kohl.

Let me turn to a longtime member of this subcommittee and the former chairman of this subcommittee, Senator Thurmond.

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

Senator THURMOND. Thank you very much, Mr. Chairman. Three years ago, I was actively involved in the passage of the Telecommunications Act, and I was pleased that we were able to make clear that the Antitrust Division maintained an important role in the review process under the Act.

Unfortunately, in practice, the Act has not created competition in the local telephone markets at the rate that we had hoped. However, I believe that the blueprint of the Act is sound, and I am pleased that the courts have upheld the law. I remain confident that, with time, we can reach the goal of competition in local markets.

I also wish to note that I support the concept of placing a deadline on the amount of time the FCC has to review mergers. I recognize that the FCC has a difficult job and must evaluate mergers

carefully. However, I believe a reasonable deadline is important to bring about finality to mergers. Companies invest a great deal into proposed mergers and they need a decision one way or the other. It is not good for the companies or the marketplace for proposed mergers to remain pending for long periods of time.

Thank you, Mr. Chairman.

Senator DEWINE. Thank you very much.

Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. When we speak of our friend, Strom Thurmond, as being a longtime member of this committee, Strom has been a longtime member of virtually every committee around here. I can remember him when I was first a member of this committee working on some of these issues.

Senator Kohl talked about the satellite companies and local-into-local, and I want to compliment both of you, both Senator DeWine and Senator Kohl, for your work. We reported out the bill this morning that will allow satellite TV carriers to compete directly with cable by offering a full range of local TV, superstations, movie channels, and everything else. You two held the hearings on this issue over the past year and it is one of the reasons why it moved so quickly.

As my former colleague, Senator Pressler, knows, I was one of the five Senators who voted against the Telecommunications Act because of concerns I had about areas where I felt that there would not be adequate competition. For example, I felt that cable rates would not come down, that instead they would go up, and a number of other things that have happened.

But my concern was also that in some respects, Congress would favor one technology over another, and that is very anticompetitive, especially if Congress guesses incorrectly on which technology will work better. And we have shown a consistent ability to guess incorrectly when it comes to technological issues. We shouldn't take sides. We should let science dictate what works best.

I think of this problem, when I first became aware of it, when I was informed about what happened on Thistle Hill, near Cabot, VT, a beautiful area in Vermont. A mobile phone company that wanted to offer analog mobile phone service made a huge mistake. They had to put up a tower, so they hired a company to survey the land for the tower. They moved ahead without talking to either the local officials or local homeowners, something that is not viewed favorably in a State like Vermont.

They put in survey signs, they pounded stakes in the ground. They drove nails into maple trees, which are a valuable commodity in our State, without any regard to who owned the land. And they picked one of the wrong yards, one that was owned by the chairman of the select board of that town. And when the town residents and officials complained, the lawyer for the phone company said, well, we take these sitings as far along in the process as we can get them before having to go public.

Well, I wouldn't want them sneaking into my yard in Vermont, or pounding nails into my trees—and I have got a tree farm

there—or stakes into the ground. It could be dangerous to those doing it. We also have a pistol range there, Mr. Chairman. I just wouldn't want anything to happen. There were no prior discussions with the town. There was no notice to the landowners whose trees were being damaged.

What I am concerned about, though, is that there is a mad dash in Vermont and other rural States by analog mobile companies to put up a bunch of towers to try to beat out digital phone service which uses newer technologies, and in some ways having the Congress favor one over the other. For example, mobile phone service that is using PCS over cable only requires small whip antennas. You don't have to build these huge towers with flashing lights near people's homes, and this PC's-over-cable is working in California and other States. Satellite phone companies don't require towers. There are other competing technologies, and we in the Congress should not favor one over the other.

I will put my whole statement in the record, Mr. Chairman, but I want to commend Chairman Kennard. He came up to Vermont, and while we brag about our weather, he came up on probably the worst weather day we had had in a long time, but sat through a public meeting for hours listening to Vermonters who are concerned about this loss of control. I don't want to see local and State governments overridden in their ability to site towers, and I don't want to see us favor one technology over another.

So, Mr. Chairman, even though I am supposed to be at another hearing, I just wanted to come and compliment you and Senator Kohl for all the work you have done on this, but also to make sure for all the people who are here in the audience that there are a lot of technologies out there and I want them to compete; I don't want some to be favored over others.

Thank you.

Senator DEWINE. Senator Leahy, thank you very much for your statement and, of course, your full statement will be made a part of the record.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Mr. Chairman: I appreciate that you and Senator Kohl have convened this important hearing. It is no secret that I consider the Telecommunications Act of 1996 as a missed opportunity.

We had the opportunity—then—to increase consumer choice for local telephone service, to ensure that cable TV rates did not skyrocket, to protect the traditional role of local governments in setting land use policies, and to keep the lid on payphone rates.

We also missed the opportunity to install safeguards to ensure that the old "Ma Bell" did not come back together again.

I was convinced then, and am still convinced, that we could have achieved these goals without interfering with the positive aspects of that Act.

As one of the five Senators to vote against the 1996 Telecommunications Act, I remain convinced that the law should not have been passed as written and should be overhauled now. I intend to reintroduce legislation in the near future to impose reasonable standards on future RBOC mergers, to give local governments more control over the siting of telecommunications towers and to address the huge increases in payphone charges. The Act has invited consolidation through mega-mergers among the Bell Companies. The proof is clear: we started with seven Bell Companies and are now down to four, with no standard in place that would forestall additional consolidation.

I will introduce antitrust legislation, similar to the bill I introduced last Congress, to bar future mergers between Bell Operating Companies or GTE, unless the federal requirements for opening the local loop to competition have been satisfied in at least half of the access lines in each State served by the merging carriers. In addition, the bill will require the Attorney General to find that the merger would promote competition for telephone exchange services and exchange access services.

To date, not a single incumbent Bell Operating Company has fully opened its local access lines to competition as required in section 251 of the Act.

While businesses may choose from a variety of companies offering local phone service, most residential customers can only get service from their existing phone company. I know that I have no local choices where I live. I still have only one choice for dial-tone and local telephone service, whether or not the service is good. That "choice" is the Bell operating company or no service at all.

I want to focus on payphones for a moment. Compared even to the increases in cable rates, payphone increases get first prize any day of the week. In Vermont, the cost of a local payphone call has increased 250 percent since passage of the 1996 Act. In fact, many Americans are now paying 50 cents for local payphone calls if they cannot quickly get change for a quarter—since the typical cost is now 35 cents.

I introduced a bill last Congress, and will do so again this Congress, to deal with this windfall and allow States to use the change for better pay phone service for public safety or health reasons.

Boosters for the Telecommunications Act of 1996 also claimed the new law would bring consumers lower cable rates and better service. This was slick sales talk that many of us questioned from the outset.

I was not alone three years ago in warning that we did "not want to see a repeat of the skyrocketing cable rates * * * It is too easy to see what might happen if the cable companies are not restrained, either by competition or by laws."

I am gratified that our Committee was able to begin to address this cable rate problem this morning. We reported out a Hatch-Leahy bill that will allow satellite TV carriers to compete directly with cable by offering the full range of local television, superstations, movie channels and everything else. This is a great idea and Senators DeWine and Kohl deserve a lot of credit for this effort and their work last year on this.

Another flaw in the Telecommunications Act, in my view, is that in some respects it has Congress favoring one technology over another.

That is very anticompetitive—especially when Congress guesses incorrectly on which technology will work better. Congress should not take sides—but should, instead, let the best science dictate our progress.

I first became aware of the seriousness of the problem when I was informed about what happened on Thistle Hill near Cabot, Vermont. A mobile phone company that wanted to offer analog mobile phone service made a huge mistake. They hired a company to survey land for their tower. They moved ahead without talking to town officials or the local homeowners.

They did not bother their homework—they surveyed sites, pounded stakes into the ground and drove nails into maple trees without any regard to who owned the land.

They picked the wrong yards—one was owned by the Chairman of the Selectboard of the town.

When town residents and officials complained a lawyer for the phone company said "we take these sitings as far along in the process as we can get them before having to go public" because they know there is a lot of opposition.

I certainly would not want them on my yard in Vermont pounding nails into my trees and stakes into the ground.

There were no prior discussions with the town and no notice to the landowners whose maple trees were damaged.

What I am concerned about is that there is a mad dash in Vermont and other rural states—by *analog* mobile phone companies—to put up a bunch of towers to try to beat out *digital* phone service using newer technologies. For example, mobile phone service using PCS-over-cable only requires small whip antennas. You do not have to build huge towers with flashing lights near people's homes.

This service is widely available in California and other States and works well.

Also, satellite phone service does not require towers. By preempting the traditional local role in the siting of towers the Telecom Act provides special treatment to one, in this example, technology that is already outmoded.

I was very pleased that Chairman Kennard came up to Vermont to hear firsthand how concerned Vermonters are over this loss of control. Congress should not pick analog tower technology over digital phone PCS technology or satellite phone service.

I introduced legislation in the last Congress that was designed to halt FCC rulemakings to override local and state controls concerning the siting of towers. Other industries do not have a right to build structures wherever they may wish by running around local authorities—the analog cellular industry should live by the same rules as everyone else.

I am working with groups throughout the nation to update my bill which I will reintroduce with a number of cosponsors soon.

The Congress should revisit the telecommunications Act and this time do a better job promoting competition and protecting consumers from increasing telephone, payphone and cable rates, and not trying to pick winners and make others losers.

The Act now has produced a track record that is pointing in many cases in far different directions than we were promised when it was enacted. It is time to take a fresh look at the law, and it is time to make course corrections for those missed opportunities that can help fulfill some of those earlier promises.

Senator DEWINE. Before we start, I would like to note for the record that two of our witnesses here today, Senator Pressler and Mr. Hundt, currently have business relationships, I am advised, with a range of clients involved in the telecommunications industry. Their testimony here today, however, is being offered in their capacity as former government officials and now as private citizens and does not necessarily reflect the views of any clients.

We do have a very distinguished panel which I will briefly introduce. William Kennard was confirmed by the Senate on October 29, 1997, as the Chairman of the Federal Communications Commission. He also served as general counsel during the FCC's implementation of the Telecommunications Act of 1996. We certainly welcome him back.

Joel Klein was confirmed as the Assistant Attorney General of the Antitrust Division in July 1997. He has testified before us frequently over the past several months and we are looking forward, of course, to his testimony again today.

Larry Pressler is a former U.S. Senator and served as a Member of Congress for 22 years. He spent 18 of those years right here in the U.S. Senate representing the people of South Dakota. Senator Pressler is a past chairman of the Senate Commerce, Science and Transportation Committee, and the author of the 1996 Telecommunications Act. Larry, thank you for joining us.

Reed Hundt served as Chairman of the FCC from 1993 to 1997. During his tenure, he presided over the implementation of the 1996 Telecommunications Act. Among his other telecom work, Mr. Hundt now serves as a senior adviser on communications and technology for McKinsey and Company. We thank him for coming and look forward to hearing his testimony as well.

We will start from my left to right with Mr. Kennard. Thank you very much.

PANEL CONSISTING OF WILLIAM E. KENNARD, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, DC; JOEL I. KLEIN, ASSISTANT ATTORNEY GENERAL, ANTI-TRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; LARRY PRESSLER, O'CONNOR AND HANNAN, WASHINGTON, DC, AND FORMER U.S. SENATOR FROM SOUTH DAKOTA; AND REED E. HUNDT, FORMER CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, DC

STATEMENT OF WILLIAM E. KENNARD

Mr. KENNARD. Thank you, Mr. Chairman, Senator Kohl. Thank you very much for the opportunity to be here. I think that this hearing is very important and very timely, and I commend you for assembling this panel today. All of the folks before you have been instrumental in the design and implementation of the 1996 Act. Joel, Reed, Larry and I have all worked tirelessly together to get to this point, and I think that we all share Congress' vision that we must have a competitive, deregulated telecommunications marketplace in our country. So it is great to be here today.

In thinking about the subject for this hearing, the status of competition in telecommunications markets, I am reminded of a famous comment that Winston Churchill made in 1942. It was right after the Allied forces had won the first major battle of World War II, the battle of El Alemagne, and Winston Churchill was able to come to the House of Commons and talk about how the tide of World War II had turned. And he said that this is not the end, it is not even the beginning of the end, but it is perhaps the end of the beginning.

And I believe that that is where we are in the status of competition in telecom markets. We are at the end of the beginning. I say that because I believe competition is taking root, that the Act is working. I know this everyday because people come and meet with me in the industry, and I can't tell you how many times companies have come to meet with me and have told me that they would not have companies but for the passage of the 1996 Act. Competitive local exchange carriers, long distance providers, resellers—their companies would not exist but for this legislation.

And the statistics that I have in my testimony bear this out. All of the economic indicators in this area are up. Investment is up, stock values are up, employment is up, revenues are up. Since 1996, revenues have grown over \$140 billion in the telecommunications industry. We have today 600 providers of long distance service. Sixty million Americans have mobile phones today. There is more competition in the wireless industry than we have ever had before, and I think that is a direct result of the actions of this Congress, and also some of the procompetitive decisions of my predecessor, Reed Hundt, in creating competition in wireless telephony.

Now, the challenge, of course, that we all face is how do we get more competition in local phone service, as you pointed out, Mr. Chairman. I think that there we are at a very pivotal point because we all know that this area has been plagued by litigation. We have worked hard to implement the Act, but some of the incumbents have had their one eye on the courts, the other eye on the Congress, the other eye on the FCC. And now that we have a little bit

more certainty—some of the major legal issues have been resolved—I feel that we are at a point now where the parties are going to come back to the table and really do the hard work that is required to implement this piece of legislation.

Now, how do we do that? First and foremost, we have to work to make sure that what I think is the heart and soul of this Act, the procompetitive provisions of the Act, sections 251 and 252, are implemented in a procompetitive way. And we are working very hard on that at the FCC. We are working to come up with stronger rules on colocation, for example, for new entrants to get into those local phone markets. We have learned in the 3 years' experience with the Act. I think we know what to do.

I have directed the FCC to deploy more resources to enforcement. Now that we have the rules in place, we have to enforce them; we have to enforce them fairly but swiftly. We will continue to work very closely with the RBOC's and all the other stakeholders in the marketplace on the RBOC entry provisions.

Now, I wanted to say a word about mergers. This Act has created a massive restructuring in the telecom marketplace. That was anticipated, I believe, by Members of Congress. But we must make sure that the consolidation that is resulting out of this Act does not undermine the fundamental thrust of the Act, which was all about competition. Our view at the FCC is to view consolidation through this prism. How do we reconcile consolidation with your vision of competition in telecom markets?

We view this through a different prism than the Department of Justice. The Department of Justice has a valuable and indispensable role in looking at these mergers, but our analysis is different and our analysis is under the public interest. We do not use an antitrust analysis that is cloaked in the public interest. The jurisdictions are different.

Now, in conclusion, I wanted to reiterate my firm belief that this Act is working. Consumers are seeing benefits, but I do believe that we are at a very delicate tipping point. I think that with more time and lots more effort, we will be over the top, a point that Mr. Klein refers to as the point of irreversibility, where we have reached a point where the growth of competition has become irreversible. We are not there yet in local telephony. We are getting there.

But we must make this final effort to tip that balance in the direction of competition, and the FCC is committed to doing this hard work. We need the support of you in the Congress. Senator Lott said just this week that the important thing to do is empower the FCC to make sure that it has the tools to complete this job.

And my final thought for you today is let's not forget that the world is watching what we are doing here. This framework that you gave us in the 1996 Act, this framework for competition, is one that we are hoping will be replicated around the world. Indeed, it is the centerpiece of our efforts worldwide in the WTO agreement on basic telecom services.

The people sitting at this table talk to leaders around the world and all the time we are saying watch what we do; we have the right framework to introduce competition and deregulation. So we have a huge stake as a Nation in making this work. We have a huge stake in making sure that the FCC is a strong, independent

regulator with the tools and the independence to get this job done. And I am confident, Mr. Chairman, that with your support and the support of your colleagues in the Congress that we will get this job done and we will succeed.

Thank you.

Senator DEWINE. Thank you very much.

[The prepared statement of Mr. Kennard follows:]

PREPARED STATEMENT OF WILLIAM E. KENNARD

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to review with you today the status of competition in telecommunications markets and the progress that has been made in the three years since the enactment of the Telecommunications Act of 1996. Because so much of that Act was focused on promoting competition in local telecommunications services, encouraging deployment of advanced services and promoting deregulation where market forces are strong, I will focus my remarks today on these subjects.

I am pleased to report that the Act is working: consumers are beginning to see competitive choices in local telecommunications services, competitive deployment of advanced broadband services is well underway and the stage is therefore set for less regulation as competition expands.

I can also say that we are by no means near the end of the process of introducing local competition and then deregulating the competitive markets.

But I can say that we are approaching the end of the beginning and we can see some tantalizing glimpses of this competitive, deregulated future. I believe that many—but not all—of the fundamental prerequisites for a fully competitive telecommunications industry are now in place as the result of the Act and the vigorous implementation of the Act by the FCC and our colleagues in the State Public Utility Commissions.

This is not to say that fully competitive markets are inevitable and that we could now declare victory and simply walk away. Indeed, today we are at that very delicate “tipping point”: with just a little more time—and probably a lot more effort—we’ll be “over the top” and competition will gain a firm foothold. But if we are unable or unwilling to make this final effort, the momentum toward competitive markets will slow, the balance will tip the other way and just as inevitably send us back to the 1996 and even 1990.

Telecommunications competition is not yet firmly established in local markets and it will take diligence and hard work by the FCC and our partners in the State Public Utility Commissions before fully competitive local markets are the norm. I know that the dedicated women and men at the FCC and the State Commissions are ready and willing to undertake this hard work. I hope that you and all the members of the Judiciary Committee, the Senate and the entire Congress will support us in this effort.

