103D CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPT. 103-559 Part 2

ANTITRUST AND COMMUNICATIONS REFORM ACT OF 1994

JUNE 24, 1994.—Ordered to be printed

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

REPORT

[To accompany H.R. 3626 which on November 22, 1993, was referred jointly to the Committee on the Judiciary and the Committee on Energy and Commerce]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3626) to supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, United States District Court for the District of Columbia; to amend the Communications Act of 1934 to regulate the manufacturing of Bell operating companies, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLES.

(a) SHORT TITLE OF THIS ACT.—This Act may be cited as the "Antitrust and Communications Reform Act of 1994".

(b) SHORT TITLES OF DIVISIONS OF THIS ACT.—(1) Title I of this Act may be cited as the "Antitrust Reform Act of 1994".

(2) Title II of this Act may be cited as the Communications Reform Act of 1994".

80-639

TITLE I—SUPERSESSION OF THE MODIFICATION OF FINAL JUDGMENT

SEC. 101. AUTHORIZATION FOR BELL OPERATING COMPANY TO ENTER COMPETITIVE LINES OF BUSINESS.

(a) APPLICATION.—

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

(A) to provide alarm monitoring services, or

(B) to provide interexchange telecommunications services.

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

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

(A) the date of the enactment of this Act, with respect to providing interexchange telecommunications services, and

(B) the date that occurs 66 months after the date of the enactment of this Act, with respect to providing alarm monitoring services.

(3) INTERAGENCY NOTIFICATION.—Whenever the Attorney General or the Federal Communications Commission receives an application made under paragraph (1), the recipient of the application shall notify the other of such receipt.

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

(b) SEPARATE DETERMINATIONS BY THE ATTORNEY GENERAL AND THE FEDERAL COMMUNICATIONS COMMISSION.—

(1) COMMENT PERIOD.—Not later than 45 days after an application is published under subsection (a)(4), interested persons may submit written comments to the Attorney General, to the Federal Communications Commission, or to both regarding the application. Submitted comments shall be available to the public.

(2) INTERAGENCY CONSULTATION.—Before making their respective determinations under paragraph (3), the Attorney General and the Federal Communications Commission shall consult with each other regarding the application involved.

(3) DETERMINATIONS.—(A) After the time for comment under paragraph (1) has expired, but not later than 180 days after receiving an application made under subsection (a)(1), the Attorney General and the Federal Communications Commission each shall issue separately a written determination, on the record after an opportunity for a hearing, with respect to granting the authorization for which the Bell operating company has applied.

(B) Such determination shall be based on a preponderence of the evidence.

(C) Any person who would be threatened with loss or damage as a result of the approval of the authorization requested shall be permitted to participate as a party in the proceeding on which the determination is based.

(D)(i) The Attorney General shall approve the granting of the authorization requested in the application only to the extent that the Attorney General finds that there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market such company seeks to enter. The Attorney General shall deny the remainder of the requested authorization.

(ii) The Federal Communications Commission shall approve the granting of the requested authorization only to the extent that the Commission finds that granting the requested authorization is consistent with the public interest, convenience, and necessity. The Commission shall deny the remainder of the requested authorization.

(iii) Notwithstanding clauses (i) and (ii), within 180 days after the date of the enactment of this Act, the Attorney General and the Federal Communications Commission shall each prescribe regulations to establish procedures and criteria for the expedited determination and approval of applications for authorization to provide interexchange telecommunications services that are incidental to the provision of another service which the Bell operating company may lawfully provide. Before prescribing such regulations, the Attorney General and the Commission shall consult with respect to such regulations.

(E) In making its determination under subparagraph (D)(ii) regarding the public interest, convenience, and necessity, the Commission shall take into account—

(i) the probability that granting the requested authorization will secure reduced rates for consumers of the services that are the subject of the application, especially residential subscribers,

(ii) whether granting the requested authorization will result in increases in rates for consumers of exchange service,

(iii) the extent to which granting the requested authorization will expedite the delivery of new services and products to consumers,

(iv) the extent to which the Commission's regulations, or other laws or regulations, will preclude the applicant from engaging in predatory pricing or other anticompetitive economic practices with respect to the services that are the subject of the application,

(v) the extent to which granting the requested authorization will permit collusive acts or practices between or among Bell operating companies that are not affiliates of each other,

(vi) whether granting the requested authorization will result, directly or indirectly, in increasing concentration among providers of the service that is the subject of the application to such an extent that consumers will not be protected from rates that are unjust or unreasonable or that are unjustly or unreasonably discriminatory, and

(vii) in the case of an application to provide alarm monitoring services, whether the Commission has the capability to enforce effectively the regulations established pursuant to section 230 of the Communications Act of 1934 as added by this Act.

(F) A determination that approves the granting of any part of a requested authorization shall describe with particularity the nature and scope of the activity, and of each product market or service market, and each geographic market, to which approval applies.

(4) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (3), the Attorney General or the Federal Communications Commission, as the case may be, shall publish in the Federal Register a brief description of the determination.

(5) FINALITY.—A determination made under paragraph (3) shall be final unless a civil action with respect to such determination is timely commenced under subsection (c)(1).

(6) AUTHORIZATION GRANTED.—A requested authorization is granted to the extent that—

(A)(i) both the Attorney General and the Federal Communications Commission approve under paragraph (3) the granting of the authorization, and

(ii) neither of their approvals is vacated or reversed as a result of judicial review authorized by subsection (c), or

(B) as a result of such judicial review of either or both determinations, both the Attorney General and the Federal Communications Commission approve the granting of the requested authorization.

(c) JUDICIAL REVIEW.—

(1) COMMENCEMENT OF ACTION.—Not later than 45 days after a determination by the Attorney General or the Federal Communications Commission is published under subsection (b)(4), the Bell operating company that applied to the Attorney General and the Federal Communications Commission under subsection (a), or any person who would be threatened with loss or damage as a result of the determination regarding such company's engaging in the activity described in such company's application, may commence an action in the United States Court of Appeals for the District of Columbia Circuit against the Attorney General or the Federal Communications Commission, as the case may be, for judicial review of the determination regarding the application.

(2) CERTIFICATION OF RECORD.—As part of the answer to the complaint, the Attorney General or the Federal Communications Commission, as the case may be, shall file in such court a certified copy of the record upon which the determination is based.

(3) CONSOLIDATION OF ACTIONS.—The court shall consolidate for review all civil actions commenced under this subsection with respect to the application.

(4) JUDGMENT.—(A) The court shall enter a judgment after reviewing the determination in accordance with section 706 of title 5 of the United States Code.

(B) A judgment—

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

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

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

SEC. 102. AUTHORIZATION AS PREREQUISITE.

(a) PREREQUISITE.—Until a Bell operating company is so authorized in accordance with section 101, it shall be unlawful for such company, directly or through an affiliated enterprise, to engage in an activity described in section 101(a)(1).

(b) EXCEPTIONS.—Except with respect to providing alarm monitoring services, subsection (a) shall not prohibit a Bell operating company from engaging, at any time after the date of the enactment of this Act—

(1) in any activity as authorized by an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the Modification of Final Judgment, if—

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

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

(2) in providing intrastate interexchange telecommunications services if—

(A) after the date of the enactment of this Act, the State involved approves or authorizes such company to provide such services, after taking into account the potential effects of such approval or authorization on competition and the public interest,

(B) not less than 120 days before such company offers to provide such services, such company gives notice to the public and the Attorney General that such approval or authorization is final and that all time for any State appeal or review has expired, and

(C) the Attorney General fails to commence a civil action in accordance with subsection (c) to enjoin such company from providing such services,

(3) in providing interexchange telecommunications services through resale of telecommunications services purchased from a person who is not an affiliated enterprise of such company if—

(A) the State involved approves or authorizes persons that are not affiliated enterprises of such company to provide intraexchange toll telecommunications services in such a manner that customers in such State have the ability to route automatically, without the use of any access code, their intraexchange toll telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such company),

(B) not less than 120 days before such company so provides such interexchange telecommunications services, such company gives notice to the public and the Attorney General that such approval or authorization is final and that all time for any State appeal or review has expired, and

(C) the Attorney General fails to commence a civil action in accordance with subsection (c) to enjoin such company from so providing such interexchange telecommunications services,

(4) in providing interexchange telecommunication services to provide cable service if such telecommunication services are provided using receive-only antennas, satellite master antenna television facilities, and satellite earth stations, owned and operated solely for the purpose of providing such cable service,

(5) in providing interexchange telecommunication services to provide cable service within any cable system serving a franchised territory,

(6) in providing interexchange telecommunication services to provide satellite transmission of cable television programming from a satellite uplink site to cable systems or video dialtone systems, solely for the purpose of providing cable service, and

(7) in providing interexchange telecommunication services—

(A) to provide interexchange intersystem handoff of wireless mobile radio transmission between adjacent wireless systems to allow the continuation of calls in progress without interruption or degradation of service due to the movement of the mobile telephone unit or the characteristics of radio propagation,

(B) to carry data concerning—

(i) the location and status of a customer's wireless mobile radio unit, and

(ii) the customer's instructions for the handling of incoming communications between such company's wireless mobile radio system and a wireless system located in another exchange area,

whenever such customer is located beyond the boundaries of the wireless system to which such customer is subscribed, or

(C) to provide for the origination of one-way paging messages and for access to voice storage and retrieval services provided by such company in conjunction with its paging services,

if such company provides commercial mobile service in any exchange area involved, if the transmission facilities used to provide such interexchange telecommunication services are leased by such company on terms and conditions (including price) no more favorable than those available to the competitors of such company, and if such company provides exchange access and interconnection to such commercial mobile service on terms and conditions (including price) no more favorable than those offered by the competitors of such company.