GOOD NEWS: THE TELECOMMUNICATIONS SECTOR IS THRIVING

By every measure, the telecommunications industry is thriving. Since the passage of the Telecom Act, revenues of the communications sector of our economy have grown by over \$140 billion. Stock values of the companies in the telecommunications sector are up, indicating that Wall Street sees a future of a rapidly enlarging pie that is big enough for all, not a zero sum game.

One-fourth of our country’s economic growth has come from the information technology sector. For 1998, it is estimated that the communications sector of our economy will have revenues in excess of \$500 billion. This growth has touched the lives of almost every American. Now, a growing number of American families across this nation have a choice of a vast array of high-tech communications services, services that now cost less.

This growth comes not only from established providers but, since the passage of the Act, we can now clearly see benefits flowing from the new competitors. The revenues of new local service providers more than doubled in 1997, and they increased substantially again in 1998. And this growth has meant new jobs for thousands of Americans.

In the wireless industry, capital investment in 1998 has more than tripled since 1993, with more than \$50 billion of cumulative investment through 1998. Similarly, the wireless industry generated almost three times as many jobs as in 1993. All this while the cost of service to the consumer has dropped. A cell phone is no longer a luxury for the privileged, but with the advances in cellular service, the advent of

PCS and digital, mobile phones are now a common communications tool for over 60 million people every day.

AT&T, BellSouth, MCI Worldcom, Ameritech, Sprint, SBC, Bell Atlantic and US West are all among the top 20 telecommunications companies, by revenue, worldwide. Similarly, GE Americom, Hughes, Loral and Panamsat are among the top 20 satellite service providers, by revenue, worldwide. And U.S. satellite manufacturers such as Hughes, Lockheed Martin, Loral, Motorola and Orbital Sciences, maintain a strong lead in contracting and subcontracting satellite systems worldwide.

And I can't finish a summary of the sector without mentioning the Internet. It goes without saying that the Internet is booming, creating new jobs, new and better means of education and commerce * * * the Information Age has clearly arrived. The Internet is a testament to a wise regulatory policy: don't regulate unless there is a clearly demonstrable need to do so. The reality is that something as dynamic and revolutionary as the Internet probably can't be regulated and, unless and until there is a demonstrable market failure affecting the general public, we should resist calls to regulate it. The unregulated, highly competitive Internet is a useful model for the more traditional telecommunications sector.

These are just a few examples of how the telecommunications economy and market are thriving, and are doing so in an increasingly competitive environment.

STATUS OF COMPETITION

Let me take a few minutes to give you an idea of how competition is evolving, starting with the long distance market.

At the end of 1997, there were over 600 long distance providers offering services, some on their own facilities, some entirely by resale and still others by a combination of owned facilities and resale. The competition they bring has had an appreciable difference on the consumer price for long distance service.

Long distance prices have steadily dropped over the past few years. The average cost of domestic interstate long distance dropped from 11.8 cents per minute to 10.3 cents per minute from 1996 to 1997. At the same time, the average rate per minute for an international call dropped from \$0.70 in 1996 to \$0.64 in 1997. We do not yet have the data for 1998, but I expect that it will show similar decreases. Consumers have responded to these rate reductions by increasing their use of these services. Interstate and international calling increased from 468.1 billion minutes in 1996 to 497.3 billion minutes in 1997.

The wireless industry is surging. Everything that is supposed to be up is up, everything that is supposed to be down is down. Subscribership is up, jobs are up, investment is up, consumer bills are down, and the wait for a license is down. What is important to remember is that this surge of the wireless industry followed the elimination of the original duopoly structure and the introduction of competition by making more spectrum available to more players. In other words, FCC policies to foster competition have proven to work for consumers' benefit and we suspect that our local competition policies will bring similar benefits to wireline services.

The international market is also flourishing. With the adoption and implementation of the WTO Agreement countries representing 90 percent of the \$600 billion global market for basic telecommunications have pledged to open their markets to international competition. And, we have been successful in our negotiation of bi-lateral agreements with other governments to permit provision of satellite service in their countries, such as Mexico and Argentina.

But local service competition was a principal focus of the Telecommunications Act and I would like to review the progress in this area in more detail.

Local competition is still nascent, but it is making significant strides. The revenues of local service competitors are \$4 billion since 1996. It is estimated that new local competitors now provide, over their own networks or by reselling incumbent company lines and UNE loops, between four and five million telephone lines to customers—between two to three percent of the nation's total telephone lines.

Local competitors are taking and increasing share of nationwide local service revenues. Local competition is broadening; new competitors are reselling incumbent company lines in almost every State—and about 40 percent of the incumbent telco lines they resell are connected to residences; new facilities-based competitors are active in almost every State. Local competitors continue to attract investment capital and deploy their networks. Industry sources report that 20 publicly traded competitive local exchange carriers (CLEC's) have a total market capitalization of \$33 billion—compared to 6 such companies with \$1.3 billion of total market capitalization prior to the 1996 Act. And these new competitors are working faster and working smarter. They continue to build fiber optic-based networks at a faster rate than incumbents.

ADVANCED SERVICES/BROADBAND DEPLOYMENT

I would like to speak briefly about the progress in the last three years in the area of “advanced telecommunications capability,” or “broadband” as it is popularly known.

What is broadband? It is two-way communications of voice, data and images via any technology and, most importantly, at vastly higher speeds than most consumers have ever had in their homes.

In practical terms, broadband will make it possible to change web pages as fast as you can flip through the pages of a book; will make possible two-way video conferencing in the home so that family members can see each other instead of just talking; and can make possible the downloading of feature length movies in minutes.

Broadband can also greatly increase the possibilities of distance learning and medical treatment at home; and its potential for persons with disabilities—for increased communications via sign language or speech reading with the advantage of facial expressions and other nuances, and the possibility of text-based Internet pages converted into braille—is enormous.

Section 706 of the 1996 Act, of course, makes it a national goal for the Commission to encourage the deployment of broadband to all Americans on a reasonable and timely basis, and we just released a Report on our nation’s progress toward that goal.

Our Report is just a snapshot taken a few seconds after the starting gun of a very long race—we and the runners in that race have a long way to go. But we find that at present, the deployment of broadband appears to be reasonable and timely.

We see two things, in particular.

First, since the 1996 Act, there has been an enormous amount of activity in the broadband area. Investment in broadband facilities has been tens of billions of dollars—large sums even by the standards of this business. In what is usually the most difficult part of this business to enter—the so-called “last mile” to the home—many companies are building last miles, or giving serious study to the idea.

- Local exchange carriers, both incumbent and competitive, are deploying new technology that has reinvigorated the ubiquitous and simple copper telephone loops into effective and low cost broadband connections for residential consumers as well as businesses.
- Cable television companies are adding two-way broadband capabilities to their networks which are inherently focused on residential consumers, including rural and non-urban areas.
- Electrical power utilities, wireless cable companies, mobile and fixed radio companies, and many satellite companies are building or planning broadband systems—some with revolutionary new technologies—to serve residential consumers.

Second, in terms of residential subscribers who are paying for the service, today broadband is on par with, or ahead of, the telephone, black-and-white and color TV, and cellular service at the same stage in their deployment. And according to the cable and telephone companies, by the end of this year they will be offering broadband to millions of residences.

I also want to note that broadband is being offered to residential consumers in a number of small towns and rural areas, which indicates that rural areas do not present intractable problems for broadband deployment. Rural areas may be targeted especially by satellite companies, which already have the highest proportion of their customers for Direct Broadcast Satellite television services in rural areas.

The success of broadband so far is the result of many longstanding FCC policies. For example, the FCC has sought to facilitate new competition in all phases of the telecommunications business, giving newcomers access to essential elements of incumbent networks, and allocating large blocks of spectrum in ways that make them usable for any technically feasible service.

Because this is the very early stage in broadband’s deployment, the nature of consumer demand is very unclear. Certainly, at present, it seems that many companies are entering broadband and offering it at consumer-friendly prices, and residential consumers are starting to find out about broadband. The market seems to be working and the best role for government is to observe, monitor and enforce our long-standing policies of promoting competition and providing the spectrum and access rights that are the building blocks for a competitive market.

TELECOMMUNICATIONS MERGERS AND ACQUISITIONS: RECONSOLIDATION OR
FOUNDATION FOR THE FUTURE?

A strong effort to firmly establish competition in local markets and your support of this goal is all the more necessary since the telecommunications industry is experiencing a wave of mergers and acquisitions. As this Subcommittee is aware, smaller companies are “bulking up” by merging with each other, major “name brand” telecommunications companies are also merging as well as acquiring the smaller, younger companies.

This activity could portend a reconsolidation of the telecommunications industry that reduces competition, to the public’s detriment, or it could establish a strong foundation for aggressive competition and innovation that greatly benefits the public.

With the stakes so high, when formerly monopolized markets are being opened to competition, it is essential that we do as much as we can to prevent anything that will retard the development of competition. This means lowering entry barriers, ensuring efficient interconnection of facilities, and encouraging the development and deployment of new technologies. This also means that the Commission needs to be particularly careful in evaluating mergers during this time of change and uncertainty, because a merger, once consummated, cannot easily be broken up. You can’t unscramble an egg.

“Good” mergers can spur competition by creating merged entities that can compete more aggressively and that can more quickly move into previously monopolized markets. Just last week, for example, the FCC approved the merger of AT&T and TCI, two companies that have complementary skills and assets with which to enter the local exchange service markets. This merged company will have an incentive to build out local telephone systems that will be able to compete with the largest local exchange companies, particularly in residential markets. If this competition develops, it will make it possible to substantially deregulate the local exchange markets, just as strong competition justified the substantial deregulation of the long distance and wireless markets.

But “bad” mergers are likely to slow the development of competition. Among the anticompetitive harms arising from a “bad” merger are: eliminating firms that would have entered markets; raising barriers to entry; discouraging investment; increasing the ability of the merged entity to engage in anticompetitive conduct; and making it more difficult for the Commission and State Public Utility Commissions to monitor and implement procompetitive policies.

In this time of great change and uncertainty, the FCC needs to be particularly vigilant to not allow any developments, including mergers, to slow the development of competition. That is why the FCC and, in some cases, State Public Utility Commissions, need to apply their unique knowledge, expertise and judgment in reviewing proposed mergers and acquisitions under the Communications Act’s “public interest” standard.

BARRIERS TO COMPETITION REMAIN

Some of the most crucial prerequisites for local competition take a considerable period of time to put in place, even under the best of circumstances. Unfortunately, but not surprisingly, the availability of some of the most important prerequisites have been delayed, sometimes through litigation, sometimes through the intransigence of parties that are threatened by competition, and sometimes through the sheer scale and complexity of the task.

This latter factor—the sheer complexity of the task—cannot be ignored: the development of local exchange competition is simply an order of magnitude more complicated, more labor-intensive and more capital-intensive than was the development of long distance competition.

While the industry players actually have to do the work, regulators can play a critical role by getting the players together, insisting that a solution be found, setting standards and deadlines, and by resolving implementation disputes. For example, by facilitating the development of the technical solution and establishing a clear implementation schedule for Local Number Portability, the FCC played a catalytic role in eliminating one complex technical barrier to competition.

Although some amount of litigation is inevitable, the Supreme Court’s recent reaffirmation of the FCC’s fundamental responsibility for implementing the Act has removed considerable uncertainty that may have been slowing the development of local competition. And one major barrier to local competition will fall as soon as the FCC is able to complete the determination of what constitutes “Unbundled Network Elements”—or UNE’s—in accordance with the Supreme Court’s remand.

It is important that those of us in government work to bring stability to the legal and regulatory environment. In the wake of the Supreme Court decision, there was immediate and deep concern among CLEC's and investors that incumbent local exchange carriers (ILEC's) would use the uncertainty of this remand as an excuse to slow down the evolution of local competition.

That is why we sought and obtained commitments from the regional Bell operating companies and GTE to honor their current inter-connection agreements to provide unbundled network elements while the FCC considers the UNE issue in accordance with the Court's opinion. This is the good faith needed for all of us to move forward to a competitive marketplace, and to bring more stability to the marketplace.

Unfortunately, the litigation isn't over: some of the parties who were disappointed by the Supreme Court's decision on the Commission's authority are now asking the 8th Circuit to review the substance of the Commission's pricing standards.

And there are some very disturbing reports of incumbents attempting to deny fundamental interconnection rights to competitors. I have said this before, and I'll say this again: under my chairmanship, no competitor will be denied fair interconnection. It is inexcusable. And it won't be tolerated.

To keep markets open and the competitive momentum going, the FCC will act as the liaison between the incumbent LEC's and the CLEC's to minimize disputes and avoid lengthy proceedings and litigation. And where the FCC's intervention cannot quickly resolve interconnection problems informally, we are using our "rocket docket" to end these disagreements quickly, and to keep the market functioning smoothly.

THE LAST MILE AND THE LAST METER: THE LAST BOTTLENECK?

Just as a chain is only as strong as its weakest link, a fully competitive local market can't be achieved unless ALL the fundamental prerequisites are in place. Unfortunately, there are two essential prerequisites—access to rights-of-way and access to buildings—that are increasingly problematic and may not be readily amenable to resolution by the FCC.

There is a simple truth: before we can have local competition, new entrants must be able to deploy their competitive network facilities and reach prospective customers on roughly the same basis as the incumbents. Unfortunately, this is not always possible today because of the inherent tension between property owner's rights to control the use of their property and the need of CLEC's to use public and private property on the same basis as the ILEC's to deploy the "last mile" and the "last meter" of their competitive networks.

Congress enacted section 253 of the Communications Act to resolve some of the issues relating to municipal rights of way. However, a few municipal governments are making it difficult for CLEC's to use public rights-of-way for fiber optic cables. Indeed, some communities have imposed obligations ostensibly related to the use of rights-of-way even on competitors that do not use public rights-of-way for their own facilities, such as wireless service providers and resellers. Section 253 is currently subject to litigation so it is too early to know whether it will solve all the problems.

Obtaining rights-of-way on private property for the "last meter" is often even more problematic for local competitors. Facilities to which competitive providers require access on private property in order to serve occupants of office and apartment buildings typically include inside wire, riser conduit, and, in the case of wireless providers, rooftops for the placement of antennas. Some State laws permit public utilities to condemn rights-of-way, but CLEC's are not always classified as public utilities for these purposes. In any case, the condemnation process is generally expensive and very time consuming. I am committed to exploring what we can do to address these critical issues.

Just as the FCC must work in partnership with State Utility Commissions on the broad range of regulatory issues affecting telecommunications services, the FCC must work cooperatively with the State and local government organizations whose actions can advance or retard competition. I have therefore worked hard to involve the Commission's Local and State Government Advisory Committee (LSGAC) in these issues.

In August 1998, the Commission announced an agreement between the LSGAC, the Cellular Telecommunications Industry Association (CTIA), the Personal Communications Industry Association (PCIA), and the American Mobile Telecommunications Association (AMTA) addressing local zoning requirements relating to the siting of personal wireless service facilities. The groups presented a joint agreement setting forth voluntary guidelines for use of moratoria on tower and antenna siting, as well as an informal dispute resolution process for moratorium issues. These groups are also pursuing similar discussions regarding other issues relating to wire-

less facilities siting. I hope and expect that this process will help to reduce many of the problems associated with wireless facilities siting, and I hope that similar arrangements can be established to speed the deployment of fiber optic cables in public streets.

With respect to the issue of access to private property, some States have enacted nondiscrimination requirements applicable to private landowners, and the National Association of Regulatory Utility Commissioners (NARUC) has passed a resolution supporting such requirements. I intend to continue working with NARUC and the appropriate State government bodies to further this policy. It is not clear, however, whether piecemeal State legislation can be fully adequate to address these issues.

ILEC's are not as adversely affected by these property issues as CLEC's because they generally have their networks in place. This has an insidious side-effect: it makes the CLEC's even more dependent on the ILEC's for the last mile and last meter connection to customers. And it neutralizes a CLEC's ability to bargain with ILEC's over the price and availability of unbundled loops because CLEC's don't always have a "build it yourself" option of the ILEC's terms and conditions are unreasonable.

CONCLUSION

We have come a long way toward a more competitive marketplace in communications, but we have much more work to do. The transition from monopoly regulation to open markets, from today's technologies to tomorrow's breakthroughs, is not yet complete. For the coming year our agenda is clear—to promote competition, to foster new technologies, to protect consumers, and to ensure that all Americans have access to the communications revolution.

These will be goals that guide us as we implement the Supreme Court's instructions on UNE's, as we continue opening local phone markets, as we work to make communications available to all Americans, as we review the mergers now before the Commission as well as those that may come.

The agenda for this year continues on the foundation laid last year—competition, community, common sense. We have a lot of work to do, and we have the will to do it well.

- We will promote competition in all sectors of the marketplace. We will reform access charges, and ensure that proposed mergers are pro-competitive and benefit consumers.
- We will continue to deregulate as competition develops, eliminating any unnecessary regulatory burdens, reducing reporting requirements, streamlining rules and our own internal functions.
- We will continue to protect consumers from unscrupulous competitors, and give customers the information they need to make wise choices in a robust and competitive marketplace. We will continue our policy of "zero tolerance" for those competitors who would rather cheat than compete.
- We will work to ensure that the Act's provisions of RBOC entry into the long distance marketplace are implemented in a manner that promotes competition and consumer welfare and is fair to all of the parties.
- We will ensure that broad access to communications services and technologies for all Americans, no matter where they live. We will complete universal service reforms, continue oversight of the schools and libraries and rural health care universal service programs, encourage accessibility of emergency information via closed-captioning and video description, and ensure that the 54 million Americans with disabilities can use and have access to the communications network.
- We will foster innovation, working to ensure that America remains the world's leader in innovation. We will continue to promote the development and deployment of high-speed Internet access, promote compatibility of digital video technologies with existing equipment and services, and promote competitive alternatives to cable and broadcast TV.
- Finally, we will advance these concepts worldwide, serving as an example and advocate of telecommunications competition worldwide. We will work to encourage the development of international standards for global interconnectivity, work to promote the fair use of spectrum through the WRC 2000, and aggressively work on the worldwide adoption of the WTO Agreement for Basic Telecommunications. We will continue to assist other nations in establishing condi-

tions for deregulation, competition, and increased private investment in their telecommunications infrastructure so that they too, can share in the promise of the Information Age, and become our trading partners.

During this time the ground rules we set now will structure competition and the telecommunications industry for years to come. Decisions we make today will determine whether or not all Americans—irrespective of where they live, their race, their age, or their special needs—can share in the promise of the Information Age.

Thank you. I look forward to answering any questions you may have.

Senator DEWINE. Mr. Klein.

STATEMENT OF JOEL I. KLEIN

Mr. KLEIN. Thank you, Mr. Chairman, Senator Kohl, Senator Thurmond. It is indeed a pleasure for me to be here again with you to talk about this issue of mutual interest to the administration and to this subcommittee. It is a special honor to appear with my friend and colleague, the Chairman of the FCC, as well as his predecessor—it is rare that I get to be bookended by two chairmen of the FCC—and my old law school classmate and good friend, Larry Pressler. So this is a high honor.

I want to be very brief, make one fundamental point, Mr. Chairman, and then three supporting points. I believe that the vision that the Congress had and the administration supported in the 1996 Telecom Act is correct. And it is not a question of whether that vision will ultimately be implemented and we will see the full benefit of competitive markets; it is simply a question of when.

And as we sit here today, 3 years later, I think there is much that we can all be proud of. The architects of this Act, in particular Senator Pressler, Reed Hundt—and indeed I want to personally thank Senator Thurmond for actually ensuring that the Justice Department would have a critical role in the implementation. I think there is much that has been accomplished and we should not miss that point, not just the consistent lowering of rates in long distance, the increased competition in the business arena, the really incredible sprouting up of new technologies on the cable side, with new promise from the AT&T/TCI merger, with respect to other cable companies already in business, like Media One, CableVision and Cox.

We are beginning to look at new developments in wireless, broadband, as you said, Mr. Chairman, and so on and so forth. And that is all good stuff. Indeed, the President's Council of Economic Advisers on February 8 of this year in the annual report detailed these developments, and I have asked that that information be included in the record.

Now, it is true that while a lot of good has been happening—and I think it is important to emphasize that before we turn to what seems to be the difficult problem that everybody is talking about. How do we take this good and expand it for more and more people, particularly for the average American consumer? And, in part, I think the frustration we feel is, as Chairman Kennard said, about to come to an end, but it will be a time in working through the end game here.

The last time I was here, the statute had been declared unconstitutional by a Federal judge in Texas. I told you at that point I thought that decision would not hold, and indeed I went to Louisiana to argue the case on appeal. I am pleased to say that we pre-

ailed and that the constitutional soundness of the statute was upheld. By the same token, Chairman Hundt's foresight has now largely been vindicated by the U.S. Supreme Court, as well, in the *Iowa Board* case.

But what happened—and I think it is unfortunate, but what happened is essentially the incumbents decided that they might get a better deal from the courts than they could get from this Congress. And unfortunately they had some early success and then litigation became the favored tool. I think they have now had a sufficient number of setbacks that they realize, given what is going on in the market and with technology, it is time to come to the table.

We in the Department as competition advocates in this process are working closely with a number of State agencies to work through the important complications to make sure that we get this right. Both Texas and New York have spent a great deal of time with us and we continue to remain optimistic about what is ahead.

So I do see this as a continuing journey, and the one thing I would hope—and I think it is reflected from all the comments from the subcommittee—is that we continue to stay together on the course that we have charted, for it is the right course and one that will ultimately do us all great pride.

Thank you.

Senator DEWINE. Mr. Klein, thank you very much.

[The prepared statement of Mr. Klein follows:]

PREPARED STATEMENT OF JOEL I. KLEIN

Good morning, Mr. Chairman and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Antitrust Division of the Department of Justice to share our perspective on the progress of the Telecommunications Act of 1996 in the three years since it was signed into law. As always, we are grateful for your support and your interest in our work, and for your continuing dedication to ensuring that the Act achieves its purpose of bringing more competition to all sectors of the telecommunications industry.

A report released by the President's Council of Economic Advisors earlier this month describes with statistic after statistic a telecommunications marketplace that has become increasingly vibrant and robust in the wake of the 1996 Act and other pro-competitive policies. As reported by the CEA, hundreds of new firms have entered all sectors of the industry, new and incumbent firms have collectively invested tens of billions of dollars in facilities, services, and R&D, network capacity has increased, new technology is being deployed, and roll-out of advanced communications services is accelerating. Output has increased and prices have declined industry-wide. A copy of that report is attached. The 1996 Act and its procompetitive, deregulatory framework clearly set the right course.

Even with these tremendous strides, there remains much hard work to be done before the job of bringing competition to all parts of the telecommunications industry is finished. That is particularly true as to the local exchange. And we are still awaiting the day when a Bell Operating Company will have achieved the degree of local exchange market-opening required as a precondition for long distance entry. While some of this is taking longer than many might have liked, we at the Justice Department remain as convinced as ever that the Act's fundamental framework is sound and that, if we stay the course, we will continue making steady progress under the Act in bringing increased competition to all telecommunications markets, with its associated benefits to America's consumers.

Unfortunately, but perhaps predictably given the stakes involved, we have had to devote a significant amount of time and energy during these first three years to litigation—regarding not only numerous specific local exchange market-opening disputes under the Act, but also the meaning of the Act, its jurisdictional scheme, and even its constitutionality.

Happily, in the last few months, the most fundamental of those court challenges have been resolved, and in favor of the Act. The D.C. Circuit and the Fifth Circuit

have now rejected constitutional “bill of attainder” challenges to the Act, with the Supreme Court denying certiorari in the Fifth Circuit case.

And just last month, the Supreme Court issued its ruling in the *Iowa Utilities Board* case, which resolved the Act’s major jurisdictional issues and upheld the FCC’s authority to adopt a uniform national set of rules for implementation of local exchange market competition, including rules governing pricing and unbundled network elements.

The litigation is not over yet. Challenges to the substance of the FCC’s pricing rules, which the Supreme Court did not rule on, remain to be considered by the Eighth Circuit. And the FCC will conduct further proceedings on its unbundled network element rules, which may be subject to further court challenges. But hopefully, the remaining issues can be dealt with quickly, so firms will focus more of their energies on business strategy instead of litigation strategy.

LOCAL COMPETITION

The Act embodies ambitious goals. It was designed to dismantle the legal, administrative, and regulatory structure that had governed local phone monopolies for decades, and replace it with a fundamentally new imperative: the local telephone market must be opened to competition. That is the Act’s linchpin. The Act also envisioned competitive benefits to consumers from allowing the Bell Companies to enter and compete in long distance, once they had demonstrated that the local bottleneck logjam was broken.

The Act provided for three different distinct avenues of competitive entry into the local exchange for a competitor to use separately or in combination to build or assemble a competing service: first, using the competitor’s own networks and facilities, interconnected with the incumbent carrier’s network; second, using the unbundled network elements (or “UNEs”) of the incumbent’s network (or a combination of UNEs and the competitor’s own facilities); and third, reselling the incumbent’s retail service offerings. According to the CEA report, competitive local exchange carriers (“CLECs”) have so far captured between 2 and 3 percent of the local exchange market as measured by lines, or about 5 percent of the market measured by revenues. Resale and UNE account for more than 70 percent of lines served by CLECs, with facilities-based accounting for the remainder.

Although there are some important success stories, each of these avenues has its own limitations, and it is important to consider each of them separately.

Facilities-based competition

In the limited sphere where competitors have been able to reach numerous profitable customers and to limit their reliance on the incumbent carriers network—to simply connecting their own networks to it—the urban business customer market—competition has already made considerable headway. According to the CEA report, since the Act’s passage new competitors have been authorized to enter local markets in every state in the U.S., and new carriers have entered all of the top 100 U.S. urban markets, as well as 250 smaller business trading areas. In fact, most major cities nationwide already have several facilities-based carriers competing with the incumbent for urban business customers. The number of switches owned by CLECs has grown from 65 before the Act to nearly 700 by the end of 1998, and the CLECs are building out their fiber network at a fast clip. According to the FCC, the amount of fiber deployed by CLECs tripled between 1993 and 1997. And some estimates indicate that CLECs added more than 120,000 route miles of fiber to their networks during just the first three quarters of 1998. According to the CEA report, new entrants have successfully raised billions of dollars in financing in capital markets, increasing market capitalization for CLECs from almost nothing in 1993 to over \$30 billion today. (This figure does not include debt financing or private venture financing).

These new entrants typically, and naturally, set their sights first on urban business customers as the most profitable slice of the local exchange market, just as the first competing long distance carriers did. Their focus has initially been limited to dense business districts, although their network coverage areas have begun to expand to reach other urban and suburban business “corridors” and office parks and, in some cases, have even begun to reach some residential apartment buildings.

In addition, there are now some encouraging signs regarding the prospects for cable company entry into local telecommunications markets—although it is taking longer than some predicted. AT&T’s decision to acquire TCI may have been what put this prospect back into the headlines recently. But a number of cable companies are now well into the process of implementing the necessary upgrades to their cable

systems to offer services such as local and long distance telephony and high-speed Internet access.

Wireless technology also offers some competitive potential. Market expansion and increased competition within the cellular and personal communications systems sectors is making these mobile wireless services more ubiquitous and affordable. In addition, several new competitors have begun to enter the local exchange market using fixed wireless technologies to provide the “last mile” of network connection to the customer. Finally, there are a number of firms hoping to enter the local exchange market using satellite technology.

While these developments are encouraging, facilities-based mass-market local entry efforts are still extremely limited and will take time to develop.

Unbundled network elements competition

The avenue of using the incumbent’s unbundled network elements, or a combination of unbundled elements and the competitor’s own facilities, has often developed at a frustratingly slow pace, and the overwhelming majority of the very few mass-market customers served by competing carriers are resale customers.

The FCC estimates that CLECs are now using UNEs leased from incumbent carriers to serve approximately 260,000 U.S. customers. This represents a tiny portion of all local customers, and most of them are concentrated in a few areas. In most states the figure is still extremely low. For example, in Bell South’s second Louisiana application, we found that only about 100 unbundled “loops” had thus far been ordered and provisioned in the entire state. In some other states, the figures are somewhat higher, but the fact remains that competition using UNEs—an integral part of the Telecom Act’s mandate—still has to go.

Resale competition

In sheer numbers of new local customers signed up, resale competition appears to have been the most successful avenue thus far. But because competition is largely confined to marketing and billing for the incumbent’s services—with virtually total reliance on the incumbent’s network—resale does not allow for a full range of possible cost-saving innovations, so its potential competitive benefits are limited. It is therefore highly unlikely to be a sufficient engine by itself for bringing the range of competitive benefits to mass-market consumers that the Telecom Act intended. Indeed, many CLECs, including AT&T and MCI, have abandoned the resale strategy. And a company that was once one of the nation’s fastest growing local service resellers, with hundreds of thousands of local access lines, was forced by late last year to lay off almost half its employees.

In short, all three avenues for competitive entry have limitations that keep any one of them from being a complete solution. We need all three.

For broad, mass-market entry, the facilities-based avenue has limitations that can be solved only over time, and at considerable expense, as competing networks are physically extended to individual households. And the resale avenue has limitations that are inherent, because by nature it involves selling the incumbent services. That is why we believe it is critical that the unbundled network elements route remain viable, and why so much attention is being focused on overcoming the difficulties in pursuing it. So let me talk for a minute about what those difficulties are.

Difficulties to remedy in UNE access

There have been two different kinds of UNE difficulties to deal with. The first has been the difficult legal process of clarifying and interpreting the Act’s UNE mandates. The second has been the difficult technical and logistical process of implementing those mandates.

Let me first say a few things about the legal difficulties. The meaning of the UNE mandates has been a major focus of the litigation over the Act, figuring prominently in the *Iowa Utilities Board* case—and perhaps predictably, given the extremely high stakes involved in exactly what CLECs are entitled to under the Act, in what manner, and at what price. Disputes over the meaning of these mandates have generated a tremendous amount of federal litigation, as well as related state commission rulings, arbitrations, and FCC rulemakings.

Some, though by no means all, of that skirmishing has been laid to rest by the Supreme Court’s decision in the *Iowa Utilities Board* case. That decision has resolved most of the disputes to date involving unbundled network elements, and has rejected a variety of incumbent carrier local exchange policies and practices which unnecessarily increased the costs or diminished the quality of services for competitors that use the incumbent’s UNEs. For example, the Court upheld the FCC’s rule prohibiting the incumbent carriers from the anticompetitive and wasteful practice of refusing to provide already-combined network elements in their combined form, thus forcing competitors to purchase them separately and recombine them on their

own, at additional expense. While there are still some details to be worked out—which will likely involve some further proceedings before the FCC and the federal courts—we are hopeful that the Supreme Court’s resolution of so many of these issues will now make it easier for important business and investment decisions to be made with more certainty regarding the legal landscape, propelling the competitive process forward as the Act intended.

Now let me turn to the technical and logistical difficulties. Quite apart from the difficulties in clarifying and interpreting the UNE mandates, the process of implementing the unbundling and interconnection requirements of the Act has been an enormously complex undertaking, requiring hard work and substantial expenditure by the incumbent local exchange carriers as well as by the new entrants. In particular, working out the technical details for sharing complex telecommunications networks, and developing the systems to support such sharing, has proven to be a formidable task.

However, as we have explained in our section 271 evaluations, it is such a formidable task precisely because access to operational support systems (“OSS”) and other wholesale support processes is so essential to the development of mass-market competition. This access is what enables a competitor to sign up a new customer, process the customer’s service order and transmit it to the incumbent, switch the customer’s service from the incumbent to the competitor, provide a new service to the customer, provide accurate customer billing, and manage any repair or service problems.

Put simply, I do not believe that you will have mass-market competition in local markets without adequate non-discriminatory access to the incumbent carrier’s OSS, a reliable means to measure the incumbent’s wholesale performance, and an effective enforcement mechanism to ensure against poor performance or “backsliding” after section 271 approval.

We already have a telling example of the critical importance of OSS in the resale context, where access to the incumbent carrier’s OSS is no less important. I am sure many of you are aware of the efforts by MCI and others to roll out mass-market resale service in California in late 1996 and into 1997. MCI was quite successful in marketing its new local service offering, and in the ensuing months signed up some 30,000–35,000 customers wishing to switch their local service provider from Pacific Bell to MCI. But Pacific Bell did not have adequate electronic systems and wholesale support processes developed to handle MCI’s order volume. Pacific Bell was not able to keep up with processing these orders manually, which resulted in huge backlogs of thousands of orders. Pacific Bell attempted to remedy the problems by adding hundreds of employees to help with manual order processing, but the order backlogs remained or grew even larger. In the end, MCI was forced to withdraw its resale offering in California. I use this example not to single out Pacific Bell, but rather to underscore why these OSS interfaces and support process are so very important if we are to give local market consumers meaningful competitive options.

Role of the Department of Justice

Now let me turn more specifically to the Department of Justice’s role in all this. The role given to us in the Act is to advise the FCC on Bell Company applications for long distance entry under section 271. And, of course, to enforce the antitrust laws. But we have always viewed our responsibility under the Act as more than merely giving a thumbs-up or thumbs-down to section 271 applications as they come in. That’s why we not only articulated our standard for recommending section 271 approval—that the local exchange market involved be “fully and irreversibly open to competition”—but also have devoted considerable resources to helping the Bell Companies and all others concerned understand what we mean by that standard. And we have tried to do this not only in the competitive analyses we have provided for section 271 applications to date, but also in formal and informal discussions with everyone concerned.

Recognizing the critical importance of OSS access to the process of opening local exchange markets, as part of our overall section 271 responsibilities we have, when asked, collaborated with the efforts of state commissions in New York, Texas, and elsewhere to tackle the OSS issue. There is no question that non-discriminatory access to OSS has emerged as one of the remaining hurdles to the market opening that is an essential precondition to the Bell Companies’ gaining section 271 approval at both the state commission and FCC level. These “OSS testing” proceedings at the state level have demonstrated that developing these systems, interfaces, and processes is difficult, but I think they have also demonstrated that it can be accomplished. In addition, the involvement of the state commissions and independent third parties in the testing processing has been particularly useful not only in point-

ing out problems and moving forward to remedy them, but also in removing some of the “he said-she said” disputes between the Bell Companies and the new entrants from the debate.

These proceedings are well underway, and we will continue to work with the state commissions and the industry to complete them. We hope that these proceedings will identify Bell Companies whose OSS and other wholesale support processes may now be sufficient to obtain section 271 approval, or at a minimum that they will clearly demonstrate what steps we still need to take towards local market opening and section 271 approval.

IMPORTANCE OF SECTION 271

As we reflect on the first three years of the Act, I believe one of the most important lessons we can take from our experience is how absolutely critical section 271 is to achieving the Act’s market-opening goals. The progress toward opening the local exchange markets that many have complained is far too slow has taken place in good measure because of the prospect of long distance entry for the Bell Companies as a reward. One of the most ambitious aspects of the Act is that it requires and expects the incumbent local exchange carrier to assist competitors that wish ultimately to take away its customers. Imagine how much more difficult this process would be without the incentive of long distance entry for the Bell Companies.

For the same reasons, the Department has paid considerable attention, in developing our competitive standard for assessing section 271 applications, to the question of how to ensure that a local exchange market remains open even after the application has been approved and the incentive of gaining entry is no longer a factor. We are hopeful that the collaborative proceedings in New York, Texas, and elsewhere will help fine-tune and implement the performance measures, the reporting requirements, the performance benchmarks, and the regulatory and contractual enforcement mechanisms that will be necessary to protect against such post-271 entry “backsliding.”