(c) CIVIL ACTION.—(1) For the purpose of paragraph (2) or (3) of subsection (b), the Attorney General may commence a civil action, not later than 120 days after receiving the notice required by subparagraph (B) of such paragraph, to enjoin such company from providing interexchange telecommunications services pursuant to such paragraph if the Attorney General determines that there is a substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market it seeks to enter with respect to such interexchange telecommunications services.

(2) In the 10-day period beginning—

(A) on the date a civil action is commenced under paragraph (1), or

(B) 120 days after receiving such notice,

whichever is earlier, the Attorney General shall publish in the Federal Register the determination that the Attorney General has made with respect to the existence of such substantial possibility.

SEC. 103. LIMITATIONS ON MANUFACTURING AND PROVIDING EQUIPMENT.

(a) ABSOLUTE LIMITATION.—Until the expiration of the 1-year period beginning on the date of the enactment of this Act, it shall be unlawful for a Bell operating company, directly or through an affiliated enterprise, to manufacture or provide telecommunications equipment, or to manufacture customer premises equipment.

(b) QUALIFIED LIMITATION.—

(1) REQUIRED CONDITIONS.—After the expiration of the 1-year period beginning on the date of the enactment of this Act, it shall be lawful for a Bell operating company, directly or through an affiliated enterprise, to manufacture or provide telecommunications equipment, or to manufacture customer premises equipment, only as described in a notification to the Attorney General that meets the requirements of paragraph (2) and only if—

(A) such company submits to the Attorney General, at any time after the date of the enactment of this Act, the notification described in paragraph (2) and such additional material and information described in such paragraph as the Attorney General may request, and complies with the waiting period specified in paragraph (3), and

(B)(i) the waiting period specified in paragraph (3) expires without the commencement of a civil action by the Attorney General in accordance with paragraph (4) to enjoin such company from engaging in the activity described in such notification, or

(ii) before the expiration of such waiting period, the Attorney General notifies such company in writing that the Attorney General does not intend to commence such a civil action with respect to such activity.

(2) NOTIFICATION.—The notification required by paragraph (1) shall be in such form and shall contain such documentary material and information relevant to the proposed activity as is necessary and appropriate for the Attorney General to determine whether there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in the market such company seeks to enter for such activity.

(3) WAITING PERIOD.—The waiting period referred to in paragraph (1) is the 1-year period beginning on the date the notification required by such paragraph is received by the Attorney General.

(4) CIVIL ACTION.—Not later than 1 year after receiving a notification required by paragraph (1), the Attorney General may commence a civil action in an appropriate district court of the United States to enjoin the Bell operating company from engaging in the activity described in such notification, if the Attorney General determines that there is a substantial possibility that such com-

pany or its affiliates could use monopoly power to impede competition in the market it seeks to enter with respect to such activity.

(c) EXCEPTION FOR PREVIOUSLY AUTHORIZED ACTIVITIES.—Subsections (a) and (b) shall not prohibit a Bell operating company from engaging, at any time after the date of the enactment of this Act, in any activity as authorized by an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the Modification of Final Judgment, if—

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

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

SEC. 104. ANTICOMPETITIVE TYING ARRANGEMENTS.

A Bell operating company with monopoly power in any exchange service market shall not tie (directly or indirectly) in any relevant market the sale of any product or service to the provision of any telecommunications service, if the effect of such tying may be to substantially lessen competition, or to tend to create a monopoly, in any line of commerce.

SEC. 105. ENFORCEMENT.

(a) EQUITABLE POWERS OF UNITED STATES ATTORNEYS.—It shall be the duty of the several United States attorneys, under the direction of the Attorney General, to institute proceedings in equity in their respective districts to prevent and restrain violations of this Act.

(b) CRIMINAL LIABILITY.—Whoever knowingly engages or knowingly attempts to engage in an activity that is prohibited by section 102, 103, or 104 shall be guilty of a felony, and on conviction thereof, shall be punished to the same extent as a person is punished upon conviction of a violation of section 1 of the Sherman Act (15 U.S.C. 1).

(c) PRIVATE RIGHT OF ACTION.—Any person who is injured in its business or property by reason of a violation of this Act—

(1) may bring a civil action in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and

(2) shall recover threefold the damages sustained, and the cost of suit (including a reasonable attorney's fee).

The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under this Act and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances.

(d) PRIVATE INJUNCTIVE RELIEF.—Any person shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief is available under section 16 of the Clayton Act (15 U.S.C. 26). In any action under this subsection in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

(e) JURISDICTION.—(1) Subject to paragraph (2), the courts of the United States shall have exclusive jurisdiction to make determinations with respect to a duty, claim, or right arising under this Act, other than determinations authorized to be made by the Attorney General and the Federal Communications Commission under section 101(b)(3).

(2) The United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review determinations made under section 101(b)(3).

(3) No action commenced to assert or enforce a duty, claim, or right arising under this Act shall be stayed pending any such determination by the Attorney General or the Federal Communications Commission.

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

(g) APPLICABILITY OF OTHER LAWS TO ENFORCEMENT OF THIS TITLE.—

(1) SECTION 5 OF THE CLAYTON ACT.—Section 5 of the Clayton Act (15 U.S.C. 16) shall apply with respect to actions under this section brought by or on behalf of the United States.

(2) ANTITRUST CIVIL PROCESS ACT.—Section 2(a) of the Antitrust Civil Process Act (15 U.S.C. 1311(a)) is amended—

(A) in paragraph (1) by striking "and" at the end,

(B) in paragraph (2) by striking the period at the end and inserting "and", and

(C) by adding at the end the following:

"(3) title I of the Antitrust and Communications Reform Act of 1994.".

SEC. 106. DEFINITIONS.

For purposes of this title:

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

(2) AFFILIATED ENTERPRISE.—The term "affiliated enterprise" has the meaning given such term under the Modification of Final Judgment.

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

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

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

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

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

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

(A) Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, US West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company,

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

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

(6) CABLE SERVICE.—The term "cable service" has the meaning given such term in section 602 of the Communications Act of 1934 (47 U.S.C. 522).

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

(8) COMMERCIAL MOBILE SERVICE.—The term "commercial mobile service" has the meaning given such term in section 332 of the Communications Act of 1934 (47 U.S.C. 332)

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

(10) ELECTRONIC PUBLISHING.—The term "electronic publishing" means the provision via telecommunications, by a Bell operating company or an affiliate of such company to a person other than an affiliate of such company, of information—

(A) which such company or affiliate has, or has caused to be, originated, authored, compiled, collected, or edited, or

(B) in which such company or affiliate has a direct or indirect financial or proprietary interest.

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

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

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

(14) INFORMATION.—The term "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

(15) INTEREXCHANGE TELECOMMUNICATIONS.—The term "interexchange telecommunications" means telecommunications between a point located in an exchange area and a point located outside such exchange area. Such term does not include alarm monitoring services or electronic publishing.

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

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

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

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

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

(21) TELECOMMUNICATIONS EQUIPMENT.—The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide a telecommunications service, and includes software integral to such equipment.

(22) TELECOMMUNICATIONS SERVICE.—The term "telecommunications service" means the offering for hire of transmission facilities or of telecommunications by means of such facilities. Such term does not include alarm monitoring services or electronic publishing.

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

SEC. 107. RELATIONSHIP TO OTHER LAWS.

(a) MODIFICATION OF FINAL JUDGMENT.—This Act shall supersede the Modification of Final Judgment, except that this Act shall not affect—

(1) section I of the Modification of Final Judgment, relating to AT&T reorganization,

(2) section II(A) (including Appendix B) and II(B) of the Modification of Final Judgment, relating to equal access and nondiscrimination,

(3) section III of the Modification of Final Judgment, relating to applicability and effect,

(4) section IV(F) and IV(I) of the Modification of Final Judgment, with respect to the requirements included in the definitions of "exchange access" and "information access",

(5) section VIII(B) of the Modification of Final Judgment, relating to printed advertising directories,

(6) section VIII(E) of the Modification of Final Judgment, relating to notice to customers of AT&T,

(7) section VIII(F) of the Modification of Final Judgment, relating to less than equal exchange access, and

(8) section VIII(G) of the Modification of Final Judgment, relating to transfer of AT&T assets, including all exceptions granted thereunder before the date of the enactment of this Act, and

(9) with respect to the parts of the Modification of Final Judgment described in paragraphs (1) through (7)—

(A) section III of the Modification of Final Judgment, relating to applicability,

(B) section IV of the Modification of Final Judgment, relating to definitions,

(C) section V of the Modification of Final Judgment, relating to compliance,

(D) section VI of the Modification of Final Judgment, relating to visitorial provisions,

(E) section VII of the Modification of Final Judgment, relating to retention of jurisdiction, and

(F) section VIII(I) of the Modification of Final Judgment, relating to the court's sua sponte authority.

(b) ANTITRUST LAWS.—Except as provided in section 105(g), nothing in this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

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

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

(d) CUMULATIVE PENALTY.—Any penalty imposed, or relief granted, under this title shall be in addition to, and not in lieu of, any penalty or relief authorized by any other law to be imposed with respect to conduct described in this title.

TITLE II—REGULATION OF MANUFACTURING, ALARM SERVICES AND ELECTRONIC PUBLISHING BY BELL OPERATING COMPANIES

SEC. 201. REGULATION OF MANUFACTURING BY BELL OPERATING COMPANIES.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 229. REGULATION OF MANUFACTURING BY BELL OPERATING COMPANIES.