CONCLUSION

We never expected the monopoly structure that has characterized the local exchange for most of this century to be removed overnight. But Congress made the right decision three years ago in deciding that it was time for competition to be the touchstone for our national telecommunications policy in all markets, including the local exchange. The Act reflects Congress’s well-founded faith in our free-market economy, faith that in the telecommunications industry as in others, competition will strengthen our economy and ensure that American consumers benefit from increased choices, enhanced offerings, and better prices.

Just as MCI and other refuted the many pessimists who said that competition in long distance would never be achieved—as recently as 1986, one observer predicted that AT&T would find itself alone in the basic long-distance market by the end of the century—so will the many large and small CLECs ultimately prove that competition is the right choice in local markets as well.

Before we get there, there is a lot of hard work yet to be done. Rather legislatively revisiting the Act, I think the right approach is to maintain our efforts to make the Act work. In my view, its basic framework is sound. The difficulties we have experienced in implementing it are of the kind to be expected with such an ambitious undertaking. After all the work that has gone into implementing the Act, and litigating it to a common, judicially interpreted understanding where required, I am concerned that revising it at this point would only lead to more litigation and more delay.

The work before us now is not to set the policy—you have already set the policy, and it is the right one—but to continue sweating the details that go into implementing that policy. We in the Justice Department are used to sweating these kinds of competitive details. We remain committed to the pro-competitive goals of the Telecommunications Act, and we will continue working vigorously to help enforce them.

I urge you to read the attached Council of Economic Advisors report. It lays out the remarkable competitive vibrancy of the telecommunications industry on a macro level. As we continue to work in the trenches to ensure all markets are competitive, we should not lose sight of the dynamism of the telecommunications marketplace writ large and the instrumental role the 1996 Act plays in this story.

Senator DEWINE. Senator Pressler.

STATEMENT OF LARRY PRESSLER

Mr. PRESSLER. Thank you very much, Mr. Chairman, and may I greet my colleagues, former colleagues, Senator Kohl and Senator Thurmond. It is an honor to appear before this hallowed committee.

As I revisit here, I think I should say that the antitrust area in the telecommunications will become more and more important as the telecommunications bill matures because if the telecommunications bill matures completely, we will have deregulation, or as the Europeans say, liberalization, and everybody will be competing. But we will need ground rules, and they are predatory pricing and other antitrust rules.

So what you are doing here today is probably the continuation of what you have been doing, but will become more and more important because as the telecommunications bill matures, when everybody gets into everybody else's business, we will need the antitrust laws and the related standards of business practices to become the ground rules, in essence.

Let me say that when we were doing the telecommunications bill—and it is to the credit of many people that it passed, certainly all the Senators in this room and the people here at the table with me. Let me say that Mr. Kennard was a key factor in the passage of that bill. Reed Hundt and many others were heavily involved. I might say my colleague, Joel Klein, who got all the A's in our class at Harvard Law School, or at least most of them—all were involved, but our motto sort of was let's get everybody into everybody else's business in telecommunications. That was the goal and that is the objective, and when the bill is fully mature, we will have everybody into everybody else's business.

And, granted, there have been some bumps along the way, but many people deserve credit for the passage of that piece of legislation in 1996. Senator Fritz Hollings and many others worked on that on a bipartisan basis. In fact, I hand-carried the original copy, the original draft of the bill to each U.S. Senator, and I believe each member of the Senate had some input, plus some House members and the White House, and many, many others. It was truly a bipartisan effort in which many people cooperated, and labor and industry and consumer groups and even the labor unions finally endorsed the bill. So it was a moment of Camelot when it finally passed, and that moment quickly passed, but hopefully we will have another moment of Camelot when we get the long distance/local thing served.

I like to point out in some of the speeches that I give that there were at least 11 groups that had a veto power over the telecommunications bill toward the end, and that is an unusual area. And I want to commend you, Mr. Chairman, and the ranking member for your continued legislation on speeding things up in the regulatory area.

And I am sure that there will be related pieces of legislation, but I have predicted that there probably won't be a major piece of telecommunications legislation similar to the telecom bill for many years because so many groups have a veto power over it. Therefore, we will depend more and more on our antitrust laws to resolve some of the disputes.

It was with some amusement that I recently heard Justice Scalia comment during a Supreme Court proceeding that a certain paragraph of the Act was not entirely clear and that clearer draftsmanship could have been used. I wanted to jump out of my chair and recall how we had to negotiate each weekend so that an equal number of House members and Senators who each insisted on adding adverbs, adjectives and punctuation to that paragraph—indeed, one even insisted on the addition of a comma, so making legislation or making sausages is probably not a pretty business. But I wanted to say to Justice Scalia I wish I had the luxury of being able to just draft like Supreme Court Justices do.

But considering all the business, labor and consumer interests that had a veto power over the bill, I think we have a pretty good result. However, as we move forward, we have to evaluate certain things. One thing I would certainly like to see that hasn't happened yet is the RBOC distance dispute.

I dream of the day when we have the RBOC's in long distance, the long distance companies in local service, and everybody in everybody else's business. And we could then use the antitrust rules to prevent unfair business practices and traditional regulators would fade away. That was the goal when we passed the Act. There is a strong fear of letting the RBOC's into long distance, but they are already in the cellular business and smaller cellular companies are able to compete quite well. Getting everyone into everyone else's business was part of the deal when the Act was passed.

I understand that Bell Atlantic probably will get into long distance by the end of this year, and I hope that the FCC, the courts and everyone else concerned will tell the other RBOC's exactly what they must do to gain entry, as the fulfillment of the Act will be in everyone's best interest.

In terms of antitrust, in drafting section 251 of the Act, we were mindful of one of the most fundamental principles of antitrust law, the essential facilities doctrine. Indeed, it is black letter antitrust law that essential facilities must be made available to competitors only if they are not available from another source or capable of being duplicated by the competitor or others.

In the context of the 1996 Act, we wanted to be sure that access to an unbundled network element of an incumbent is only justified when a new entrant has a genuine need for such an element. Thus, section 251 requires that in determining what elements an incumbent must make available, the FCC shall consider, at a minimum, whether access to proprietary network elements is necessary and whether the failure to provide access to other network elements would impair the ability of the requesting carriers to provide service. We intended for there to be a preference that new entrants invest in their own facilities, where possible, in order to promote facilities-based competition and encourage innovation.

Some of our debate got very flowery. I recall in one debate that I said I considered that the CLEC's would grow up like flowers across the face of American telephony and that the RBOC's entry into long distance would merely heighten competition and not harm anyone. Someone shot back that the CLEC's, rather than being flowers on the face of American telephony, might well be blemished pock marks on the face of American telephony. You can see we had

some high rhetoric. The point of the rhetoric was that we wanted new competitors, but we also would let the RBOC's into long distance. Now, some people are saying we really didn't mean that, and what the Act clearly says is being ignored in some cases.

Antitrust rules and legislating for telecommunications is extremely complex, in an industry which needs some very big companies and some small companies. I mean, telecom is a very difficult industry because you have to have some very big companies, obviously, if you are going to make a long-distance call from Seoul, Korea, to my hometown of Humboldt, SD. On the other hand, it is more obvious in some industries, like the automobile industry, people accept that we have to have some very big companies. But we also, in telecommunications, need the small companies, and we have made provision for them and we have called them the competitive local exchange carriers. Others are smaller manufacturers, and others are things such as local rural LEC's, and so forth.

Several things have happened since the passage of the Telecommunications Act. It is working and much progress has been made. We now have more than 140 local competitive exchange carriers currently operating with their own facilities-based local telephone service, far more than the 13 at the end of 1995. Those new companies are vigorously raising money on Wall Street, and they are deploying fiber optic subscriber lines more quickly than the local incumbents. We all want to see them thrive, and we want to see everyone into everyone else's business. I hope that the courts, the FCC, and others find a format by which the RBOC's can get into long distance so that we truly can complete the maturation of this bill.

Mr. Chairman, I shall summarize the rest of my statement, since it was my pet peeve when I was chairing committees if somebody would come along and talk forever in the opening statement.

There is a study by Harvard called "Mergers, Sell-Offs, and Economic Efficiency" that pointed out that close to half of all these mergers don't work out and that they result in smaller companies, and some of the big companies find themselves cumbersome. Justice Learned Hand said in the *Alcoa* case that bigness itself was not a basis for preventing a merger, but rather unfair business practices were. This committee will have more influence over which mergers should and should not be allowed, and I commend to you Learned Hand's philosophy.

On the international picture, I keep a chart of how quickly countries are opening up or liberalizing their telecommunications markets. The most liberalized or open ones include England, Sweden, Finland, Chile, Norway, New Zealand and Australia. The middle group includes the United States, Canada, and most other European countries. And then this is followed by a third group of other countries in the world that are the last liberalized that include countries such as China, Pakistan, India, Vietnam, and others.

But I hope the time comes when all the telecommunications markets are open to competition, and that will raise the question of antitrust extraterritoriality as to how far we go in our country in comity, in respecting other countries, and their respecting our decisions in the area of antitrust.

We live in an age when we want to be able to use a credit card in a remote country and be billed accurately later. We also want to be able to directly dial a telephone call or send an E-mail around the world instantly and have it go accurately, and be billed fairly and accurately for that transaction. It requires big organizations or big companies to be able to accomplish that. The trick is to be able to retain competitiveness with that necessary bigness, and that is what your committee is charged with, and also to allow startup small companies to compete.

We must recognize that the marketplace, especially in this industry, is an international one. This is understandable, as we all want to be able to directly dial that phone call or send that E-mail. When international companies combine, not only U.S. law is invoked, but that of other countries as well. Your committee will need to examine questions of international comity, antitrust extraterritoriality, and the other issues in the application of those antitrust laws.

Thank you for the opportunity to testify here today. I will do my best to answer any questions that you may have.

Senator DEWINE. Senator Pressler, thank you very much.

[The prepared statement of Mr. Pressler follows:]

PREPARED STATEMENT OF FORMER SENATOR LARRY PRESSLER

(Larry Pressler is currently a partner in the law firm of O'Connor & Hannan. He served in the U.S. Senate from 1978–1996, and in the U.S. House of Representatives from 1974–1978. He was the principal author of the Telecommunications Act of 1996, and served as Chairman of the Senate Commerce, Science and Transportation Committee as well as that Committee's Subcommittee on Telecommunications.)

Thank you, Mr. Chairman, for this opportunity to revisit the Judiciary Committee, on which I formerly served. It is a great honor for me to be able to testify before this Committee, which has such a hallowed tradition.

Let's get everybody into everybody else's business in telecommunications" was my motto in speeches to staff, industry, labor groups and consumer groups during the four years of final consideration of the Telecommunications Act of 1996. I first started working on the new Telecommunications Act with Barry Goldwater when he preceded me as chairman of the Telecommunications Subcommittee of the Commerce Committee, back in the 1980s.

Many people deserve credit for passage of the Telecommunications Act of 1996. Senator Fritz Hollings and I, and many others, worked hand-in-hand on that bill on a bipartisan basis. Many senators on this committee made major inputs to that bill. I hand-carried an original draft of the bill to each U.S. Senator, and I believe each member of the Senate had some input, plus some House members, the White House and many others. It was truly a bipartisan effort on which many people cooperated.

In the end, at least eleven interest groups from industry, labor, consumer groups, and decency groups had virtual veto power over passage of the Act. Somehow, we had a moment of "Camelot" when the fighting paused, and I went to Bob Dole, Newt Gingrich and many others and begged for floor time to move the bill. Somehow the moment of "Camelot" lasted long enough, and we accomplished this.

Thus, it was one of the great honors of my lifetime to have been the Chairman of the Commerce, Science and Transportation Committee, and to have been the principal author of the Telecommunications Act of 1996. That Act took 13 years to pass, and was a hard-fought bill.

I do not believe it is generally known, but teams of about 35–45 staff worked on Saturdays and Sundays throughout much of 1995 to hammer out differences. They worked as volunteers—as you know, there is no overtime pay in government service—so the least I could do was pay for their lunches!!

It was with some amusement that I recently heard Justice Scalia comment during a Supreme Court proceeding that a certain paragraph in the Act was not entirely clear. I wanted to jump up and recall how we had to negotiate each weekend so that an equal number of House members who each insisted on adding adverbs, adjectives

and punctuation to that paragraph. Indeed, one even insisted on the addition of a comma! Making legislation or making sausages is probably not a pretty business. But considering all the business, labor and consumer interests that had a veto power over the bill, I think we did a pretty good job of getting it done.

Many have called for changes in the telecommunications bill since its passage, but to my knowledge, no serious effort has reached either floor, or, indeed, has been considered in any committee. According to a speech I regularly give on telecommunications interest groups, there are about a dozen groups which have veto power over any new telecommunications legislation for five to ten years, if then even. There are several groups which can veto telecommunications legislation. Included among them are: regional bells; cable; labor; newspapers; long-distance companies; decency lobbies; burglar alarm companies; universal service and consumer leagues; electric utilities; the American Association of Retired Persons; broadcasters; and several others.

Therefore, it is my conclusion that this Anti-Trust Subcommittee, chaired by my friends, Sens. DeWine and Kohl, will play a major, major role in telecommunications activities in the next five to ten years, as I do not anticipate any new legislation.

The ideal thing would be for the traditional regulation to wither away with time, and, indeed, on an international basis for the WTO, regulations to be met and to have less regulation in each country. Everyone would compete with anti-trust rules, to ensure that fair trade practices are used. The true "nirvana" of telecommunications deregulation might be when we don't need any more regulation, and anti-trust laws can take over.

It is my feeling that we are also about to enter an era when anti-trust extraterritorial rules will govern more and more. We presently use "positive comity" among Europe, the U.S. and many of our other allies. I predict that Europe, especially, will attempt to impose its anti-trust standards on the U.S., via the World Trade Organization.

THE 1996 TELECOMMUNICATIONS ACT IS WORKING

The 1996 Telecommunications Act is working positively and has worked. There are bumps in the road, and the biggest one is probably the long-distance/RBOC controversy.

As author of that Act, I dream of the day when we have the RBOCs in long distance, the long distance companies in local service and everybody else's business. We would then use the anti-trust rules to prevent unfair business practices and traditional regulators would fade away. That was our goal when we passed the Act.

There is a strong fear of letting the RBOCs into long distance. But they already are in the cellular business and smaller cellular companies are able to compete quite well. Getting everybody into everybody else's business was part of the deal when the Act was passed. I understand that Bell Atlantic probably will get into long distance by the end of this year, and I hope that the FCC, the courts and everyone else concerned will tell the other RBOCs exactly what they must do to gain entry, as the fulfillment of the Act will be in everyone's best interests.

I recall in one debate I said that I considered the CLECs would grow up like flowers across the face of American telephony, and that the RBOCs' entry into long-distance would merely heighten competition and not harm anyone. Someone shot back that the CLECs, rather than being flowers on the face of American telephony, might well be blemished pock marks on the face of American telephony! You can see that we had some high rhetoric! The point of the rhetoric was that we will have these new competitors but we also will let the RBOCs into long distance. Now people are saying that we didn't really mean that. And what the Act clearly says is being ignored.

Anti-trust rules and legislating for telecommunications is extremely complex, as it is an industry which needs some very big companies and some small companies. The automobile industry, to everyone's agreement, needs large companies to build automobiles. The telecommunications industry needs large companies if one is to make a direct-dial phone call from India to my home in South Dakota. However, the telecom industry also needs small companies—we call some of them competitive local exchange carriers, others are smaller manufacturers, other are rural local exchanges, etc. Several things have happened since the passage of the Telecommunications Act. It is working, and much progress had been made. We do not yet have the long-distance local situation solved, but as the author of the Telecommunications Act, I very much want to see the development of more CLECs on the one hand, and I want to see the regional bell operating companies get in on long distance, on the other hand.

We now have more than 140 local competitive exchange carriers currently operating with their own facilities-based local telephone service—far more than the 13 at

the end of 1995. These new companies are vigorously raising money on Wall Street, and they are employing fiber optic subscriber lines more quickly than the local incumbents. We all want to see them thrive. On the other hand, we want everybody into everybody else's business and I hope the courts, the FCC and others find a format by which the RBOCs can get into long distance so we truly have everybody into everybody else's business.

Some people have been concerned about the number of mergers under the Telecommunications Act of 1996. Let me point out that these same mergers are occurring in agricultural companies, international companies, manufacturing companies and all types of companies. The Harvard Study, *Mergers, Sell-Offs, and Economic Efficiency* by David J. Ravenscraft and F.M. Scherer, points out that about half of mergers never work out. They create a company which is too clumsy or cumbersome, and there is either a business failure or essentially a business divorce. We need some big companies and some small companies in telecommunications.

Justice Learned Hand said in the Alcoa case that bigness itself was not a basis for preventing a merger, but rather unfair business practices were. This committee will have more influence over which mergers should and should not be allowed, and I commend you to Learned Hand's philosophy.

THE INTERNATIONAL PICTURE

The Telecommunications Act of 1996 was used as a basis for much of the language of the WTO agreement on telecommunications finalized in 1997. That agreement has encouraged other countries to open up their markets to foreign competition, and to have transparent systems for issuing licenses. I do an annual rating of how quickly countries are opening up, or liberalizing, their telecommunications markets. The most liberalized, or open, include: England, Sweden, Finland, Chile, Norway, New Zealand and Australia. The middle group includes: the USA, Canada, and most other European countries. This is followed by a third group of the other countries in the world and, finally, are the least liberalized or the least open. They include: China, Pakistan, India, Vietnam and others. Of course, many other countries in the world do not have very well-developed telecommunications systems.

The point is, though, that almost all countries of the world have made it their business to try to cooperate on international telecommunications standards, and many of those are based almost verbatim on the 1996 Act.

Herein, enters the issue of anti-trust extraterritoriality. Increasingly, those countries in categories one and two are demanding that fair business practices be followed, and they are using "comity" in demanding that there be an international anti-trust standard. Europe, in particular, is pushing for broadened WTO anti-trust standards.

We live in an age when we want to be able to use a credit card in a remote country, and be billed accurately later. We also want to be able to directly dial a telephone call or send an e-mail around the world instantly and have it go accurately and to be able to accomplish that. The trick is to be able to retain competition with that bigness, and also to allow start-up, small companies to compete.

We must all recognize that the marketplace, especially in this industry, is an international one. That is understandable as we all want to be able to directly dial a telephone call or send an e-mail around the world instantly and have it routed accurately and billed fairly and correctly. It requires big organizations and big companies to be able to accomplish such feats. The trick is to be able to retain competition with that bigness. This will stimulate fascinating questions concerning the international application of anti-trust laws. When international companies combine, not only U.S. law is invoked, but that of other countries as well. This committee will need to examine questions of international comity in the application of anti-trust laws.

CONCLUSION

Thank you for the opportunity to testify today. I will do my best to answer any questions that you may have.

Senator DEWINE. Mr. Hundt.

STATEMENT OF REED E. HUNDT

Mr. HUNDT. Thank you very much, Senator. Thank you both for inviting me. It is a pleasure to see you again. It is a pleasure to be here with my current friends and former colleagues. And, in

particular, when I think of the work that Joel and Bill are doing now and the burdens they have, I chuckle. [Laughter.]

It is pathetic, but it is a relief to observe their work. It is also a pleasure to commend them because they have continued to do a fantastic job.

Let me say that on the third anniversary of the Telecom Act, it is my personal view that we have to judge the law to be a very, very substantial success, and then we have to say how can we make it be even more successful and how can we make sure that we don't lose the gains that we have obtained because this is the most important active and dynamic sector in the entire American economy. This communications and information sector, however we want to define it, is a sixth, growing to a fifth, and to be within a decade as much as a fourth of the entire American economy.

It is clearly the fastest growing part in terms of job growth, in terms of productivity gains, in terms of investment capital. By any measurement whatsoever, this is the sector of the economy that is doing the best of all. It is also the sector of the economy that, in my personal view, inspires the most consumer confidence and gives us the greatest feeling across the entire range of the economy that we are actually able to get things right.

Every time you read about the Internet and whether the bubble will burst, I always say, you know, I don't know whether you want to call it a bubble or not, but, boy, it sure is a wealth creator and it sure is a source of hope and excitement for every young person in America. And that is really the truth. You go out there across this country—and I know you Senators have had this experience—everybody is talking about it. How do I get into communications? Most of them want to skip going to college now and go straight to invention.

And they have the record of Thomas Edison, Henry Ford and Bill Gates to cite back at you when you tell them maybe they ought to spend some time in college. Well, this isn't the education committee, so we won't go on about that choice. But we should say how did this happen in this country and how do we make sure we don't lose it.

The number one story in the communications age, of course, is the Internet, and I think that this committee should take great pride in the fact that Congress has made possible the growth of the Internet in this country. Maybe we didn't invent the technology, maybe we were very lucky in that respect, but we would not see happening with the Internet in this country what has happened if it were not the case that the right policies were passed, have continued to be held by this Congress, and are part of the Telecommunications Act.

Very briefly, just to approach this from two perspectives, first of all, there are two countries that lead the world in terms of new telephone lines added, two at the top and they are essentially tied. One is China—they add the size of a Bell company every year—and the other is the United States. Now, how can that be? The answer is two totally different explanations.

In one, the whole country is mobilized to catch up. In the other, in this country, we have unleashed the power of innovation, and so the market is driving—not a centralized, state-run economy in

some capital, but the market is driving tremendous line growth. People in their homes are ordering an extra line. People in businesses are ordering ten extra lines. Why are they doing this? No. 1, to get on the Internet, and, No. 2, because they are finding competitive choices, particularly for Internet access that never existed before.

We have 5,000 companies in this country that sell Internet access. When I started as the Chairman of the FCC, we had about two or three. When I started as the Chairman of the FCC, which my kids regard as a very long time ago, but it wasn't all that long ago by adult measurements, there was no electronic commerce, absolutely zero. It was only in 1994 that the Web was invented, in 1995 that Netscape went public. The whole burgeoning of electronic commerce and the tools for having this all happen has just happened in the last 3 years.

But let's not forget this. We have the cheapest Internet access of any country on the planet, and if we had the prices for Internet access that they have in Japan or China or France or any of these other countries, nothing that I have told you about now would be happening in our country. And the reason we have those cheap prices is fundamentally we have a very, very intelligent combination at the State level and at the Federal level of smart regulation and no regulation, a combination of the two.

We don't regulate the Internet, and the FCC and the Government decided that they would not impose on Internet traffic the old cumbersome regulatory system applied to voice traffic. And that decision, which has been carried out by my successor—that decision is the reason why we have a deregulated, cheap Internet access economy.

The second thing is that all these new lines added, particularly the businesses that are getting on the Internet. One-half of all the new lines added in this country per month are not supplied by the incumbent telephone company in the business market. In the business market, one-half of all new line adds are supplied by these new, competitive companies that didn't even exist until you passed the telecommunications law and that would not exist if you had not passed it. And if the principles of that are not enforced, those companies will not exist in the future. We must not forget that.

If the principles of the telecommunications law are not enforced in the future, if courts intervene again—I hope they don't—and block the law, if there is any backing off, then all this competition will go away because it is not established yet.

So I will just say, in conclusion, all the glories of the Internet, all the marvels of our productivity-gaining economy are directly attributable to this combination of wise regulation and a fundamental commitment to deregulation. And so far, we have pulled it off and it is magical and let's stick with it.

[The prepared statement of Mr. Hundt follows:]

PREPARED STATEMENT OF REED E. HUNDT

INTRODUCTION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: It is a pleasure to appear before you today to testify on the state of competition in telecommunications. During my tenure as Chairman of the Federal Communications Commission, I had the

privilege to appear before this Committee on several occasions. I am delighted to have this opportunity to renew acquaintances with many members of the Committee and to meet members who have joined since I last appeared.

This is my first opportunity to appear as a member of the private sector. My testimony today reflects my personal views and not necessarily the views of any of the companies with which I am affiliated. I currently serve as a member of the boards of directors of Allegiance Telecom, Inc. and NorthPoint Communications, Inc., both of which are facilities-based providers of telecommunications services. I also serve on the boards of Ascend Communications, Inc., a telecommunications equipment manufacturer, and Novell, Inc., a manufacturer of computer software. In addition, I am a consultant to venture capital firms and an international consulting firm.

I am especially pleased and honored to appear today with such distinguished colleagues, each of whom has played a critical role in making the telecommunications and information sector the most dynamic and productive in our nation's economy.

Senator Pressler spearheaded the bi-partisan legislative effort that resulted in passage, by overwhelming majorities, of the first comprehensive reform of the Communications Act of 1934. Over the past three years, we have seen incredible growth in new investment in telecommunications and information service firms and an equally awesome expansion in the array of services that these firms are delivering to the American people. The dynamic growth and expansion have even spread to other industries and undoubtedly have contributed to the country's productivity gains. And this economic growth has created thousands of new jobs for American workers. None of this would have been possible without the Telecommunications Act of 1996.

Assistant Attorney General Klein has led the Administration's vigilant enforcement of the nation's antitrust and merger laws. These efforts are vital to preserving the unprecedented robust growth of our free market economy. In particular, they provide an assurance to investors and entrepreneurs in the telecommunications and information industries, an assurance that they will succeed or fail on the basis of the creativity and quality of their products and services, free from the pernicious effects of anticompetitive practices.

Of course, Chairman Kennard has been at the center of the FCC's implementation of the 1996 Act, first as the Commission's General Counsel and now as Chairman. Throughout the Commission's deliberations on the scores of rulemaking proceedings mandated by the statute, Bill was an invaluable source of insightful, prudent legal advice on an enormous range of complex issues. He also supervised the work of Chris Wright and other extremely able litigators in the Office of General Counsel who have defended the Commission's orders in federal courts throughout the United States. I learned from my experience as Chairman that you can count on somebody appealing every decision that the FCC issues in carrying out its responsibilities under the 1996 Act. Incidentally, a major accomplishment under Chairman Kennard and General Counsel Kennard is the FCC's outstanding success record in appellate cases.

In my testimony today, I would like to concentrate on a few principal themes:

- The forces of competition and innovation in telecommunications that were unleashed by the Telecommunications Act of 1996 have fueled the unprecedented growth in this sector of our economy over the past three years.
- The dynamics expansion of telecommunications and information services since 1996 would not have occurred without the concerted efforts of the Congress, in particular the leadership of this Subcommittee, the Department of Justice and the FCC to undertake initiatives that removed legal and economic barriers to entry into local and other telecommunications markets.
- The challenge of the coming months is to ensure that consumers, especially residential consumers, throughout the country enjoy the benefits of competition.
- The ultimate objective of the 1996 Act is deregulation of local telecommunications markets so that consumers, not government agencies, decide the products and services that are offered and the prices charged.

TELECOMMUNICATIONS IN THE UNITED STATES—A TRUE SUCCESS STORY

Over the past three years, the United States economy has demonstrated a unique ability to continue to grow and prosper in a faltering world economy. I believe that the unparalleled growth in this country's telecommunications and information sector has contributed significantly to the expansion of the national economy. We are the world's leaders in these industries—Americans have more choices among providers, services, and educational resources than consumers else in the world.

The Telecommunications Act of 1996, in my view, is largely responsible for this economic success story. The Act opened telecommunications markets that have been closed to competition since the beginning of this century. It unleashed the creativity of innovation entrepreneurs and gave Wall Street the confidence needed to invest billions of dollars in these start-up firms. Indeed, the Telecommunications Act of 1996 was instrumental in converting the telecommunications and information sector from a beneficiary of national economic growth to one of the key drivers of that growth.

The impact of the 1996 Act on the telecommunications industry is well documented in the report released on February 8, 1999 by the Council of Economic Advisers.¹ The Act jump-started the entry of competitive local exchange carriers (CLECs) into markets around the country. Today, CLECs are competing with the incumbent monopoly telephone companies in every one of the top 100 urban markets as well as 250 business trading areas.² The number of switches deployed by CLECs increased from 65 before the Act to almost 700 by the end of 1998.³ These firms have a market capitalization of over \$30 billion and employ more than 50,000 workers.⁴

And the CLECs are having a significant impact on the markets where they compete. Data analyzed by the Council of Economic Advisers indicate that CLECs doubled their share of total local access lines during 1998⁵ and accounted for approximately five percent of the revenues in local telecommunications markets by the end of 1998.⁶

The expansion of the wireless telephone industry over the past few years has been even more remarkable. In 1993, approximately 16 million Americans subscribed to cellular service. By 1998, subscribership had increased to more than 60 million.⁷

New competition from digital personal communications services (PCS) has contributed importantly to the expansion of the wireless industry. It is estimated that median prices per minute for wireless customers (what the typical customer pays) declined by up to 30 to 40 percent for residential subscribers and between 30 and 50 percent for business customers.⁸

According to the CEA Report, capital investment in the wireless industry now amounts to \$50 billion and annual revenues approach \$30 billion.⁹ The new challenge for this burgeoning industry is clear: to compete with traditional wireline telephone services for residential and business customers.

Although the CLEC and wireless segments of the industry have enjoyed unprecedented growth over the past three years, nothing has surpassed the explosive expansion in Internet use and Internet companies. The CEA Report estimates that the number of Internet "hosts" (computers that store information that is accessible via the Internet) increased from fewer than 3 million world-wide in 1993 to 20 million in 1997 to over 35 million in early 1998.¹⁰ Estimated Internet users in the United States grew from about 28 million in 1995 to over 73 million in 1997 to more than 80 million in 1999 or almost one in three American adults.¹¹

Recognizing the importance of this new medium, Congress included a provision in the 1996 Act, section 706, that is expressly designed to promote the deployment of advanced telecommunications services to all Americans. Telecommunications carriers, led by the CLECs, are meeting this need by deploying high-speed Internet access services, such as digital subscribers lines (DSL), and are aggressively marketing these services to residential and business customers nation-wide.

THE ROLE OF THE FEDERAL GOVERNMENT

All of us at this table and the members of this Committee have been privileged to be part of this unprecedented explosion in the telecommunications and information industries since 1996. Indeed, I think one of the most important lessons we can learn from this experience is the enormous impact that a clear, forward-looking national policy can have on these industries.

¹*Progress Report: Growth and Competition in U.S. Telecommunications 1993-1998*. Council of Economic Advisers (Feb. 8, 1999) (*Progress Report*).

²*Progress Report* at 18.

³*Id.* at 17.

⁴*Id.* at 18, 16.

⁵*Id.* at 24 (Chart 6).

⁶*Id.* at 24 (Chart 7).

⁷*Id.* at 29 (Chart 9).

⁸*Id.* at 27.

⁹*Id.* at 27-28.

¹⁰*Id.* at 36.

¹¹*Id.* at 36-37.

Each of the governmental bodies represented in this hearing—legislative branch, executive branch, and expert independent agency—has spent the last three years sending the same message to the American business community. We will vigorously promulgate and enforce policies that foster competition in the telecommunications and information industries and ultimately permit the complete deregulation of local telecommunications markets.

Indeed, the leadership of this Committee, Chairman DeWine and Senator Kohl, almost two years ago made one of the most important contributions to the goals of competition and deregulation. At that time, the press was full of stories about merger discussions that were taking place between AT&T and a Bell Operating Company. In my opinion, if those discussions had produced an agreement, the resulting merger would have completely undermined Congress's plan for bringing the benefits of competition to consumers in local telecommunications markets. Instead, Chairman DeWine and Senator Kohl courageously stepped forward and encouraged the FCC to take a position on that impending merger. In the wake of that letter, the merger talks collapsed and the AT&T was forced to pursue a new strategy. The recently approved merger AT&T and TCI is, in my view, a direct result of the earlier intervention by Chairman DeWine and Senator Kohl. That merger is right for all of the reasons that the earlier merger was wrong. The acquisition of TCI will enable AT&T to offer to residential consumers a facilities-based, high-speed data alternative to the offerings of incumbents. Absent facilities-based competition for residential customers, complete deregulation of local markets will never be achieved.

The timely action of Chairman DeWine and Senator Kohl underscores another point about introducing competition and deregulation into monopoly markets previously protected by government franchises. Prompt, effective governmental action is necessary from time to time in order to dismantle historic hindrances to competition and to prevent new ones from being erected.

The growth of wireless services and Internet usage demonstrates the benefits that a fully deregulated market for local telecommunications services can offer to consumers. The elimination of retail price regulation for wireless services combined with the entry of new competitors has led to the stunning growth in wireless usage that I noted earlier. For consumers, deregulated wireless services today offer a mind-boggling array of features and pricing plans. The Internet likewise has flourished in a completely free market, stimulated by continuing declines in the prices of personal computers and Internet access together with the incredible growth in service providers and the services available over the Internet. The Telecommunication Act of 1996 is designed to deliver the same benefits of lower prices and more choices in the local telecommunications market.

Competition and deregulation also will benefit incumbent telephone companies enormously. These changes will free incumbents from the pricing and other controls that governmental agencies exercise over their operations. Incumbents will compete vigorously with newer providers to serve the growing demand for high-speed data and other innovative services. Incumbents are already benefiting from the growth in demand for Internet access and other data services. The CEA report noted that the number of American households with more than one telephone line rose from 8.8 million in 1993 (9.4 percent of residences) to 15.7 million in 1996 (16.5 percent).¹² Local competition also will mean that the Bell Companies will be free to offer long distance service in the areas in which they provide local telephone service. We learned during the transformation of the long distance industry from monopoly to competition that as an incumbent loses market share, its revenues nonetheless can continue to grow from increased demand for new and more efficiently priced service offerings.

BRINGING COMPETITION TO LOCAL TELECOMMUNICATIONS MARKETS

The dominant themes of the Telecommunications Act of 1996 can be succinctly captured in two words: competition and deregulation. The Congress, Department of Justice, FCC, and state regulatory commissions all have made essential contributions to the successes to date in moving toward accomplishment of these objectives. But, there is also much to be done.

Congress set forth in the 1996 Act an extremely innovative plan for achieving those goals. It gave new competitors in the telecommunications industry the tools they need to enter the market quickly and establish their presence. Congress also granted the Commission both the authority to adopt rules to facilitate that entry

¹²*Progress Report* at 35–36.

as well as the responsibility for eliminating those rules as soon as competition rendered regulation unnecessary.¹³

Some provisions of the 1996 Act eliminate formal, legal limits on entry into telecommunications markets. Section 253 of the Communications Act, for example, bars any state or municipality from adopting any requirements that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁴ And the Commission has used that authority on several occasions to remove entry barriers that threatening to foreclose new competitors from local telecommunications market.

Congress also recognized, however, that simply eliminating the statutory and regulatory barriers to entry into local markets would not immediately lead to effectively competitive markets and deregulation. New competitors needed access to the incumbents’ networks as the first step in the development of competitive local markets. Congress, therefore, required the incumbent telephone companies to interconnect their networks with the networks of new entrants. In the absence of such a requirement, the incumbents would have no incentive to do so. To the contrary, incumbents would recognize that a new competitor would find it impossible to market its service if its customers were unable to place calls to, and receive calls from, customers on the incumbent’s network.

For the same reason, Congress ordered incumbents to provide access to their networks for lease by new entrants. Requiring these new firms to construct completely new networks that duplicated the incumbents’ networks would have ensured lengthy delays in the delivery of the benefits of competition to consumers, especially residential consumers.