"(a) GENERAL AUTHORITY.—Subject to the requirements of this section and the regulations prescribed thereunder, but notwithstanding any restriction or obligation imposed before the date of enactment of this section pursuant to the Modification of Final Judgment on the lines of business in which a Bell operating company may engage, a Bell operating company, through an affiliate of that company, may manufacture and provide telecommunications equipment and manufacture customer premises equipment.

"(b) SEPARATE MANUFACTURING AFFILIATE.—Any manufacturing or provision authorized under subsection (a) shall be conducted only through an affiliate that is separate from any Bell operating company.

"(c) COMMISSION REGULATION OF MANUFACTURING AFFILIATE.—

"(1) REGULATIONS REQUIRED.—The Commission shall prescribe regulations to ensure that Bell operating companies and their affiliates comply with the requirements of this section.

"(2) BOOKS, RECORDS, ACCOUNTS.—A manufacturing affiliate required by subsection (b) shall maintain books, records, and accounts separate from its affiliated Bell operating company which identify all financial transactions between the manufacturing affiliate and its affiliated Bell operating company and, even if such manufacturing affiliate is not a publicly held corporation, prepare financial statements which are in compliance with financial reporting requirements under the Federal securities laws for publicly held corporations, file such statements with the Commission, and make such statements available for public inspection.

"(3) IN-KIND BENEFITS TO AFFILIATE.—Consistent with the provisions of this section, neither a Bell operating company nor any of its nonmanufacturing affiliates shall perform sales, advertising, installation, production, or maintenance operations for a manufacturing affiliate, except that—

"(A) a Bell operating company and its nonmanufacturing affiliates may sell, advertise, install, and maintain telecommunications equipment and customer premises equipment after acquiring such equipment from their manufacturing affiliate; and

"(B) institutional advertising, of a type not related to specific telecommunications equipment, carried out by the Bell operating company or its affiliates, shall be permitted.

"(4) DOMESTIC MANUFACTURING REQUIRED.—

"(A) GENERAL RULE.—A manufacturing affiliate required by subsection (b) shall conduct all of its manufacturing within the United States and, except as otherwise provided in this paragraph, all component parts of customer premises equipment manufactured by such affiliate, and all component parts of telecommunications equipment manufactured by such affiliate, shall have been manufactured within the United States.

"(B) EXCEPTION.—Such affiliate may use component parts manufactured outside the United States if—

"(i) such affiliate first makes a good faith effort to obtain equivalent component parts manufactured within the United States at reasonable prices, terms, and conditions; and

"(ii) for the aggregate of telecommunications equipment and customer premises equipment manufactured and sold in the United States by such affiliate, the cost of the components manufactured outside the United States contained in all such equipment does not exceed 40 percent of the sales revenue derived in any calendar year from such equipment.

"(C) CERTIFICATION REQUIRED.—Any such affiliate that uses component parts manufactured outside the United States in the manufacture of telecommunications equipment and customer premises equipment within the United States shall—

"(i) certify to the Commission that a good faith effort was made to obtain equivalent parts manufactured within the United States at reasonable prices, terms, and conditions, which certification shall be filed on a quarterly basis with the Commission and list component parts, by type, manufactured outside the United States; and

"(ii) certify to the Commission on an annual basis that such affiliate complied with the requirements of subparagraph (B)(ii), as adjusted in accordance with subparagraph (G).

"(D) REMEDIES FOR FAILURES.—(i) If the Commission determines, after reviewing the certification required in subparagraph (C)(i), that such affiliate failed to make the good faith effort required in subparagraph (B)(i) or, after reviewing the certification required in subparagraph (C)(ii), that such affiliate has exceeded the percentage specified in subparagraph (B)(ii), the Commission may impose penalties or forfeitures as provided for in title V of this Act.

"(ii) Any supplier claiming to be damaged because a manufacturing affiliate failed to make the good faith effort required in subparagraph (B)(i) may make complaint to the Commission as provided for in section 208 of this Act, or may bring suit for the recovery of actual damages for which such supplier claims such affiliate may be liable under the provisions of this Act in any district court of the United States of competent jurisdiction.

"(E) ANNUAL REPORT.—The Commission, in consultation with the Secretary of Commerce, shall, on an annual basis, determine the cost of component parts manufactured outside the United States contained in all telecommunications equipment and customer premises equipment sold in the United States as a percentage of the revenues from sales of such equipment in the previous calendar year.

"(F) USE OF INTELLECTUAL PROPERTY IN MANUFACTURE.—Notwithstanding subparagraph (A), a manufacturing affiliate may use intellectual property created outside the United States in the manufacture of telecommunications equipment and customer premises equipment in the United States. A component manufactured using such intellectual property shall not be treated for purposes of subparagraph (B)(ii) as a component manufactured outside the United States solely on the basis of the use of such intellectual property.

"(G) RESTRICTIONS ON COMMISSION AUTHORITY.—The Commission may not waive or alter the requirements of this paragraph, except that the Commission, on an annual basis, shall adjust the percentage specified in subparagraph (B)(ii) to the percentage determined by the Commission, in consultation with the Secretary of Commerce, pursuant to subparagraph (E).

"(5) INSULATION OF RATE PAYERS FROM MANUFACTURING AFFILIATE DEBT.—Any debt incurred by any such manufacturing affiliate may not be issued by its affiliated Bell operating company and such manufacturing affiliate shall be prohibited from incurring debt in a manner that would permit a creditor, on default, to have recourse to the assets of its affiliated Bell operating company.

"(6) RELATION TO OTHER AFFILIATES.—A manufacturing affiliate required by subsection (b) shall not be required to operate separately from the other affiliates of its affiliated Bell operating company, but if an affiliate of a Bell operating company becomes affiliated with a manufacturing entity, such affiliate shall be treated as a manufacturing affiliate of that Bell operating company and shall comply with the requirements of this section.

"(7) AVAILABILITY OF EQUIPMENT TO OTHER CARRIERS.—A manufacturing affiliate required by subsection (b) shall make available, without discrimination or self-preference as to price, delivery, terms, or conditions, to any common carrier any telecommunications equipment that is used in the provision of telephone exchange service and that is manufactured by such affiliate so long as each such purchasing carrier—

"(A) does not either manufacture telecommunications equipment, or have an affiliated telecommunications equipment manufacturing entity; or

"(B) agrees to make available, to the Bell operating company affiliated with such manufacturing affiliate or any common carrier affiliate of such Bell operating company, any telecommunications equipment that is used in the provision of telephone exchange service and that is manufactured by such purchasing carrier or by any entity or organization with which such purchasing carrier is affiliated.

"(8) SALES PRACTICES OF MANUFACTURING AFFILIATES.—

"(A) PROHIBITION OF DISCONTINUATION OF EQUIPMENT FOR WHICH THERE IS REASONABLE DEMAND.—A manufacturing affiliate required by subsection (b) shall not discontinue or restrict sales to a common carrier of any telecommunications equipment that is used in the provision of telephone exchange service and that such affiliate manufactures for sale as long as there is reasonable demand for the equipment by such carriers; except that such sales may be discontinued or restricted if such manufacturing affiliate demonstrates to the Commission that it is not making a profit, under a marginal cost standard implemented by the Commission by regulation, on the sale of such equipment.

"(B) DETERMINATIONS OF REASONABLE DEMAND.—Within 60 days after receipt of an application under subparagraph (A), the Commission shall reach a determination as to the existence of reasonable demand for purposes of such subparagraph. In making such determination the Commission shall consider—

"(i) whether the continued manufacture of the equipment will be profitable;

"(ii) whether the equipment is functionally or technologically obsolete;

"(iii) whether the components necessary to manufacture the equipment continue to be available;

"(iv) whether alternatives to the equipment are available in the market; and

"(v) such other factors as the Commission deems necessary and proper.

"(9) JOINT PLANNING OBLIGATIONS.—Each Bell operating company shall, consistent with the antitrust laws (including title I of the Antitrust and Communications Reform Act of 1994), engage in joint network planning and design with other contiguous common carriers providing telephone exchange service, but agreement with such other carriers shall not be required as a prerequisite for such introduction or deployment.

"(d) INFORMATION REQUIREMENTS.—

"(1) FILING OF INFORMATION ON PROTOCOLS AND TECHNICAL REQUIREMENTS.—Each Bell operating company shall, in accordance with regulations prescribed by the Commission, maintain and file with the Commission full and complete information with respect to the protocols and technical requirements for connection with and use of its telephone exchange service facilities. Each such company shall report promptly to the Commission any material changes or planned changes to such protocols and requirements, and the schedule for implementation of such changes or planned changes.

"(2) FILING AS PREREQUISITE TO DISCLOSURE TO AFFILIATE.—A Bell operating company shall not disclose to any of its affiliates any information required to be filed under paragraph (1) unless that information is filed promptly, as required by regulation by the Commission.

"(3) ACCESS BY COMPETITORS TO INFORMATION.—The Commission may prescribe such additional regulations under this subsection as may be necessary to ensure that manufacturers in competition with a Bell operating company's manufacturing affiliate have access to the information with respect to the protocols and technical requirements for connection with and use of its telephone exchange service facilities required for such competition that such company makes available to its manufacturing affiliate.

"(4) PLANNING INFORMATION.—Each Bell operating company shall provide, to contiguous common carriers providing telephone exchange service, timely information on the planned deployment of telecommunications equipment.

"(e) ADDITIONAL COMPETITION REQUIREMENTS.—The Commission shall prescribe regulations requiring that any Bell operating company which has an affiliate that engages in any manufacturing authorized by subsection (a) shall—

"(1) provide, to other manufacturers of telecommunications equipment and customer premises equipment that is functionally equivalent to equipment manufactured by the Bell operating company manufacturing affiliate, opportunities to sell such equipment to such Bell operating company which are comparable to the opportunities which such Company provides to its affiliates; and

"(2) not subsidize its manufacturing affiliate with revenues from telephone exchange service or telephone toll service.

"(f) COLLABORATION PERMITTED.—Nothing in this section (other than subsection (m)) shall be construed to limit or restrict the ability of a Bell operating company and its affiliates to engage in close collaboration with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof related to such equipment.

"(g) ACCESSIBILITY REQUIREMENTS.—

"(1) MANUFACTURING.—The Commission shall, within 1 year after the date of enactment of this section, prescribe such regulations as are necessary to ensure that telecommunications equipment and customer premises equipment designed, developed, and fabricated pursuant to the authority granted in this section shall be accessible and usable by individuals with disabilities, including individuals with functional limitations of hearing, vision, movement, manipulation, speech, and interpretation of information, unless the costs of making the equipment accessible and usable would result in an undue burden or an adverse competitive impact.

"(2) NETWORK SERVICES.—The Commission shall, within 1 year after the date of enactment of this section, prescribe such regulations as are necessary to ensure that advances in network services deployed by a Bell operating company shall be accessible and usable by individuals whose access might otherwise be impeded by a disability or functional limitation, unless the costs of making the services accessible and usable would result in an undue burden or adverse competitive impact. Such regulations shall seek to permit the use of both standard and special equipment and seek to minimize the need of individuals to acquire additional devices beyond those used by the general public to obtain such access.

"(3) COMPATIBILITY.—The regulations prescribed under paragraphs (1) and (2) shall require that whenever an undue burden or adverse competitive impact would result from the manufacturing or network services requirements in such paragraphs, the manufacturing affiliate that designs, develops, or fabricates the equipment or the Bell operating company that deploys the network service shall ensure that the equipment or network service in question is compatible with existing peripheral devices or specialized customer premises equipment commonly used by persons with disabilities to achieve access, unless doing so would result in an undue burden or adverse competitive impact.

"(4) DEFINITIONS.—As used in this subsection:

"(A) UNDUE BURDEN.—The term 'undue burden' means significant difficulty or expense. In determining whether an activity would result in an undue burden, factors to be considered include—

"(i) the nature and cost of the activity;

"(ii) the impact on the operation of the facility involved in the manufacturing of the equipment or deployment of the network service;

"(iii) the financial resources of the manufacturing affiliate in the case of manufacturing of equipment, for as long as applicable regulatory rules prohibit cross-subsidization of equipment manufacturing with revenues from regulated telecommunications service or when the manufacturing activities are conducted in a separate subsidiary;

"(iv) the financial resources of the Bell operating company in the case of network services, or in the case of manufacturing of equipment if applicable regulatory rules permit cross-subsidization of equipment manufacturing with revenues from regulated telecommunications services and the manufacturing activities are not conducted in a separate subsidiary; and

"(v) the type of operation or operations of the manufacturing affiliate or Bell operating company as applicable.

"(B) ADVERSE COMPETITIVE IMPACT.—In determining whether the activity would result in an adverse competitive impact, the following factors will be considered:

"(i) whether such activity would raise the cost of the equipment or network service in question beyond the level at which there would be sufficient consumer demand by the general population to make the equipment or network service profitable; and

"(ii) whether such activity would, with respect to the equipment or network service in question, put the manufacturing affiliate or Bell operating company, as applicable, at a competitive disadvantage in comparison with one or more providers of one or more competing products and services. This factor may only be considered so long as competing manufacturers and network service providers are not held to the same obligation with respect to access by persons with disabilities.

"(C) ACTIVITY.—For the purposes of this paragraph, the term 'activity' includes—

"(i) the research, design, development, deployment, and fabrication activities necessary to comply with the requirements of this section; and

"(ii) the acquisition of the related materials and equipment components.

"(5) EFFECTIVE DATE.—The regulations required by this subsection shall become effective 18 months after the date of enactment of this section.

"(6) IMPACT OF ADA.—Nothing in this section shall be interpreted to limit or otherwise affect the application of the Americans with Disabilities Act or its implementing regulations.

"(h) PUBLIC NETWORK ENHANCEMENT.—A Bell operating company manufacturing affiliate shall, as a part of its overall research and development effort, establish a permanent program for the manufacturing research and development of products and applications for the enhancement of the public switched telephone network and to promote public access to advanced telecommunications services. Such program shall focus its work substantially on developing technological advancements in public telephone network applications, telecommunication equipment and products, and access solutions to new services and technology, including access by (1) public institutions, including educational and health care institutions; and (2) people with disabilities and functional limitations. Notwithstanding the limitations in subsection (a), a Bell operating company and its affiliates may engage in such a program in conjunction with a Bell operating company not so affiliated or any of its affiliates. The existence or establishment of such a program that is jointly provided by manufacturing affiliates of Bell operating companies shall satisfy the requirements of this section as it pertains to all such affiliates of a Bell operating company.

"(i) ADDITIONAL RULES AUTHORIZED.—The Commission may prescribe such additional rules and regulations as the Commission determines necessary to carry out the provisions of this section.

"(j) ADMINISTRATION AND ENFORCEMENT AUTHORITY.—

"(1) COMMISSION REGULATORY AUTHORITY.—For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to any Bell operating company as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act.

"(2) PRIVATE ACTIONS.—Any common carrier that provides telephone exchange service and that is injured by an act or omission of a Bell operating company or its manufacturing affiliate which violates the requirements of paragraph (7) or (8) of subsection (c), or the Commission's regulations implementing such paragraphs, may initiate an action in a district court of the United States to recover the full amount of damages sustained in consequence of any such violation and obtain such orders from the court as are necessary to terminate existing violations and to prevent future violations; or such regulated local telephone exchange carrier may seek relief from the Commission pursuant to sections 206 through 209.

"(k) RULEMAKING REQUIRED.—The Commission shall prescribe regulations to implement this section within 180 days after the date of enactment of this section.

"(l) EXISTING MANUFACTURING AUTHORITY.—Nothing in this section shall prohibit any Bell operating company from engaging, directly or through any affiliate, in any manufacturing activity in which any Bell operating company or affiliate was authorized to engage on the date of enactment of this section.

"(m) ANTITRUST LAWS.—Nothing in this section shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws (including title I of the Antitrust and Communications Reform Act of 1994).

"(n) DEFINITIONS.—As used in this section:

"(1) The term 'affiliate' means any organization or entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership with a Bell operating company. The terms 'owns', 'owned', and 'ownership' mean an equity interest of more than 10 percent.

"(2) The term 'Bell operating company' means those companies listed in appendix A of the Modification of Final Judgment, and includes any successor or assign of any such company, but does not include any affiliate of any such company.

"(3) The term 'customer premises equipment' means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

"(4) The term 'manufacturing' has the same meaning as such term has under the Modification of Final Judgment.

"(5) The term 'manufacturing affiliate' means an affiliate of a Bell operating company established in accordance with subsection (b) of this section.

"(6) The term 'Modification of Final Judgment' means the decree entered August 24, 1982, in United States v. Western Electric Civil Action No. 82–0192 (United States District Court, District of Columbia), and includes any judgment or order with respect to such action entered on or after August 24, 1982, and before the date of enactment of this section.

"(7) The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of an electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

"(8) The term 'telecommunications equipment' means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

"(9) The term 'telecommunications service' means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.".

SEC. 202. REGULATION OF ENTRY INTO ALARM MONITORING SERVICES.

Title II of the Communications Act is amended by adding at the end the following new section:

"SEC. 230. REGULATION OF ENTRY INTO ALARM MONITORING SERVICES.

"(a) REGULATIONS REQUIRED.—Not later than 6 years after the date of enactment of this section, the Commission shall prescribe regulations—

"(1) to establish such requirements, limitations, or conditions as are (A) necessary and appropriate in the public interest with respect to the provision of alarm monitoring services by Bell operating companies and their affiliates, and (B) effective at such time as a Bell operating company or any of its affiliates is authorized to provide alarm monitoring services;

"(2) to prohibit Bell operating companies and their affiliates, at that or any earlier time after the date of enactment of this section, from recording or using in any fashion the occurrence or the contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of the Bell operating company, any of its affiliates, or any other entity; and

"(3) to establish procedures for the receipt and review of complaints concerning violations by such companies of such regulations, or of any other provision of this Act or the regulations thereunder, that result in material financial harm to a provider of alarm monitoring services.

"(b) EXPEDITED CONSIDERATION OF COMPLAINTS.—The procedures established under subsection (a)(3) shall ensure that the Commission will make a final determination with respect to any complaint described in such subsection within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, as determined by the Commission in accordance with such regulations, the Commission shall, within 60 days after receipt of the complaint, issue a cease and desist order to prevent the Bell operating company and its affiliates from continuing to engage in such violation pending such final determination.

"(c) REMEDIES.—The Commission may use any remedy available under title V of this Act to terminate and punish violations described in subsection (a)(2). Such remedies may include, if the Commission determines that such violation was willful or repeated, ordering the Bell operating company to cease offering alarm monitoring services.

"(d) DEFINITIONS.—As used in this section, the terms 'Bell operating company', 'affiliate', and 'alarm monitoring services' have the meanings provided in section 106 of the Antitrust Reform Act of 1994, except that, for purposes of the term 'affiliate', to own shall refer to owning an equity interest of more than 10 percent.".

SEC. 203. REGULATION OF ELECTRONIC PUBLISHING.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 231. REGULATION OF ELECTRONIC PUBLISHING.

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

"(2) Nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture from engaging in the provision of electronic publishing or any other lawful service in any area.