I want to emphasize that in my view, Congress intended unbundled network elements to be a transitional stage in the evolution of competitive local markets. Congress wisely understood that complete deregulation of those markets would require the presence of facilities-based alternatives to the incumbent providers. Otherwise, government regulation of the prices of network elements would remain necessary. Thus, although I regard CLEC access to unbundled network elements at efficient prices as essential to the rapid emergence of local competition, the ultimate success of the congressional plan for competition and deregulation depends upon the deployment of alternative facilities to serve consumers, and the sharing of facilities not likely to be built redundantly.

The Department of Justice has pursued the same goals of competition and deregulation through its antitrust and merger policies. As everyone knows, the Department is currently involved in the trial of its antitrust suit against Microsoft. At the risk of oversimplifying an extremely complex case, Microsoft’s operating system allegedly is functionally similar to the local telephone loop. That is, Microsoft is allegedly the dominant provider of operating systems for personal computers. Those systems function as the interface between the consumer and the vast array of software that is needed for the computer to communicate with the Internet, obtain access to and download information from millions of websites, send documents to printers and perform thousands of other applications. Similarly, the local loop is currently predominantly provided by a single firm and functions as the interface between the consumer and the telecommunications infrastructure. In both circumstances, the key to creating and preserving effective competition is to ensure that the interface is accessible by multiple providers—in the case of the Microsoft operating system, software and peripheral equipment providers and in the case of the local loop, competing providers of telecommunications services.

Of course, concerns about a dominant firm in one market leveraging its power to dominate a related market may be mitigated as its position in the original market erodes. For example, the development of full, facilities-based competition in local markets may reduce the unbundled network elements that need to be provided.

The Department also contributed significantly to the commission’s review of the applications of two Bell Operating Companies to enter the in-region long distance business, pursuant to section 271 of the Act.¹⁵ In the cases of SBC’s application to enter the Oklahoma long distance market and Ameritech’s application to enter the Michigan long distance market, the Department submitted an extensive analysis of the applicants’ compliance with the requirements of section 271. The Department’s submissions formed a critical part of the record in those proceedings on which the Commission relied in reaching its decision.

And certainly the FCC has embraced the goals of competition and deregulation in implementing the 1996 Act. Because Congress gave to the FCC the tools nec-

¹³ See 47 U.S.C. § 160.

¹⁴ 47 U.S.C. § 253.

¹⁵ 47 U.S.C. § 271.

essary to open monopoly telecommunications markets to competition, the Commission has been able to adopt rules that opened each of the three paths of local entry mandated by the statute to new firms. The unbundled network element rules, for example, enable new competitors to enter local telecommunications markets by using the incumbent provider's network to offer new services tailored to meet the needs of nascent market segments. The Telecommunications Resellers Association last year reported to the House Commerce Committee that between 1995 and 1998 the percentage of its membership that provided service over facilities the resellers owned or leased from incumbent local exchange carriers rose from 34 percent to 54 percent, a significant shift away from simply reselling the services offered by incumbents.

Moreover, some of these new entrants have leased loops from the incumbents in order to create services that are particularly attractive to Internet service providers. Merrill Lynch has reported that CLECs have become quite successful in competing with incumbents to provide new lines to business customers. Internet service providers, as a group, are responsible for a significant share of this constant demand for new lines, because, at least in part, the CLECs are doing a better job of serving this market segment than the incumbents.

CLECs today frequently offer to install new lines within 24 hours at lower rates than the incumbent carriers offer. Consequently, many CLECs have attracted Internet service providers as customers. Together, these new entrants into the telecommunications and information industries have made possible the rapid expansion of Internet access to residential customers. Between 1997 and 1998, for example, retail sales over the Internet more than doubled. Further, it has been estimated that electronic commerce will total \$300 billion by 2002.¹⁶

Pursuant to its congressional mandate, the FCC also rejected proposals that would have limited access to, and retarded use of, the Internet. In particular, the Commission refused to permit incumbent telephone companies to assess interstate access charges on calls that consumers place to reach their Internet service providers. Had it acceded to these requests, consumers using the Internet would have paid per-minute-of-use charges. And, undoubtedly, the unbelievably explosive demand for Internet access that we have witnessed in the past three years would have suffered a devastating blow.

We don't have to speculate about what would have happened if the Commission had not followed the pro-competition, pro-Internet policies of the Congress and Administration. You only have to look around the world at other countries to see what would have happened.

We all have seen instances where a foreign government has adopted policies that are intended to discourage use of the Internet: high access prices, limits on the types of traffic that may be carried. Result: growth in electronic commerce in these countries has lagged far behind the amazing rates that the United States has sustained year after year. The CEA report, for example, notes that "the United States ranks far above Japan, Germany and the United Kingdom in public participation in the Internet, as measured by the number of hosts per capita."¹⁷ I also do not think it a coincidence that this nation's economy as a whole has substantially outperformed the economies of those countries in terms of annual economic growth, low inflation and low unemployment.

A few years ago, some incumbent telephone companies discussed deploying ISDN service in their territories in order to provide high-speed data services to both residential and business consumers. But, those incumbents were not highly motivated. The results were delayed deployment; slow resolution of technical problems, which made installation an ordeal for customers; and high prices, which made the service unaffordable for most customers, including students. A better policy is competition and deregulation, trusting that demand will drive the deployment of high-speed data links.

THE ROLE OF NATIONAL TELECOMMUNICATIONS POLICY TODAY

What lessons can we draw from the successes in telecommunications since passage of the 1998 Act? Perhaps, the paramount lesson is the vital importance of establishing and enforcing a national telecommunications policy. Congress recognized this when it passed the Act and gave the FCC the authority—indeed, the obligation—to implement national rules to govern the development of fair and effective

¹⁶ See *Progress Report* at 37–38.

¹⁷ *Progress Report* at 36 (citing Atkinson, Robert D. Randolph H. Court, 1998. *New Economy Index: Understanding America's Economic Transformation*. Washington, D.C.: Progressive Policy Institute, at 30).

competition in all telecommunications markets in all regions of the country. And leaders from both parties and both chambers—Senators Lott and Hollings and Congressmen Bliley and Markey—emphasized the role of a national telecommunications policy in accomplishing the goals of the 1996 Act in the brief they filed in the Eighth Circuit in support of the FCC’s interpretation of the statute. Just a few weeks ago the Supreme Court endorsed the view expressed in that brief.

Specifically, the Supreme Court held that Congress in passing the Telecommunications Act of 1996 established a national telecommunications policy. The FCC is responsible for adopting rules to implement that policy and the state commissions are responsible applying those rules in the arbitration proceedings they oversee. The Act created a new partnership between the FCC and the state commissions and the success of the Act depends directly on the strength of that partnership.

What should be the focus of national telecommunications policy today? In my view, the most important objective is the delivery of the benefits of local telecommunications competition to residential consumers. The data from the CEA report that I discussed above indicate that many businesses in both large and small communities across the country today have a choice for local telephone service. That progress toward full and fair competition for business customers needs to be sustained, but residential consumers, by contrast, to date have not seen much of the tangible benefits of local competition.

I would like to suggest a few elements of a national policy that would advance the interests of consumers.

National Rules Governing Non-Discriminatory Access to Unbundled Network Elements—Currently, the incumbent telephone companies control the only telecommunications networks linking virtually all residential customers. Eventually, wireless companies, cable systems, and CLECs likely will offer an alternative means of access, but that will take time. The ability of new entrants in the near term to use elements of the incumbents’ networks—including combinations of elements—to offer service is the only realistic chance that residential consumers have to realize significant, concrete benefits from the 1996 Act.

Efficient, Pro-Competitive Prices for Network Elements—The Supreme Court upheld the FCC’s conclusion that the 1996 Act adopted a national standard for the pricing of access to unbundled network elements. Specifically, The Act authorized the Commission to promulgate rules that would enable new entrants to obtain access to elements from any Bell Company or other major carrier in the country at economically efficient rates. To that end, the Commission adopted a pricing methodology for state commissions to use in setting the network element rates that incumbent telephone companies within their jurisdiction would charge. The so-called TELRIC or Total Element Long Run Incremental Cost methodology is designed to produce prices for each carrier’s network elements that approach the prices that would result from a competitive market. The FCC’s rules also require the unbundled network element rates to be deaveraged geographically, with a minimum of three areas. This requirement is intended to ensure that significant variations in the cost of providing elements in different areas of a state are reflected in the elements’ prices, rather than obscured by averaging the costs across the entire state. As Chairman Kennard rightly stated in his remarks yesterday before the NARUC Winter Meeting, deaveraged pricing of unbundled network elements “is a central tenet of [the FCC’s] competition policy.” Providing non-discriminatory access to unbundled elements will not lead to residential competition if the prices for those elements are wrong.

Improved Access to Advanced Services—Residential consumers require access to high-speed data and other advanced services if they are to take full advantage of the rapidly growing array of telecommunications and information services. Carriers, incumbents and new entrants, should have incentives to invest efficiently in new technologies to compete to serve this market. And the Commission should ensure that incumbents make network elements available to new competitors in a manner that enables them to offer advanced services to residential customers.

Calling Party Pays for Wireless Carriers—As I mentioned above, we are only beginning to see substitution for basic telephone service between wireless service providers and incumbent telephone companies. That process should be hastened by continuing declines in the charges for wireless calls. I am doubtful, however, that truly effective substitution between these providers will develop in the near term unless the calling party on a wireless call begins to pay for calls, rather than the called party as is typically the case today.

Prompt, Efficient Transfer of Customers—Vigorous, effective competition for residential consumers did not really take hold in the long distance business until the

advent of "1+" access. Similarly, residential consumers need the ability to change carriers quickly and without disruption if new entrants are to be able to compete effectively in this market.

Effective Enforcement—Rules that are designed to lead to broad-based residential competition are unlikely to be successful without a commitment to the swift and sure enforcement of those rules.

We have made significant progress in the last three years dismantling the monopolies that historically have dominated the provision of local telecommunications services in this country. Today, there can be little doubt that consumers in cities and towns throughout the nation, especially business customers, are reaping substantial benefits from the work of the Congress, the Department of Justice and the FCC since 1996. The challenge in the coming months is to make these benefits available to all consumers.

I thank you again for your invitation to appear at this hearing today. I would welcome the opportunity to respond to any questions you may have.

Senator DEWINE. Let me thank our panel very much for the opening statements. Each one of you has—at least most of you have described, I think, a fairly optimistic viewpoint of the Telecommunications Act on its third anniversary. But you have identified one problem and that has to do with local phone residential service, and I would like for each one of you, if you wish, to just comment on that a little bit. What do you say to our constituents about that? What is wrong?

Mr. PRESSLER. I hope, as I said in my testimony, that we get everybody into everybody else's business and we get competition, and that we can find a way to have a clear path for the RBOC's to get into long distance. And I think we are making progress. Now, we didn't envisage that it would take over 3 years to get this done. This has been the more difficult area of the bill, as you say so well.

There was a belief that by the end of 3 years—at the end of 3 years, the bill provides that the long distance people can work together in their advertising and pool some of their markets, and so forth, because it was kind of envisaged that this would be resolved. And it has been a difficult issue, but I believe that we are moving closer and I hope that the FCC and the courts will clearly tell the RBOC's what they have to do so that within 1 year or 2 we can have everybody in everybody else's markets.

Senator DEWINE. Senator Pressler, as the author of the bill, are you disappointed at where we are in regard to residential, 3 years into it?

Mr. PRESSLER. Well, it is a difficult thing to pull together. I think it is coming.

Mr. KENNARD. Mr. Chairman, if I might address that question?

Senator DEWINE. Sure.

Mr. KENNARD. It is really a quibble that I will take with Senator Pressler. RBOC entry into long distance is not the end in itself, and we shouldn't judge the success or failure of this piece of legislation as to whether and when the RBOC's get into long distance. The key is: Are those markets open to competition because when the market is open to competition, then the RBOC's will get in?

And you gave us, I think, a very good road map in this Act on how the FCC is to evaluate the question of RBOC entry. But let's not forget that the law that you laid down doesn't just give the RBOC the discretion of when it wants to decide to open markets so that it can get into long distance. The law requires that the mar-

kets be open, whether or not the RBOC decides to get into long distance.

And the important thing for the FCC to do at this point is to have, first, the independence and the power to enforce the provisions of law that you gave us. That is why we are deploying many more of our resources to the enforcement side so that we can make sure that the law is complied with.

Senator DEWINE. Mr. Klein.

Mr. KLEIN. I essentially agree with Chairman Kennard. I would add the following. I think part of the reason this gets slowed down is because the incumbents who have the last monopoly decided to fight rather than to implement the statute. You know, I think when Reed was chairman, they had to put down an order under the rules imposed by the statute in remarkably short order. The Commission geared up. It got an order done that was remarkable in its breadth, its scope, its detail, and people decided that they would rather take that to court than to go ahead and do the hard work of opening up markets. I think that is understandable in some respects, even if unfortunate, but that slowed us down.

Second, we have to work through some of the hard issues which the Commission continues to work on on universal service. A system that has dimensions of cross-subsidization within it is going to take some time to shake out as well.

And, third, and finally, what you ought to tell to all of those consumers is two things. Right now, even for them good things are happening. Rates are beginning to come down in long distance. They have many more options. They are beginning to see nibbling around the edges, and over time this technological innovation that Reed talked about, this burgeoning sort of sense in America today that there will be not one, but several different ways to access the home, is going to give people combinations and opportunities that are not even fully imagined today. And that is not so very far away.

And so for all those reasons, while I would have like to have seen more done by now, and while we certainly need to redouble our efforts at the Commission and at the Justice Department to get more done in the years ahead, I still think that the basic story here is a success story, Mr. Chairman.

Senator DEWINE. Mr. Hundt.

Mr. HUNDT. Senator, you are absolutely right that the residential telephone market is the key area where we need to do better and where government policy needs to be very focused. Ultimately, what is the holy grail in this respect? It is to totally deregulate in the residential market. It is to not have a reason even for State public utility commissions to continue to regulate prices. That seems very far-fetched to many people, but it is absolutely important that we remain very constant in our focus on the fact that that is the ultimate goal.

And in order to do that, and at the same time feel comfortable that consumers will be able to have choice and a fair price, not just find themselves at the mercy of an unregulated monopoly—in order to do that, it is absolutely critical that, No. 1, there be a national policy implemented by the FCC. Only 1 month ago did the FCC, after 3 years, get the power to do that. And, No. 2, it is absolutely

critical that very large companies be guided, if you will, by a merger policy to make the commitment to compete instead of merge in the local market.

And I particularly want to remind the two Senators here, Senator Kohl and Senator DeWine, that you stood up at the time that there was a national discussion about AT&T possibly merging with a telephone company and you publicly said you didn't think that was that great an idea and you would love it if you thought AT&T thought again about it. And they did think again about it.

There were a few changes, some policy changes in their management, but there is a direct relationship between your stand on that position and the fact that AT&T subsequently invested in cable and is now committed to using the cable facility on a national basis, in time, with billions of dollars yet to be spent, to be able to provide that choice in the residential market. That is great and is a great example of necessary intervention by government to shape a result that will lead not to more regulation, but ultimately to deregulation.

It is absolutely critical that the wireless industry not be allowed to over-consolidate and be forced to be very, very competitive so that prices will continue to drop in wireless. And ultimately, in the fullness of time, we will see that wireless communications is, for the average consumer, an alternative to wire communications because the price will really be substitutable. The products will really be interchangeable. And we actually see this as something that can very well happen within the next several years.

Now, this ultimate goal of deregulating the local market and having no reason for State or Federal commission regulation in that particular area—that is something we have to strive for. So we want cable to compete against telephony and we want wireless to be a substitute for wire, and it is going to take continued government monitoring and continued government action to force those results. But if we shape the market in that way, we will ultimately, in a much faster period of time, maybe 4 or 5 years, get to this goal and then be able to deliver on the final result that we are supposed to deliver on, complete and total deregulation in the communications sector.

You know, it would be like the computer sector. You would never think of regulating it. You know, you would never think of having the FCC establish those kinds of rules in other sectors, and you wouldn't do it in this sector either.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you, Senator DeWine.

Mr. Pressler and Mr. Hundt, you obviously were the architects of the Telecom Act. As you sit here today and reflect back, if you could do one thing differently, one major thing differently to have enacted a better law in view of what has happened since it was enacted, what would you do? Mr. Pressler—Senator Pressler?

Mr. PRESSLER. Thank you very much. Of course, this is awfully hard to say. The bill was negotiated so long, and actually the bill had been around in some form since Lionel Van Derlin and Barry Goldwater introduced one. I guess we had the 1934 Act and we were struggling to catch up a little bit. And I still think that gov-

ernment is about 20 years behind technology, usually, and we probably are still struggling with that today in different areas.

Originally, the bill we had drafted was struggling to try to find a way, I suppose, to find a date certain that everybody could compete and then the antitrust laws would take over. And, ideally, if we could have done that—but that was impossible to pass, and so I suppose if we could have found a way that we could have resolved the local competition/long distance thing within a definite period of time, that might have been one change that I would make.

But it is very hard to say because over a period of almost 2 years that the bill was up, we had about 30 to 40 staffers every weekend who worked on it on a bipartisan basis, negotiating out words, and so forth. So I guess I have just never really—there are lots of things I might like to change, but we had to work with a lot of people.

Senator KOHL. OK, Senator Pressler.

Mr. Hundt, anything major that you think you could have done better?

Mr. HUNDT. Well, there are a lot of things that we could have done better. But the Supreme Court decision, actually making it clear that the FCC has the power to write the national rules and to oblige States to implement them—you know, it did take us nearly 3 years to get that particular result, and there is no doubt whatsoever that that is the single most important reason why competition has been slowed in the residential market.

I suppose, in retrospect, I wish we had a law that had so explicitly directed the courts on this subject that they couldn't have avoided the result that the Supreme Court ultimately found to be actually written fairly clear. So I am not sure we should be criticizing here, except for the intervening process. Let's put it that way.