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

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

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

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

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

"(4) file with the Commission annual reports in a form substantially equivalent to the Form 10–K referenced at 17 C.F.R. 249.310 as that section and form are in effect on the date of enactment;

"(5) after 1 year from the effective date of this section, not hire as corporate officers sales and marketing management personnel whose responsibilities at the separated affiliate or electronic publishing joint venture will include the geographic area where the Bell operating company provides basic telephone service, or network operations personnel whose responsibilities at the separated affiliate or electronic publishing joint venture would require dealing directly with the Bell operating company, any person who was employed by the Bell operating company during the year preceding their date of hire, provided that this requirement shall not apply to persons subject to a collective bargaining agreement that gives such persons rights to be employed by a separated affiliate or electronic publishing joint venture of the Bell operating company;

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

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

"(8) have performed annually by March 31, or any other date prescribed by the Commission, a compliance review which—

"(A) must be conducted by an independent entity which is subject to professional, legal, and ethical obligations for the purpose of determining compliance during the preceding calendar year with any provision of this section that imposes a requirement on such separated affiliate or electronic publishing joint venture; and

"(B) must be maintained by the separated affiliate for a period of 5 years subject to review by any lawful authority;

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

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

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

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

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

"(4) carry out transactions with a separated affiliate in a manner that is auditable in accordance with generally accepted accounting principles;

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

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

"(7) except for—

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

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

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

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

"(9) have performed annually by March 31, or any other date prescribed by the Commission, a compliance review which—

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

"(B) must be maintained by the Bell operating company for a period of 5 years subject to review by any lawful authority;

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

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

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

"(13) if prices for network access and interconnection for basic telephone service are no longer subject to regulation, provide electronic publishers such services on the same terms and conditions as a separated affiliate receives such services;

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

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

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

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

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

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

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

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

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

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

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

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

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

"(e) COMPLIANCE WITH SAFEGUARDS.—A Bell operating company, affiliate or its separated affiliate is prohibited from acting in concert with another Bell operating company or any entity in order to knowingly and willfully violate or evade the requirements of this section.

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

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

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

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

"(h) PERMISSIBLE JOINT ACTIVITIES.—

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

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

"(3) ELECTRONIC PUBLISHING JOINT VENTURES.—A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not any Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, provided that the Bell operating company or affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50 percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize the Bell operating company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

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

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

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

"(B) auditable in accordance with generally accepted accounting principles; and

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

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

"(3) A Bell operating company shall not provide an affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing, which such affiliate then directly or indirectly provides to a separated affiliate, and which is not made available to unaffiliated companies on the same terms and conditions.

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

"(1) Any facilities, services, or basic telephone service information provided or any assets, personnel, or anything of commercial or competitive value transferred, from a Bell operating company to any affiliate as described in subsection (i) and then provided or transferred to a separated affiliate shall be—

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

"(B) auditable in accordance with generally accepted accounting principles; and

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

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

"(3) An affiliate shall not provide a separated affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing, which were provided to such affiliate directly or indirectly by a Bell operating company, and which is not made available to unaffiliated companies on the same terms and conditions.

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

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

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

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

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

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

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

for any entity that engages in electronic publishing.

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

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

"(m) SUNSET.—The provisions of this section shall cease to apply to a Bell operating company or its affiliate or separated affiliate in any telephone exchange area on June 30, 2000.

"(n) PRIVATE RIGHT OF ACTION.—

"(1) Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may file a complaint with the Commission or bring suit as provided in section 207 of the Communications Act of 1934 (47 U.S.C. 207), and such Bell operating company, affiliate, or separated affiliate shall be liable as provided in section 206 of the Communications Act of 1934, (47 U.S.C. 207): *Provided, however*, That damages may not be awarded for a violation that is discovered by a compliance review as required by subsection (b)(8) or (c)(9) of this section and corrected within 90 days.

"(2) In addition to the provisions of paragraph (1), any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may make application to the Commission for an order to cease and desist such violation or may make application in any district court of the United States of competent jurisdiction for an order enjoining such acts or practices or for an order compelling compliance with such requirement.

"(o) ANTITRUST LAWS.—Nothing in this section shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws (including title I of the Antitrust and Communications Reform Act of 1994).

"(p) DEFINITIONS.—As used in this section—

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

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

"(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, and

"(B) wireless telephone exchange service provided by an affiliate that is required by the Commission to be a corporate entity separate from the Bell operating company.

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

"(4) The term 'control' has the meaning that it has in 17 C.F.R. 240.12b-2, the regulations promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or any successor provision to such section.

"(5) The term 'customer proprietary network information' means—

"(A) information which—

"(i) relates to the quantity, technical configuration, type, destination, and amount of use of telephone exchange service or interexchange telephone service subscribed to by any customer of a Bell operating company, and

"(ii) is available to the Bell operating company by virtue of the telephone company-customer relationship; and

"(B) information contained in the bills for telephone exchange service or interexchange telephone service received by a customer of a Bell operating company.

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

"(i) news or entertainment;

"(ii) business, financial, legal, consumer, or credit material;

"(iii) editorials;

"(iv) columns;

"(v) sports reporting;

"(vi) features;

"(vii) advertising;

"(viii) photos or images;

"(ix) archival or research material;

"(x) legal notices or public records;

"(xi) scientific, educational, instructional, technical, professional, trade, or other literary materials; or

"(xii) other like or similar information.

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

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

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

"(iii) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

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

"(v) Level 2 gateway services as those services are defined by the Commission's Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking in CC Docket No. 87–266 dated August 14, 1992.

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

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

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

"(ix) Language translation.

"(x) Conversion of data from one format to another.

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

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

"(xiii) Caller identification services.

"(xiv) Repair and provisioning databases for telephone company operations.

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

"(xvi) 911–E and other emergency assistance databases.

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

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

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

"(i) full motion video entertainment on demand; and

"(ii) video programming as defined in section 602 of the Communications Act of 1934.

"(7) The term 'electronic publishing joint venture' means a joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

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

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

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

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

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

Amend the title so as to read:

A bill to supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, United States District Court for the District of Columbia; to amend the Communications Act of 1934 to regulate the manufacturing of Bell operating companies; and for other purposes.

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 3626 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

H.R. 3626, the "Antitrust and Communications Reform Act of 1994," would supersede the line-of-business restrictions in the 1982 AT&T antitrust consent decree, replacing them with a statutory mechanism for the Bell telephone operating companies to gain entry into these lines of business as soon as competitive and public interest considerations will permit. The legislation is designed to preserve the tremendous innovative and competitive gains achieved under the consent decree, while establishing a new antitrust and regulatory policy to guide the telecommunications industry into the Information Age.

The bill sets forth complementary roles for the Attorney General, as the Nation's preeminent antitrust enforcer, and the Federal Communications Commission, as the Nation's preeminent telecommunications regulator. A limited role is also given to the States, subject to an independent Federal antitrust-based review.

The 1982 consent decree, also known as the Modification of Final Judgment, or MFJ, settled a 1974 Justice Department Sherman Act enforcement action by divesting the competitive lines of telecommunications business from the old consolidated Bell Telephone System monopoly.[1] This created the framework for a competitive environment in which the divested lines of business—long distance (interexchange) services, telecommunications equipment manufacture, and information services—could finally flourish free of the coercive and market-distorting effects of the underlying local telephone exchange monopoly.

The local exchange monopoly—which the Bell System controlled before the MFJ and which the seven regional Bells now control in their respective regions—is the lifeline to virtually every customer of every competitor in the telecommunications marketplace, referred to in antitrust terminology as an "essential facility."[2] Control over this essential facility gave the Bell System an inherent ability to impede competition in lines of business dependent upon it; and when the Bell System itself was engaging in those lines of business, it had a strong *incentive* to impede competition there as well.

It is now abundantly clear that, under the MFJ, these lines of business *have* flourished since their separation from the Bell System. In part precisely because of that flourishing, however, the telecommunications industry is beginning to look much different from the one the Department of Justice saw in 1974 or the one U.S. District Judge Harold Greene saw in 1982. New technologies now make it possible for telecommunications to bypass the local exchange monopoly in some cases. There is an increasing convergence of the traditional telecommunications industry with the once-disparate cable video transmission, broadcast, film, publishing, and other information industries into the "information superhighway." Vertical integration is beginning to occur in various parts of this converging mega-industry in ways that raise novel competitive implications. The regional Bell holding companies, once able to speak with one voice, are beginning to have divergent business goals.

These revolutionary developments counsel for a fresh look at the legal constraints now applicable to this industry. The MFJ was crafted for the industry of 1982; while its built-in review mechanism has resulted in numerous refinements to the line-of-business restrictions, the procedures have in some instances resulted in unacceptable delays in evaluating Bell company requests for changes. And communications regulatory policy was crafted for the industry of 1934.

The Committee has undertaken this "fresh look" with an appreciation for the enduring values embodied in the antitrust laws, and for the expression of those values in the MFJ's competitive entry test. The antitrust laws have never functioned as a shield to be used to protect any particular competitors; their role is to ensure

[1] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) [hereinafter *MFJ Opinion*].

[2] *See infra* note 180.

that competition itself is safeguarded as the cornerstone of the distinctive American free enterprise system.[3]

Judge Greene had this important distinction—between competitors and competition—in mind as he reviewed the proposed consent decree submitted by the Justice Department and the Bell System in 1982. Mindful of the persistent monopolistic abuses that had required the Justice Department to bring its antitrust suit, yet also mindful of the difficulty of predicting future developments in a robust, competitive industry that he hoped the MFJ would spawn, Judge Greene modified the proposed consent decree. While the parties had contemplated that the line-of-business restrictions would be a permanent legacy of divestiture, Judge Greene provided that the restrictions would be lifted "upon a showing by the petitioning Bell that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."[4]

For over 80 years, the antitrust laws have co-existed with the telecommunications regulatory apparatus as an independent and essential element of congressional policy. The Federal Communications Commission (and earlier, the Interstate Commerce Commission) has played the predominant day-to-day regulatory role, while the antitrust laws have played the overarching role of fostering competitive vigor and consumer choice.[5] This dual perspective—antitrust enforcement and public interest regulation—is reflected in the independent, complementary roles H.R. 3626 gives to the Attorney General and the FCC for evaluating proposed Bell entry into the long distance business.

The 1974 antitrust enforcement action was not the first time the Justice Department found it necessary to invoke the Sherman Act in order to free the marketplace from the Bell System's monopolistic chokehold. Twice before in this century—in 1913 and in 1949, as in 1974—the Justice Department commenced Sherman Act litigation against the Bell System.[6] Each time, a competitive crisis had revealed fundamental limitations in regulatory capability in the face of entrenched monopoly power in this technologically complex industry.[7]

Unfortunately, the first two Sherman Act enforcement actions were ultimately undercut by a loss of nerve at the political levels of the Federal Government in the face of intense political pressure brought to bear by the Bell System. In the 1913 case, the structural relief obtained was soon officially nullified; in the 1949 case, the structural relief sought was abandoned entirely. In both cases,

---

[3] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962) (antitrust laws were enacted for "the protection of *competition,* not *competitors*").

[4] *MFJ Opinion, supra* note 1, 552 F. Supp. at 225. *See infra* text accompanying notes 207–208.

[5] The benefits to consumers of free-market competition over monopoly were observed by no less an authority on the free market than Adam Smith:

> "The price of monopoly is upon every occasion the highest which can be got. The natural price, the price of free competition, on the contrary, is the lowest which can be taken. . . . The one is upon every occasion the highest which can be squeezed out of the buyers. . . . The other is the lowest which the sellers can commonly afford to take, and at the same time continue their business."

Adam Smith, Wealth of Nations 61 (Modern Lib. ed. 1937).

[6] *United States* v. *AT&T* (D. Or. 1914) (consent decree entered March 26); *United States* v. *Western Elec. Co.,* 1956 Trade Cas. (CCH) ¶68,246 (D.N.J. Jan. 24, 1956).

[7] *See infra* text accompanying notes 51–66, 89–98, 148–183.

the Justice Department left the stage, and responsibility for reining in the Bell System's monopolistic tendencies was handed over completely to the regulatory apparatus, accompanied by solemn professions of confidence in new regulatory capability.[8]

When the MFJ was approved in 1982, there was hope that this frustrating cycle had finally been broken and that the Sherman Act would be allowed to work as intended. Under the MFJ, AT&T agreed to divest its local monopoly telephone operations so that the competitive markets in which it was engaged would not be tied to the monopoly structure. To ensure that the divested local Bell telephone monopolies would not re-create the past problems of unfair exploitation of their monopoly control over access to the local telephone lines, the MFJ reinforced the divestiture by forbidding the Bells from providing information services, manufacturing telecommunications equipment, or providing long distance services—all competitive functions dependent on access to the local telephone system. A Bell could remove these restrictions upon showing that there was "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."[9] Before the MFJ took effect in 1984, the presiding judge, U.S. District Judge Harold H. Greene, permitted the 22 local Bell monopolies to recombine into seven regional Bell holding companies (RBOCs), creating seven dominant regional monopolies where a monolithic nationwide monopoly had existed before.[10]

The MFJ set in place a competitive market structure in which competition has never been more vigorous and which has provided one of the strongest engines of economic growth and job creation over the last decade.[11] The American consumer now enjoys a wider selection of telecommunications goods and services than has ever existed and, in accordance with basic antitrust principles, is the ultimate beneficiary of market-driven price competition.

But a decade of revolutionary technological change, along with sustained litigation and political pressure, has taken a toll on the MFJ's viability. As each new technological development has shifted the horizons for the telecommunications industry, the Bell companies have argued vigorously that their monopoly is waning and that the line-of-business restrictions have become obsolete. Judge Greene has been compelled by the court of appeals—in a decision premised on an unanticipated procedural quirk[12]—to remove the MFJ's information services restriction, without regard to the competitive entry test and despite his conviction that:

> the most probable consequences . . . will be the elimination of competition . . . and the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates, with the . . . local telephone monopolies as their base.[13]

[8] *See infra* text accompanying notes 67–72, 99–132.
[9] *MFJ Opinion, supra* note 1, 552 F. Supp. at 225. *See infra* text accompanying notes 207–208.
[10] *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C.), *aff'd mem. sub nom. California* v. *United States*, 464 U.S. 1013 (1983). *See infra* text accompanying note 210.
[11] *See infra* text accompanying notes 217–228, 304, 316.
[12] *See infra* text accompanying notes 266–271.
[13] *United States* v. *Western Elec. Co.*, 767 F. Supp. 308, 326 (D.D.C. 1991).

Legislation approved by the Senate in the first session of the 102d Congress, S. 173, would have removed the manufacturing restriction, again without regard for the MFJ competitive entry test. And the long distance restriction has also been under increasing assault.

The unraveling of the MFJ's competitive framework is causing instability in financial and business decisionmaking throughout this trillion-dollar industry. The thousands upon thousands of competitive enterprises now thriving in information service, telecommunications equipment, and long distance markets face the prospect of their future prosperity being decided by seven giant corporations who have monopoly "bottleneck" control over the local telephone exchange on which all these competitive enterprises must depend, for now and at least some time into the future. This is precisely the problem the 1974 Justice Department action and the MFJ have sought to prevent.

The Judiciary Committee has resolved that the Government not lose its nerve once again and allow an industry born in monopoly to be reborn in monopoly. For the sake of the democratic economic and political values which depend on the preservation of free markets,[14] it is imperative that Congress step in to reaffirm the basic competitive principles underlying the MFJ while at the same time creating room for appropriate changes in response to new technological and market developments as they occur.[15] Preserving a strong antitrust foundation will help secure a telecommunications marketplace in which the American people can be confident that they will be able to make choices on the basis of quality and price, and in which competitors can be assured of a fair chance to prosper. The Committee certainly envisions that these competitors will

---

[14] The threat of the monopolist to political freedom as well as economic independence is well known. *See, e.g.,* Eleanor M. Fox, *The Sherman Act and the World: Let Freedom Ring,* 59 Antitrust L.J. 109 (1990).

Justice Harlan recounted the widespread public concern regarding industrial monopolization which led to enactment of the Sherman Act in 1890:

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—[but] the conviction was universal that the country was in danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to then be imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong."

Standard Oil Co. of New Jersey v. *United States,* 221 U.S. 1, 83–84 (1911) (Harlan, J., concurring and dissenting).

[15] In a 1992 letter to the Committee in support of legislation to reaffirm the MFJ's competitive principles, Stanford University law professor William F. Baxter, who as President Reagan's first Antitrust Division Chief prevailed on the Bell System to enter into the MFJ, referred to the MFJ's line-of-business restrictions as:

> "the only effective and lasting solution to the Bell System's anticompetitive activities . . . especially in a complex and rapidly changing field like telecommunications."
>
> * * * * * * *
>
> As Assistant Attorney General, it was my hope that the MFJ would provide a lasting foundation for the growth of competition in business vertically related to local exchange service. Due to the incessant legal challenges to the MFJ by the [RBOCs], however, it has become clear to me that legislation is needed to restore certainty to the marketplace.

William F. Baxter, Letter to Chairman Jack Brooks 2, 4 (May 19, 1992).

eventually include the Bells—as soon as their entry is possible without unacceptably endangering the free market environment.

In the 102d Congress, the Judiciary Committee reported legislation establishing a procedure for Bell entry based on the MFJ's competitive entry test. The legislation, H.R. 5096, the "Antitrust Reform Act of 1992," was approved by a strong bipartisan vote of 24 to 9. Near the close of the 102d Congress, a hearing was held in the House Rules Committee to prepare for floor consideration of H.R. 5096, but Congress adjourned before the legislation was considered by the full House. Following adjournment, Chairman Jack Brooks of the Judiciary Committee and Chairman John Dingell of the Energy and Commerce Committee began discussing the possibility of jointly introducing legislation in the 103d Congress, that would address not only antitrust concerns but also telecommunications regulatory concerns. These discussions continued throughout the First Session of the 103d Congress, and resulted in the introduction of H.R. 3626.

As with H.R. 5096, under H.R. 3626 the Attorney General's antitrust review of proposed Bell company entry into a restricted line of business is based on the competitive entry test set forth in the MFJ. But H.R. 3626 also establishes a complementary role for the Federal Communications Commission, both in evaluating certain Bell entry applications and in regulating Bell activity once entry has occurred, thus taking into account important regulatory concerns in addition to traditional antitrust concerns. Moreover, the bill establishes new expedited procedures for evaluating proposed entry, designed to enable the Bell companies to respond more rapidly to, and participate in, technological and market innovations.

By establishing competition as the cornerstone of telecommunications policy, H.R. 3626 will promote the realization of the full societal benefits of a robustly competitive marketplace. The historical tendency of monopolies to stifle healthy competition, retard innovation, and reduce employment was observed by Judge Learned Hand:

> Possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.[16]

The history of the Bell System bears out this tendency, proving that, in telecommunications as in other industries, the most conducive environment for innovation and new product availability is a competitive market.[17] This will be especially important for speeding the availability of new telecommunications products and serv-

[16] *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945).