Senator KOHL. OK; Mr. Klein, Mr. Kennard, how could we have done it better in a significant way? Mr. Kennard.

Mr. KENNARD. Well, as you well know, Senator, when the FCC proceeded to implement the Act, virtually every major rulemaking that was adopted was almost immediately challenged in the courts, and not just by the incumbents. Everybody was challenging these orders, and what happened is that lawyers tried to exploit every conceivable little ambiguity in the law.

There is a certain inevitability about this, but I think that with 3 years' hindsight we can all look back and wish that, gee, if there had just been a word here or a word there, we might have avoided some of this litigation. But I think that ultimately what we learned is that perhaps it might have been better if all of the litigation had been consolidated perhaps in a single appellate court and put on an expedited track so that we wouldn't have lost 3 years in the implementation of this Act.

It does concern me somewhat that the Act was written in a way that balkanizes the judicial review of State decisions. For example, we have these arbitrations that are decided in the various States and then they are decided ultimately in the Federal district courts. That is a somewhat cumbersome process.

But nothing that I am suggesting here should be construed as my advocacy for any change in the Act. I think we are getting to a point of stability. We need to let things settle out. The market-

place is crying for certainty here. When I talk to people on Wall Street, all they want to know is when are things going to settle out so that we know how to make investment decisions. And so I think that we are at a point now where things are settling down and we just need to stay the course and proceed ahead and implement the law that you gave us.

Senator KOHL. Mr. Klein.

Mr. KLEIN. I essentially agree with Reed and Chairman Kennard. I think that with the benefit of hindsight, after you go through a litigation you say why didn't you write this statute this way, or maybe we should have put it this way. But I am convinced, with the number of lawyers and the amount of money involved, no matter what statutory draftsman you employed, there would have been litigation challenging these efforts to slow down the process.

So it seems to me it is easy with the benefit of hindsight to say you should have made this a little clearer or we should have done this a little bit more carefully. But I think this is a predictable shake-out process and I think that for legislation that needed as many different constituents and interest groups supporting it that had the widespread bipartisan support that this had, it actually is a strong piece that has stood up well.

Senator KOHL. Is there something we could have done to do a better job in keeping cable rates more competitive than they are today? Mr. Hundt.

Mr. HUNDT. I think that it is imperative—and you mentioned this earlier; some of the Senators referenced this earlier—it is imperative that Congress pass a law that permits the satellites to, in fact, deliver truly competitive interchangeable packages with cable. You will never see competition in this particular area until a law like that is passed.

It is just technologically not the case that there is any other contestant to the cable pipe that has the same capability to deliver multichannel packages. But right now, as we know from the recent troubles with respect to a couple million cable subscribers who are going to lose broadcast signals, the fundamental problem is we don't have a serviceable national policy about the way that satellites can pick up local broadcasts and send them back down. Until we have that, we are always going to be disappointed about the lack of choice in the video market.

Senator KOHL. OK; anybody else want to comment on that? The Satellite Home Viewer Act, in effect—do you think that will be very significant in reducing cable rates?

Mr. KENNARD. Yes; I agree with what Reed said. The litigation is unfortunate because there are a lot of consumers out there, particularly in rural areas, that are scared to death that they are going to lose their television service. But if there is any silver lining in this dark cloud of litigation, it is that it is prompting, I think, a very healthy debate about how we can update our laws to make sure that the copyright laws and the Communications Act are relevant in a time when you do have a vibrant direct broadcast satellite industry. So I agree with Reed. That is the single most important thing that the Congress could do to spur competition and constrain rates.

Senator KOHL. OK; Senator Pressler.

Mr. PRESSLER. I would certainly concur in the concept that anything that can be done to get more competition—we live on Capitol Hill over here and I am always trying to get a little better service out of D.C. Cable. Hopefully, we will get some alternatives.

Senator DEWINE. That got a few smiles in the audience. You can't see that.

Mr. PRESSLER. The AT&T merger with TCI, which I think is overall a positive thing in the sense that it should bring us more of that type of competition—I have been somewhat troubled that things like the SBC–Ameritech merger are not viewed as synergistic in the press, but they might be. Of course, that is a fact-intensive question. But the point is it is going to take some of those companies working together.

And, in fact, I believe that AT&T's alliance with cable operators, coupled with its ownership of the TCI systems, means that AT&T will pass more homes than it did in 1983, the year before the divestiture of the local phone companies. So the point is I don't know what the fact-intensive objections to some mergers are and why others are approved, but I am of the feeling that if we can get more synergistic competition, we are better off.

Senator KOHL. OK; there are some who would do away with the FCC's role in reviewing mergers. They claim that the Department of Justice should be the sole analyst of whether these deals meet the general antitrust standards.

Mr. Kennard, you have said that your agency plays a crucial role by ensuring that mergers serve the public interest. So, in your opinion, what would be the pros and cons of abolishing the FCC's merger review authority and deferring entirely to the Department of Justice?

Mr. KENNARD. I think it would be a very bad idea because the analysis that we undertake is very different from that which the Department of Justice undertakes. The FCC's mandate is to determine whether any merger is in the public interest, and that means reconciling the merger proposal with our ability to administer the Communications Act in a way that protects consumers. And when we do that, we look at the transaction in different ways than the Department of Justice does which is charged with enforcing the antitrust laws.

The AT&T/TCI merger is a good example. When the FCC considered that merger, we looked at things like its effect on our program access rules, its effect on cable rates, its effect on competition in the provision of broadband, universal service issues like how these services would be deployed to make sure that all Americans have access to these services. This is a fundamentally important part of our review of these transactions. And to suggest that the FCC should not have a role or that that role is somehow irrelevant in this day and age just doesn't make any sense to me.

Senator KOHL. Well, Mr. Kennard, as you know, the FCC has been criticized across the board for sitting back on merger applications, waiting until others rule on a deal before the Commission itself makes up its mind. You said recently that the cost of delay is great and the marketplace needs certainty. So, in view of this, what is your opinion for having so often a wait-and-see approach?

Mr. KENNARD. Well, first of all, let me say that I enthusiastically share your concern that we have got to make the merger review process work, and work well. And I think that if you look at the number of mergers that the FCC has looked at in the wake of the 1996 Act, it is a huge number of transactions, ones that have been dealt with since I have been chairman and under Reed's chairmanship.

And I took a look at the time within which the FCC deals with most mergers and most mergers—the routine mergers get dealt with in about 6 months. The very routine ones, the noncontested ones, go through as quickly as 2 months. The ones that involve more delay are the extraordinarily complex ones, the ones that involve overarching issues of policy, difficult issues of market structure. And I think that there, we have to be sensitive to a couple of things.

First of all, we have to recognize that because the FCC's mandate is to evaluate whether these mergers are in the public interest, the public has to be involved. That is why when we look at a complex merger, we make sure that we are consulting with all of the stakeholders. We bring consumer groups in, we bring State and local regulators in. And, of course, all the competitors come in. And we have a robust, comprehensive debate about these mergers. And I think that that is our job and that is the right role for the FCC.

We also have to be mindful of the interrelationship between our decisionmaking and other jurisdictions, State approvals, approvals of DOJ, in some cases approvals of foreign governments like the EU. All of these things impact on the timing and complexity of our decisionmaking.

At the end of the day, we have to write an order that funnels together all of the inputs from the public, addresses all of the arguments in a way that is true to the Administrative Procedures Act and that will be upheld in court. In a complex merger, this is a complex task and it takes time to get it done. I am looking forward to working with you on your legislation to find ways that we can improve the process, but I hope that you will be mindful, as you proceed, of some of the factors that I have pointed out here.

Senator KOHL. Thank you, Mr. Chairman.

Mr. PRESSLER. Could I comment briefly?

Senator KOHL. Yes, Senator Pressler.

Mr. PRESSLER. I believe that the long-run goal should be to have the Justice Department determine antitrust matters, and that this is the case with other industries in our economy. And I have felt, as has been pointed out, that the FCC hasn't moved as quickly as we might hope in some of these areas and I commend you for your legislation to get a time certain.

But I think that we have to have a goal. Certainly, the FCC has a role in many areas, but in terms of the long-term goal of what antitrust law should be, I think that the Justice Department should be the center for it. And so I would have to be respectfully in disagreement on that point.

I might also point out that a lot of things happen in the marketplace that government doesn't foresee, and that government shouldn't really be picking winners and losers. For example, when I was a young man, everybody thought IBM was going to dominate

the world forever, and along came Bill Gates and lots of other people, which was a surprise, and government regulation was not needed.

The Harvard study I have pointed out says that about over half the mergers prove to be unwise business decisions. But so be it, and there is either a setback or increasingly stockholders are questioning certain mergers. So what I am saying here is that having an additional layer of government approval, essentially, even though they are supposed to be looking at other issues, is unnecessary, in my view. And in the long run, the Justice Department should decide mergers.

Mr. HUNDT. May I offer a comment on this?

Senator KOHL. Yes.

Mr. HUNDT. I would like to suggest that the procedural changes that have been discussed, in fact, would operate as substantive changes in practice, in my experience. I mean the following. The well-announced but essentially informal policy between the FCC and the Department of Justice that I was party to and that historically pretty much everyone has been party to has been this, that the Department of Justice would go first, that the FCC would follow, and that the FCC would follow very, very expeditiously. And without ever writing it down, we always tried to have it be that it was not more than 1 to 2 months after the Department of Justice decision that the FCC would make its decision.

Why did we do it this way? First, because the Department of Justice has much, much more ample and effective powers to engage in discovery. They can obtain documents, they can treat them confidentially, they can keep them confidential. They do keep them confidential. They have got a great record. They have got staff, they have got people. The FCC statutorily and in terms of staff really doesn't have that capability and cannot really rationally be expected to go in front of the Department of Justice.

So if a procedural change is made that would put the FCC decision in front of the Department of Justice, in effect, it won't be able to be a substantive decision. Really, you question why there is any need for it at all. But if the FCC comes after the Department of Justice, then here is what happens. The Department of Justice, of course, if it has rejected the merger, that is the end of it. If it has approved the merger, then what goes to the FCC is the following.

The Department of Justice has the important and interesting documents. It has isolating them, it has narrowed them down. It shares them with the staff at the FCC and they look at the following issues. No. 1, are there any regulatory changes that we can make or should make that are necessary in light of the approval of this merger? In other words, we at the FCC who have the regulatory power, then, in light of the approval of a merger, may say, you know, this was probably a close question for them. Maybe if we write this rule this way or attach this condition which comes out of our regulatory power that way, we actually can make sure that we have a kind of belt-and-suspenders approach to their approval.

That is, in practice, the way it worked, and that is the way it worked on the Bell Atlantic-NYNEX merger, just to give you a very specific example, where the FCC did echo the Department of Jus-

tice in approving the merger. But because we were able to come later and stand on their shoulders and look at their documents and use their work, we were also able to add a couple of regulatory conditions that they do not have the power to add in the same particular manner. Instead, they have to go a consent decree route, which has its own complexities. And quite understandably, in that case they chose not to go that route.

So, in practice, what happens is there isn't a lot of delay due to this informal understanding. And, second, the FCC stands on the shoulders of DOJ and does something that it and only it can do, and that is it considers regulatory changes as it considers whether to fundamentally echo the Department of Justice.

I don't know of a case where the FCC has flatly forbidden a merger that the DOJ has approved. I don't know that that has ever happened. What has happened is what I have said, which is where the FCC makes regulatory changes that it thinks are wise even if the merger is going to go through. That is the substance here. And so I would suggest to you that the procedure really shouldn't be changed because the substance works fine. And changes in the procedure that would change the timing and change the interaction really wouldn't work very well.

Thanks for listening.

Senator KOHL. OK; thank you very much, Mr. Chairman.

Senator DEWINE. A question for Mr. Kennard and Mr. Klein. We have had hearings recently where SBC and Ameritech, and also GTE and Bell Atlantic, testified before this subcommittee and they told us that they needed to get bigger so that they could compete on a national scale. Justice and the FCC recently approved the AT&T/TCI deal, which appears to have the potential to bring competition to local phone markets, as well as video and data, in a large number of markets around the country.

How does the AT&T/TCI merger affect your analysis of the SBC/Ameritech and the GTE/Bell Atlantic deals? And are those companies correct when they tell us that they need to be bigger to compete with AT&T?

Mr. KENNARD. Well, Senator, they are very different mergers. The AT&T merger is an example of a company aggregating capital, a long-distance company joining together with a cable company to pool their resources and to compete in a new market, the local phone market. That is why I was able to vote for this merger because I think it fundamentally has the potential to be a very pro-competitive merger.

The merger of the local exchange carriers that you mentioned are different and more complex in this respect. The legislation that you passed in 1996 is all about competition, ensuring that the companies that control those local markets open up to competition. We are now presented with mergers of companies who want to extend their market reach, but they have not yet demonstrated that their markets are open to competitors. They have not received 271 relief.

I don't believe that those companies are in compliance with sections 251 and 252. That makes this a much more complex determination for us. I would much prefer these companies to be focusing more on what they are doing in their own regions to promote competition, as opposed to discussing what the merger will produce

out of region. That is important, too, but let's have a discussion first about how they are going to comply with the law and open their markets to competition. That is my view.

Senator DEWINE. Mr. Klein.

Mr. KLEIN. Yes. Mr. Chairman, I want to be exceptionally careful in answering this because both of those mergers are currently pending before us.

Senator DEWINE. I understand.

Mr. KLEIN. But let me just say that I think each of these mergers has to be looked at in terms of its competitive impact and not its size. And I think if we go down the path of just simply saying you need to be bigger to compete more effectively as a sort of rule of thumb, I think we are going to make a very, very bad mistake, a mistake sometimes made, frankly, in antitrust enforcement in the 1960's.

And one example, and I don't want to take sides on any side of the example, but is the example that Reed gave just a few moments ago when he was faced with the proposed merger of AT&T and one of the local RBOC's. He early on said—I think the word was it was unthinkable, and I suppose he would not have thought, had he been where Bill Kennard is today, that the merger of AT&T and TCI is unthinkable. So it is not a question of size. It is a question of markets and competitive impact, and that is one of the reasons we need to do the hard work that sometimes does take time in this merger review process.

Senator DEWINE. Mr. Pressler or Mr. Hundt, do either one of you want to comment on that?

Mr. PRESSLER. I might just say that, you know, like US West—I am not familiar with all their operations, although they were in the State I represented. But a lot of people are not interested in competing in some of their residential and rural and smaller-city areas. And it has been my feeling that sometimes in this whole thing the RBOC's get, let's say, bad press compared to some of the newer companies. The RBOC's provide the basic facilities in many areas and they are there and I guess they are easy to criticize. But the point is there isn't too much interest in a lot of the more remote or lesser populated residential areas.

Now, the critics of the SBC/Ameritech merger often try to characterize the alliance as a recreation of the old Ma Bell. And I have already pointed out that the AT&T/TCI merger was viewed sort of in the national press, and so forth, as being so synergistic, et cetera. But, actually, this is going to be bigger possibly than the old Ma Bell before 1983. So it depends on how you look at this, and I am sincerely hopeful that in reviewing these mergers that Justice Learned Hand's standards will be used, that we are seeking to help the consumer or to protect the consumer.

Senator DEWINE. Mr. Hundt.

Mr. HUNDT. Well, I totally agree with the comments that have been made in advance. Let me just say that one major question that has yet to be answered and one major issue that, in my view, has yet to be taken into account—the question that has yet to be answered is really what is the maximum percentage ownership in the local telephone market or in the cable market that we as a country want to have right now. What is the maximum?

We don't have an answer yet, and that's what these mergers are all about. And I am not saying I have got the number in my pocket and don't want to share it, but that is why Joel is exactly right to say this requires a lot of deliberation. These are fundamentally the questions that are being looked at, the consolidation questions.

The issue that has yet to be taken into account, because I think none of us necessarily know quite how to do it and we are all working on it in our different capacities, is this, and that is the issue of convergence. As we try to think about these markets and think of what really constitutes the local telephone market, do we take wireless into account or don't we? Do we take the potential of cable to offer telephone service into account or don't we?

The fantastic and fascinating and complexifying thing about the communications sector is—as Senator Pressler said, his goal was to have everybody into everybody else's business. In time, but not right today, that will happen. So what is the right merger policy? Should we consider what we think might happen in the future and reason backward from that? And how exactly do we have that balance between wanting to encourage the convergence versus being quite prudent and conservative and assuming it will show up when it hasn't?

Here is a case where it hasn't showed up—video over cable. That convergence hasn't happened, so we know that you can't just snap your fingers and say I really need those satellites to be offering a competitive service today. We also know that, as we said before, if the right laws are passed, in time, satellites can offer a competitive service. So this convergence issue has yet to be, in my judgment, fully articulated by even the best of antitrust experts, and that certainly—I don't mean myself, but others—has yet to be fully explained.

Mr. PRESSLER. If I may add a footnote to that on Senator Kohl's earlier question as to what we would do differently, I don't think we envisaged how fast the Internet convergence issues were coming. That has come much faster than we anticipated, which is another example of trying to legislate for some of these things, you get out of date before—we had cellular phones available in the late 1950's, but it took government 20 years to figure out a way to allocate the spectrum in regard to them.

But this is why this nirvana in this whole area will be when we have reached a stage when everybody is in everybody else's business and this subcommittee oversees antitrust laws that oversee everything.

Senator DEWINE. Mr. Klein and Mr. Kennard, the SBC/Ameritech merger was announced in May. GTE/Bell Atlantic was announced in September. I certainly understand and I support the need for a thorough review of such important deals, but it would seem that at a certain point we all begin to wonder why these investigations take so long. The SBC/Ameritech merger, in particular, has been in limbo for a long time. Can you give us some idea of when you think you will complete your review of these deals?