[17] The Bell System often strenuously resisted the introduction of new products and services, either by itself or by competitors. *See infra* text accompanying notes 41-50, 148-179.

ices to rural areas[18] and to individuals with disabilities or other special needs.[19]

Entrusting a monopoly with the responsibility of being the handmaiden of technological progress was an utterly failed policy. Entrusting progress to a free marketplace has been a resoundingly successful one. In shaping a new policy for the telecommunications revolution ahead, Congress should not unfairly exclude the Bell companies simply for the historical monopolistic abuses of their predecessor. But neither should Congress accept the notion that these seven large companies are somehow so uniquely situated to provide new products and services not already being provided in a robust free market that their monopoly power should be overlooked. With this in mind, H.R. 3626 is designed to facilitate the Bells' entry into the competitive markets as soon as—and wherever—their entry truly heralds the arrival of a new competitive opportunity, and not the return of an old anticompetitive threat.

HEARINGS

On November 22, 1993, Representative Jack Brooks, Chairman of the House Committee on the Judiciary, and Representative John D. Dingell, Chairman of the House Committee on Energy and Commerce, introduced H.R. 3626, a bill to supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82-0192, United States District Court for the District of Columbia; to amend the Communications Act of 1934 to regulate the manufacturing of Bell operating companies; and for other purposes (the bill was subsequently amended to include the short title, the "Antitrust and Communications Reform Act of 1994").

H.R. 3626 is an outgrowth of oversight and legislative hearings conducted by the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary during the 101st, 102d, and 103d Congresses.[20]

During the 101st Congress, the Subcommittee met on August 1 and 2, 1989, to receive testimony from Stephanie Biddle, executive vice president, Computer & Communications Industry Association; Lee G. Camp, vice president and general manager of information service, Pacific Bell; Barbara Easterling, executive vice president, Communications Workers of America; William T. Esrey, president and CEO, United Telecommunications, Inc.; Allen R. Frischkorn,

[18] The suggestion that only the Bell Companies will extend new services outside the major population centers should be judged against the fact that the Bell System grew up in the cities, ignoring the needs of rural areas. Responsibility for rural telephone service was typically assumed by independent carriers. Even today, the Bell companies provide service to much of rural America only through interconnection with these independent telephone companies—interconnection that the Bell System agreed to provide only after the Justice Department brought an antitrust enforcement action. *See infra* notes 43, 57-65, 291 and accompanying text.

[19] Just as with other specialized needs, a free market will spur new product development to meet the needs of individuals with disabilities more quickly than a monopolized one, because it takes more of a profit to satisfy a monopolist than a firm competing under free market conditions. Even the Bells have conceded that the development of new products for individuals with disabilities depends on marketability. When a Bell monopoly representative was recently questioned regarding the absence of any provision for special education in the new educational information service it was developing, he replied: "I don't know, I guess there's really no money in that segment of the educational market." Spokesman for Ameritech, *quoted in* Communications Daily, June 17, 1992, at 4.

[20] The Subcommittee also held oversight hearings on the MFJ during the 96th, 97th, and 100th Congresses under Chairman Rodino. *See infra* note 282.

president, Telecommunications Industry Association; Sam Ginn, chairman and CEO, Pacific Telesis Group; Albert Halprin, partner, Myerson, Kuhn & Sterret; Alan C. Hasselwander, chairman, United States Telephone Association, and president and CEO, Rochester Telephone Corp.; Robert M. Johnson, president and CEO, Newsday, Inc., on behalf of the American Newspaper Publishers Association; Gene Kimmelman, legislative director, Consumer Federation of America; William G. McGowan, chairman, MCI Communications Corporation; Brian R. Moir, partner, Fisher, Wayland, Cooper & Leader, on behalf of the International Communications Association; Wayne Robins, chairman, the Competitive Telecommunications Association, and president, ITT Communications Services, Inc.; Casimir Skrzypczak, vice president for science and technology, NYNEX Corp.; Thomas F. Smith, chairman, Alarm Industry Communications Committee, and chairman, Security, Inc.; Edwin B. Spievack, president, North American Telecommunications Association; Philip L. Verveer, partner, Wilkie Farr & Gallagher, on behalf of the National Cable Television Association; Patricia M. Worthy, vice chairman, National Association of Regulatory Commissioners, and chairman, District of Columbia Public Service Commission; John D. Zeglis, general counsel and senior vice president for government affairs, American Telephone and Telegraph Company.

The Subcommittee held three hearings on this issue during the 102d Congress. On August 1, 1991, the Subcommittee heard testimony regarding the operation of the AT&T Consent Decree from William G. McGowan, chairman and CEO, MCI Communications Corporation; Edward E. Whitacre, Jr., CEO, Southwestern Bell; Cathleen Black, president and CEO, American Newspaper Publishers Association; Gene Kimmelman, legislative director, Consumer Federation of America; Edwin B. Spievack, president/executive director, North American Telecommunications Association; Ken Allen, senior vice president, Information Industry Association; Ronald J. Binz, president, National Association of State Utility Consumer Advocates; Barbara J. Easterling, executive vice president, Communications Workers of America.

Chairman Brooks convened a second hearing on February 19, 1992, to consider competition policy in the telecommunications industry. Testimony was received from Robert E. Allen, chairman and CEO, American Telephone & Telegraph Company; David Easterly, president, Cox Newspapers; Cathleen Black, president and CEO, American Newspaper Publishers Association; Ivan Seidenberg, vice chairman for telecommunications, NYNEX Corporation; Bert C. Roberts, Jr., president and CEO, MCI Communications Corporation; Dwight D. Opperman, president and CEO, West Publishing Company; Stephen T. Lynn, president, International Brotherhood of Electrical Workers, Local 1898; Daniel J. Bruns, president and CEO, General Videotex Corporation; John V. Roach, president and CEO, Tandy Corporation.

On March 18, 1992, the Subcommittee met again, to receive testimony from government witnesses on competition in the telecommunications industry. Testimony was received from James F. Rill, Assistant Attorney General, Antitrust Division, U.S. Department of Justice; Thomas J. Sugrue, Acting Assistant Secretary for

Communications and Information, U.S. Department of Commerce; Alfred C. Sikes, Chairman, Federal Communications Commission; Hubert H. Humphrey, III, attorney general, State of Minnesota; Charlie Donaldson, assistant attorney general and chief, Energy and Utilities Unit, New York State Department of Law; David W. Rolka, chairman, Pennsylvania Public Utility Commission; William J. Cowan, general counsel, New York State Public Service Commission.

During the 103d Congress, the Subcommittee held three days of hearings. Witnesses at the January 26, 1994 hearing included Anne K. Bingaman, Assistant Attorney General for the Antitrust Division, Department of Justice; Larry Irving, Assistant Secretary for Communications and Information, Department of Commerce; Philip L. Verveer, partner, Willkie, Farr & Gallagher; and Peter W. Huber, of counsel, Kellogg, Huber & Hansen.

On February 2, 1994, the Subcommittee heard testimony from Reed E. Hundt, Chairman, Federal Communications Commission; John D. Zeglis, senior vice president-general counsel, government affairs, American Telephone and Telegraph Company; William T. Esrey, chairman and CEO, Sprint Corporation; Bernard J. Ebbers, chairman of the board of directors, Competitive Telecommunications Association (CompTel), and president and CEO, LDDS Communications; Edward E. Whitacre, Jr., chairman and CEO, Southwestern Bell Corporation; Richard W. Odgers, executive vice-president for external affairs and general counsel, Pacific Telesis Group; and James G. Cullen, president, Bell Atlantic Corporation.

The witnesses at the February 10, 1994 hearing were Frank A. Bennack, Jr., president and CEO, the Hearst Corporation, appearing on behalf of the Newspaper Association of America; Allen R. (Mike) Frischkorn, Jr., president, Telecommunications Industry Association; Robert M. McGlotten, legislative director for the AFL-CIO, appearing on behalf of the AFL-CIO, the Communications Workers of America, and the International Brotherhood of Electrical Workers; Vance K. Opperman, president of West Publishing Company, appearing on behalf of the Electronic Publishing Group; and Emil J. Wengel, Wengel Electronics Inc., Annandale, Virginia, president of the Virginia Burglar and Fire Alarm Association and chairman, legislative committee, National Burglar and Fire Alarm Association.

Over the years, numerous additional statements have been submitted to the Subcommittee from other interested parties.

COMMITTEE ACTION AND VOTE

On March 2, 1994, the Subcommittee on Economic and Commercial Law met to mark up H.R. 3626. By voice vote, the Subcommittee ordered the bill favorably reported, without amendment, to the full Committee.

On March 16, 1994, the Committee on the Judiciary met to mark up H.R. 3626. The following amendments were adopted by voice vote:

1. Representative Synar's amendment to title I, section 106, adding definitions of "affiliated enterprise" and "manufacture" to conform to the Modification of Final Judgment.

2. Representative Fish's amendment to title II that broadened the definition of electronic publishing.

3. The en bloc technical amendments package offered jointly by Chairman Brooks and Representative Fish.

4. Chairman Brooks' amendment relating to interexchange telecommunications services.

5. Chairman Brooks' amendment relating to the evidentiary standard.

6. Chairman Brooks' amendment relating to "incidental" interexchange telecommunications services, including certain cable and cellular services.

7. Representative Glickman's amendment to title II relating to small newspapers.

Representative Goodlatte's amendment to title II to delete the domestic content provision was rejected by a rollcall vote of 16 to 19.

By voice vote, with a quorum being present, the Committee ordered H.R. 3626, as amended, favorably reported to the House with recommendation that it pass.

DISCUSSION

I. HISTORICAL BACKGROUND

A. Origin of the Sherman Antitrust Act and the birth of the Bell monopoly

The Bell monopoly was hardly unique in its origins and its actions in consolidating concentrated power in the late 19th century. It may, however, have been singular in its tenacious ability to retain and project such monopoly power into the closing decades of the 20th century.