Mr. KLEIN. Sure. I think certainly I am comfortable telling you that in the next, I would suspect, month to two we will be finished with the SBC matter. And I suspect not long after that we will be finished with the Bell Atlantic/GTE merger.

Senator DEWINE. Mr. Kennard.

Mr. KENNARD. We are still actively developing a record in both those proceedings. I can't give you an exact date, but I will say that both of those proceedings are on the front burner. We are actively engaged with not only the parties, but all the parties to that proceeding, and I am hopeful that we will be able to resolve it in the near future.

Senator DEWINE. Mr. Kennard, on December 12, 1998, the Wall Street Journal published an article entitled "U.S. Could Try and Halt Bell Atlantic and SBC Deals." In this article, there were several FCC officials who spoke on background about impending mergers before the Commission. This article had an immediate and negative impact on stock prices. Moreover, and most disturbing, it appears that the Commission appears to be announcing its merger policies through the press. I personally find this disturbing. I know that Senator McCain wrote to you about this matter.

What actions have you taken in the wake of this article to address the problem?

Mr. KENNARD. Well, we may differ somewhat, Mr. Chairman, on the import of that article. I am very familiar with it, and basically what the article said is essentially what the Commission's merger review process is all about. And basically you have three options when you are considering a merger. To boil it down, you can grant it, you can deny it, or you can grant it with conditions.

This is very essential information, and I think information that the public has every right to know about. We want our processes to be transparent. We want more public participation in our merger review. We want all the stakeholders at the table so that they can tell us what they think about these important mergers. And so I don't feel that the mere fact that we talk publicly about the process and how it works is necessarily a bad thing.

Now, what we are not going to do is forecast exactly what our decision is because nobody knows what that is until we have developed a record and come to a decision. But these mergers are vitally important. They will dictate the structure of this telecommunications market for a lot of years, and I think that we ought to have an open and transparent process.

Senator DEWINE. Mr. Klein, does your office background the press on issues like this?

Mr. KLEIN. I have no idea about the facts of what happened with the Commission. The Department's view is on any merger that is pending before it; we will not comment other than before this committee, on occasion, we have said obviously that will get careful scrutiny. But we do not comment on the substance of any merger before us.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you. For all, one question. Is Internet access going to drive local telephone competition, and when will we see local telephone competition? When will we move from the end of the beginning, as you have called it, to the beginning of the end? Senator Pressler.

Mr. PRESSLER. Well, I will just briefly say that I hope we have more local competition. I think it is coming. I still have a farm and a home at Humboldt, SD, and there is nobody scrambling out there

to—local competition is not very great. Hopefully, Internet competition will increase that.

But we do have 140 CLEC's that have sprung up, and they have gotten financing and done their IPO's and are out there. So it is coming. Most of those are seeking urban markets or business markets. The lesser populated residential and rural areas are left to be the responsibility of the traditional RBOC's, and there aren't too many people out there competing.

But I am hopeful that the Internet competition will join in the increase for local competition, and I see those 140 new CLEC's and the others that are doing their financing now and their IPO's. I think the bill is working and I think we will have substantial local competition.

Senator KOHL. When is that going to happen?

Mr. PRESSLER. Well, I think within 1 year or 2. It is happening. We have 140 CLEC's now, and I think we will have double that number in 1 year or 2.

Mr. KENNARD. Senator, we compared the increase in competition in the long distance marketplace in the wake of the divestiture of AT&T with the status of progress in local telephony competition today, and we found that 3 years after the divestiture there was far less long distance competition than we have today in local telephony. Now, granted, a lot of that is in the business side, but recall that competition in the long distance market also began on the business side. This gives me some cause for optimism. I can't tell you exactly when it is going to happen, but I do know that the conditions are developing and coming together so that we will have competition if we continue to have a strong procompetitive policy that promotes it.

Mr. HUNDT. Senator, the Internet creates new value propositions for customers. Customers want new telephone lines. They want high-speed lines. They want to do E-commerce over the Internet. They want to buy their books over the Internet. It means that customers are willing to spend more, and so it means that people are more eager to compete to offer services to those customers.

The number one problem we have right now is that for residential communities there is only one way to get the Internet to the home and that is over the local telephone line. And unless that line on the residential side can be borrowed or leased by a competitor at a fair price, then there is no way to have that competition really break out, no matter how eager the residential consumer is to get to the Internet.

Now, it is writing the rules that set fair prices for those lines in the residential market—that is what the FCC was not allowed to do until last month and that is what it now can do. It basically means deaveraging—that is the term—because the prices in the residential market and the prices in the business market and in the rural market, those three geographic zones, need to be different.

Illinois has three different prices, and if you have different prices, you get the competition. Illinois has it. New York only has two zones. South Dakota only has one zone, I believe. Until you get deaveraged pricing, you really cannot see competition in that residential market.

Senator KOHL. That is FCC's job?

Mr. HUNDT. Yes, and that was part of the 1996 order that was enjoined until 1 month ago.

Senator KOHL. So you think it is urgent that they get on about that business?

Mr. HUNDT. Yes, sir.

Senator KOHL. Do you agree with that, Mr. Kennard?

Mr. KENNARD. Yes, absolutely. Earlier this week, I gave a speech to the National Association of Regulatory Utility Commissioners in which I indicated that deaveraging, the issue that Reed was just talking about, is a central tenet of our competition policy.

Unfortunately, with the litigation causing a lot of confusion in the marketplace, some of the States didn't go forward as quickly as everyone had hoped to deaverage these rates. But we are working with the State commissions and I think we are getting things back on track to put the pieces of our competition policy back together.

Senator KOHL. Does that mean that we can expect to see deaveraging proceed very quickly or very slowly?

Mr. KENNARD. Hopefully, fairly quickly. It is probably going to vary State by State to some extent, but we have got to sit down and work with the State commissions, get a better sense of what their timetables are, and make sure that we continue the forward thrust toward deaveraging.

Senator KOHL. Is deaveraging the key to local competition?

Mr. HUNDT. It is a process that, as the chairman said, every State needs to do. And, yes, it is absolutely key. It will also drive States to take on their own other steps. I won't go into the details, but it really is the driver because it permits the State commissions to set frameworks so that every business that wants to compete can actually know the prices in the different geographic zones and define the markets they want to go after.

It is hard work. It is almost an accounting kind of work. The FCC, in 1996, wanted the States to get to that work right away. As my successor said, they didn't have to. It was hard. The court protected them, so they didn't really do it. Now, they have to do it if we want this competition in the residential market.

Senator KOHL. Do you agree with that, Mr. Kennard?

Mr. KENNARD. Absolutely.

Senator KOHL. Thank you, Mr. Chairman.

Senator DEWINE. Mr. Kennard, this week the Ohio Public Utilities Commission reached a tentative agreement on the SBC/Ameritech merger in which significant concessions were made by Ameritech and SBC that hopefully will open the local residential phone market.

I would like your comments on this agreement, and specifically do you believe these concessions represent significant progress in opening the local phone markets? As you may know, the agreement called for steep discounts in resale prices to stimulate residential competition, low lease rates for network elements, and fines up to \$90 million for failing to meet these commitments. I wonder if you have any comment on that.

Mr. KENNARD. I haven't studied that proposal in detail, but I do think it is encouraging in this respect. I think that it refocuses the

debate about this merger back to what is happening in-region, what those companies are doing to open up their markets for competition so that the vision that you wrote in the Act can be realized. I can't comment beyond that because I haven't studied it in any detail.

Senator DEWINE. I appreciate that very much. Mr. Kennard, one of the goals of the Act that has not received a lot of attention lately was to encourage phone service from electric utilities. This has been an area where we have seen really relatively little activity. Specifically, some States have even passed laws prohibiting municipal electric utilities from the provision of that service. Do you have any concerns about those limitations?

Mr. KENNARD. I certainly do. I think that we should do everything we can to facilitate the provision of telecommunications services by the electric utilities. Frankly, there are three wires into the home today, in most American homes. There is the telephone wire, the cable wire, and the electric wire, and we ought to do everything we can to make sure that every one of those wires is a vehicle for competition in telecommunications.

I am discouraged that there have been some problems in the courts that haven't allowed some of these municipal utilities to provide these services. But I think that we ought to continue to work hard to open up every competitive avenue we can, including from this industry.

Mr. PRESSLER. I would just comment on that. That was a key part of the Telecommunications Act of 1996, letting the electric utilities in, and maybe that part of it has not come to fruition as much. I was recently in Japan, and Tokyo Power and Electric has—I guess they have different kinds of transformers, but on some of their low-voltage lines they can bring certain telecommunications signals into the home, and this may be a way to have additional competition. Now, the electric industry has been frozen in this deregulation struggle on a Federal level. They have done some of it on the State level, but I would expect that they would provide more and more competition in the future.

Senator DEWINE. Let me conclude with one last question to all of you. There has been some concern that rural America may be last in line when it comes to getting telecommunications services, especially the advanced services. And Senator Pressler has addressed this a little bit already.

As you survey the competitive landscape, do you think this is a major problem, and what can Justice, what can the FCC, and what can Congress do to address this if it is a concern?

Mr. PRESSLER. Well, I might just say a word or two. The local telephone cooperatives made out very well with the universal service in the bill and some of them have become worth quite a bit. The two places in the world where I live more or less, Capitol Hill, in the Nation's Capital, a few blocks from the Library of Congress, and a farm in Humboldt, SD—in both places, I would love to speed up my computer when I am trying to go on the Internet, and in both places I am told it is going to be pretty hard to do it.

But, certainly, if we leave our inner cities and rural America—those would seem to be the two places—out of the telecommunications revolution, we will regret it very much. I am very concerned

that where there is not a large market—this new competition we are talking about is very good, but we do have to continue to look very carefully at the services provided. I know that our rural cooperatives do a good job in some areas. In Humboldt, SD, we don't have a rural cooperative. We are big enough that we are sort of in between and we are kind of left out, but so are we right behind the Supreme Court.

Senator DEWINE. Mr. Hundt.

Mr. HUNDT. Congress in the 1996 Telecom Act ordered the FCC to develop the means by which the Internet could be put into every classroom in the United States and into every rural healthcare clinic. This is tremendously important. It is actually very expensive to put the Internet in every classroom because you have to build networks inside schools. And in rural areas it is even more expensive because you often have to build to old schools that are not necessarily being constructed brand new. Larry's elementary school is still around in South Dakota. And, you know, as young as we all are, that wasn't just built yesterday.

So here is the good news. Ninety percent of all the school districts in the United States applied for money under this program over the last 12 months. And Chairman Kennard ought to be very proud, and I am sure he is very, very proud, that he is able to actually preside over this system that Congress asked him to create and send those checks out and get the Internet into every classroom, every public library—I shouldn't have forgotten them—and every rural healthcare clinic.

Now, in terms of the residences in rural America, there is a technological problem. It is very expensive to provide the high-speed connections that Senator Pressler was talking about. And we cannot overcome that, but what we can do at the minimum and right away in all of these public locations in rural America is get high-speed Internet access for every library, every healthcare clinic, and every classroom.

Senator DEWINE. Mr. Kennard.

Mr. KENNARD. I agree with the comments that have been made already. I think that this is going to be a principal challenge of the information age to make sure that everybody comes along. And we do have a problem in this country, a challenge in this country to make sure that we bring everybody along, particularly people in rural areas.

And when we talk about rural areas, let's not forget Native Americans on Indian reservations. That is the most distressed population when it comes to telephone penetration. I have personally visited Indian reservations where only 20 percent of people have access to a telephone. We are not talking about high-speed Internet access. We are talking about access to basic dial tone services.

I think we have to recognize that in order to serve those folks, there is going to have to be some subsidy system in place. And you gave us the tools to do that in the Telecommunications Act of 1996. Not only did you ask us to promote competition, but also preserve universal service, and that means that we have got to have a safety net for those people who are not otherwise able to get service through the competitive market at affordable rates.

And as we move ahead to reform universal service, as you directed us to do and as we are doing, I think it is important that we do it in a way that promotes new technologies. I have visited rural areas where I am certain that there are wireless solutions to bringing service to folks, or services from satellites. And we have got to reform universal service in a way that gets that subsidy money, a very scarce resource, to the most efficient, effective provider. And I think that that can be at least in part the answer to bringing advanced services to rural America.

Senator DEWINE. Mr. Klein.

Mr. KLEIN. Well, the question is really outside of my expertise in antitrust enforcement and the role of markets. But as a citizen, I would like to associate myself with Chairman Kennard's remarks because I think he has got it exactly right.

Senator DEWINE. Let me thank all of our witnesses for their appearance before the subcommittee today. We appreciate it very much. It has been very helpful, and I think it is a very unusually knowledgeable panel of witnesses. The testimony we have received today will be very helpful as we continue our efforts to bring competition to a variety of telecommunications markets.

We still have a long way to go, as we all know. I must admit, though, that after the hearing today I am a little more inclined to be optimistic. We are making progress and we will continue to make progress as long as we stay the course and keep plugging away to make competition a reality in local phone markets.

The legislation that we have introduced today is just one part of that effort, and we will consult with all interested parties and take steps to mark it up as soon as possible. In addition, we will continue to look for other ways to promote competition, competition in residential service and video delivery and in broadband services.

We look forward to working with the FCC, with the Justice Department, and all of the interested parties in the telecommunications industry to ensure that business and consumers reap the full benefits of the Telecommunications Act just as we all intended.

Again, I want to thank our very distinguished panel for your time. Thank you.

[Whereupon, at 3:50 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSION FOR THE RECORD

PREPARED STATEMENT OF THE NATIONAL COALITION FOR COMPETITIVE CHOICE IN TELECOMMUNICATIONS

The National Coalition for Competitive Choice in Telecommunications (NCCCT) is a grassroots coalition working to ensure that all Americans have choices in their telecommunications services. The coalition is concerned about recent trends to erect barriers to entry for certain types of providers, particularly municipal utilities.

THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 promised better services, lower rates and expanding innovations in the telecommunications market. Competition was the impetus for such change and the law sought to reduce barriers to entry and encourage vigorous competition in the market. The intent was to provide more choices to all Americans, regardless of their residence. Congress recognized the potential for barriers to entry and provided the remedy set forth in Section 253:

Section 253 of the Act states:

- (a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.

If States erect such barriers, the FCC is directed to *preempt* any State law or regulation that prohibits *any entity* from providing telecommunications services. The law does not make distinctions among types of entities or forms of ownership.

- (d) Preemption—If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute regulation or legal requirement to the extent necessary to correct such violation or inconsistency.

BARRIERS TO ENTRY HAVE NOT BEEN OVERTURNED BY THE FCC

Recently, the plain meaning of the “any entity” language of Section 253 has come into question as incumbent telecommunications providers work at the state level to prohibit municipal utilities from providing telecommunication services to their customers. In a recent decision, the Federal Communications Commission (FCC) missed an opportunity to uphold Congressional intent. The FCC chose not to preempt a Texas law that prohibited municipalities from providing telecommunications services. The Commission said that it did not want to “insert this Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253.” A recent D.C. District Court decision upheld the FCC’s position, claiming that “we are dealing with the written word and we have no way of knowing what intonation Congress wanted readers to use.”

NCCCT believes that Congress’ intent was clear: maximize consumers’ choices by maximizing the number of entities offering telecommunications services. Lawmakers clearly understood that in an extremely capital intensive industry, there would be few companies ready and able to commit millions for high speed data infrastructure. Moreover, municipal electric utilities have communications systems, including fiber

optic cable for their own communications and load control functions which can be utilized for other non-utility communications purposes. They did, however, understand that municipal utilities, many already servicing government functions with telephone, electric, and other services, would be able to provide such infrastructure. In the Senate conference report lawmakers explained. "In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services * * * explicit prohibitions on entry by a utility into telecommunications are preempted under this section."¹

Since the FCC decision, several States have passed laws to prohibit or restrict municipal entry into the telecom business, leaving many residents with no options other than their incumbent provider. Because of such actions, NCCCT is concerned that some communities are in effect still controlled by a monopoly provider and do not have access to advanced telecommunications services. This seems to be particularly true for rural areas and small towns.

BARRIERS TO ENTRY HURT COMMUNITIES

Barring and restricting *any entity's* entry into telecommunications hurts communities for several reasons:

1. Incumbents are not investing in facility upgrades and are selling many local exchanges in remote and rural areas. Citizens in these areas wait longer, receive fewer choices and fewer services instead of the numerous options promised by the Telecommunications Act. As a matter of fact, we know of some communities that lose up to 25 percent of their telecommunications capacity simply when it rains. That is surely not what the law intended.

2. If communities are prohibited from using every tool to their discretion—including their existing utility infrastructure—they are left with no bargaining power to negotiate lower rates or better services with their incumbent providers. These people are then at a double disadvantage: not only are they prohibited from providing their own services, they cannot even threaten to do so to negotiate lower rates or better services. For example, the City of Lynchburg, Virginia asked its incumbent provider for high speed/high volume data transmission service for its Emergency 911 center. When quoted a price of \$1200 per month the city discussed building its own connection and the incumbent dropped the price to only \$400 per month. Virginia has since passed legislation that prohibits any governmental entity from offering telecommunications equipment, infrastructure or services. Now the citizens of Virginia are stranded.

3. Without advanced communications systems, communities—particularly those in sparsely populated and rural areas—cannot attract new business and new jobs. The current rhetoric of "linking every school and hospital" to the rest of the world through advanced telecommunications is moot for rural areas that do not have access to such infrastructure.

Such basic telecommunications services are types of advancements promised by the Telecommunications Act and made possible by competition. Without competition, communities are left at the mercy of their incumbent providers—virtual monopolists that control vast areas with no viable competitors.

We urge the Committee and the Federal Communications Commission to consider fully the implications of erecting barriers to entry on rural and remote areas and to take all appropriate steps to ensure that the intent of the law is followed. Help assure that all Americans benefit from the technology revolution.



¹ Senate Report 104-230 2nd Session 104th Congress, February 1, 1996.