As the Industrial Revolution transformed the American economy in the decades following the Civil War, vast concentrations of economic power began accumulating in the hands of a few private interests. The ascendancy of the Age of the Robber Baron was characterized by the monopolization of vital U.S. industries through trust and cartel arrangements and predation of competitors.[21]

To counter the threat posed by unrestrained monopoly power to American economic liberty and political democracy, Congress enacted the Sherman Act in 1890.[22] Senator John Sherman, a Republican from Ohio, explained during debate the magnitude of the threat:

---

[21] *See, e.g.,* The Legislative History of the Federal Antitrust Laws and Related Statutes, pt. 1, vol. 1, at 7–13 (Earl W. Kintner ed., 1978); Walter Adams & James W. Brock, *The Sherman Act and the Economic Power Problem,* 35 Antitrust Bulletin 25 (1990); A.D. Chandler, The Managerial Revolution in American Business (1977). *See generally* H. Lloyd, Wealth Against Commonwealth (1984); M. Josephson, The Robber Barons (1934); G. Porter, The Rise of Big Business, 1860–1910 (1973).

[22] 15 U.S.C. 1 *et seq. See* William H. Taft, The Anti-Trust Act and the Supreme Court, ch. 1 (1914); H. Thorelli, The Federal Antitrust Policy: Organization of an American Tradition 129 (1955). *See generally* The Legislative History of the Federal Antitrust Laws and Related Statutes, *supra* note 21, ch. 1.

The principle that economic liberty depends on the preservation of a competitive *industrial* structure was the necessary corollary to the Founding Fathers' recognition that political liberty depends on the preservation of a competitive *governmental* structure: in the words of Thomas Jefferson, "it is not by the consolidation or concentration of powers, but by their distribution, that good government is effected." Thomas Jefferson, Jefferson: Writings 74 (Library of America ed. 1984). *See* Adams & Brock, *supra* note 21, at 26.

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities . . . Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life.[23]

The Sherman Act enshrines competition as the "charter of economic liberty"[24] by criminally prohibiting any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade," and any "monopoliz[ation of], or attempt to monopolize, any part of . . . trade or commerce."[25] The Sherman Act not only imposes stiff criminal penalties, but—in the case of entrenched monopolists—empowers the Department of Justice to obtain dissolution of the enterprise as well. In the immediate decades after the passage of the Sherman Act, Justice Department "trust-busters" used this important Sherman Act authority to rescue industry after industry from monopoly stranglehold, breaking apart entrenched monopolies in the oil,[26] railroad,[27] aluminum,[28] cast-iron pipe,[29] tobacco,[30] meat-packing,[31] and explosive[32] industries, among others.

The creation of the telephone monopoly—which would become the Nation's largest monopoly—was already aggressively underway when Congress enacted the Sherman Act.[33] In 1877, a year after Alexander Graham Bell had patented his "talking machine," the Bell Telephone Company began licensing his patents to "operating companies" to develop telephone systems in specific geographic areas.[34] In 1882, Bell Telephone designated Western Electric Com-

---

[23] 21 Cong. Rec. 2460 (1890).

[24] *Northern Pac. Ry.* v. *United States,* 356 U.S. 1, 4 (1957).

[25] 15 U.S.C. 1, 2.

[26] *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911) (controlled 90–95 percent of U.S. refining capacity).

[27] *Northern Securities Co.* v. *United States,* 193 U.S. 197 (1904); *United States* v. *Union Pac. R.R.,* 226 U.S. 61 (1912); *United States* v. *Reading Co.,* 253 U.S. 26 (1920); *United States* v. *Southern Pac. Co.,* 259 U.S. 214 (1922).

[28] *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).

[29] *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211 (1899) (controlled 55 percent of cast-iron pipe manufacturing capacity in States west and south of New York, Pennsylvania, and Virginia).

[30] *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1911) (controlled 90 percent of crop).

[31] *Swift & Co.* v. *United States,* 196 U.S. 375 (1905) (controlled 60 percent of market).

[32] *United States* v. *E.I. duPont de Nemours & Co.,* 188 F. 127 (D. Del 1911) (controlled 64–74 percent of market in five types of explosives).

[33] For a history of the development of the Bell Telephone monopoly, *see, e.g.,* Robert Bornholz & David S. Evans, *The Early History of Competition in the Telephone Industry, in* Breaking Up Bell 7–40 (D.S. Evans ed., 1983); Geoffrey M. Peters, *Is the Third Time the Charm? A Comparison of the Government's Major Antitrust Settlements with AT&T This Century,* 15 Seton Hall L. Rev. 252 (1985).

[34] Bornholz & Evans, *supra* note 33, at 8. From the beginning, Mr. Bell ceded control of his invention to financiers. Boston lawyer Gardiner Hubbard and Salem leather merchant Thomas Sanders were Mr. Bell's two original partners. G.L. Bradley assumed control with Mr. Sanders in 1878. The following year, Colonel William Forbes displaced Mr. Sanders and became president, with Theodore Vail as general manager. In 1907, a syndicate led by J.P. Morgan took control from Colonel Forbes and Mr. Bradley, and Mr. Vail replaced Frederick P. Fish as president.

Continued

pany, in which it had purchased a majority interest, as the exclusive manufacturer of its patented telecommunications equipment.[35]

Initially, Bell Telephone issued only temporary licenses, after which it could exercise its option to purchase the licensee's assets.[36] In 1881, Bell Telephone began issuing permanent licenses, in exchange for 35 percent of the licensee's stock, representation on its board, and control over its borrowing practices.[37] By 1894, Bell had acquired controlling interest in most of its licensees.[38]

Even though in the early years Bell Telephone held only a minority interest in the operating companies, it controlled them through its control of the patents, the telephones (which Bell leased directly to consumers), and the long-distance lines (which connected the operating companies to each other).[39] The licensing contracts between Bell Telephone and the operating companies gave it additional leverage by permitting it to seize the property of an operating company that violated the contract.[40]

In 1878 Bell Telephone was able to use a patent suit to drive its first potential competitor, Western Union, out of the telephone business.[41] The expiration of the original Bell patents in 1893 and 1894, however, led to the emergence of independent telephone companies and a corresponding lapse in Bell Telephone's control of the telephone market.[42] Many independents based themselves in rural areas, which Bell Telephone had shunned and would continue to shun in favor of the more lucrative large urban centers.[43] The inde-

---

This was the last major shake-up in control of the Bell System until its reorganization in 1982–1984 under the MFJ. *Id.* at 8–9, 11–12.

[35]Decision to Divest: Major Documents in U.S. v. AT&T, 1974–1984, at I-3 (Christopher H. Sterling et al. eds., 1986) [hereinafter *Decision to Divest*]. By 1925 Bell had acquired 100% ownership of Western Electric. *Id.*

[36]*Report of the Federal Communications Commission on the Investigation of the Telephone Industry in the United States* 18 (1939) [hereinafter *1939 FCC Report*] ; U.S. Dep't of Justice, *Plaintiff's Third Statement of Contentions and Proof, United States* v. *Western Elec. Co.*, No. 74-1698 (Jan. 10, 1980), at 1787 [hereinafter *1980 Justice Dep't Brief*].

[37]*1939 FCC Report, supra* note 36, at 19; *1980 Justice Dep't Brief, supra* note 36, at 1787.

[38]*1939 FCC Report, supra* note 36, at 19; *1980 Justice Dep't Brief, supra* note 36, at 1787.

[39]Bornholz and Evans, *supra* note 33, at 9–10.

[40]*Id.* at 10.

[41]*See* John Brooks, Telephone: The First Hundred Years 69–72 (1976). In 1909 Bell Telephone acquired a controlling interest in Western Union, the Nation's largest telegraph company.

[42]*1980 Justice Dep't Brief, supra* note 36, at 1788–1789; *Decision to Divest, supra* note 35, at I-3. In 1907 the 6 million telephones in service were equally divided between Bell and the independents. *1939 FCC Report, supra* note 36, at 129–130.

[43]*1939 FCC Report, supra* note 36, at 129–130, 132–133. *1980 Justice Dep't Brief, supra* note 36, at 1788. In 1907, for example, independent telephone companies provided 75 percent of the available service in West Virginia and Indiana, 93 percent in South Dakota, 78 percent in North Dakota, 84 percent in Iowa, 80 percent in Kansas, 70 percent in Missouri, 69 percent in Nebraska, 67 percent in Minnesota, and 65 percent in Arkansas. U.S. Dep't of Commerce and Labor, Bureau of the Census, *Special Reports, Telephones: 1907,* at 23 (1910).

Extension of service to "rural America" never became a high priority for the Bell System. Because it was more costly to develop than urban service, the Bell System left rural service to the independent telephone companies, mutual telephone companies, and home-made, one-wire "farmer lines." *1980 Justice Dep't Brief, supra* note 36, at 1806–1810; *Special Reports, Telephones: 1907, supra,* at 23–24; *Hearings Before the House Agriculture Subcomm.*, 81st Cong., 1st Sess. 156 (1949).

Even with all this independent and mutual activity and self-help effort, in 1945 less than one-third of America's farms had telephone service. In seven States—Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina—less than 10 percent of farms had telephone service. In 1949, it was estimated that "from a third to a half of the farms *with* telephones are receiving inferior service because of inadequate and outmoded facilities." *1980 Justice Dep't Brief, supra* note 36, at 1808; H. Rep. No. 246, 81st Cong., 1st Sess. 2–4 (1949); *Hearings Before the House Agriculture Subcomm., supra,* at 16–17.

To respond to the rural void left by the Bell System, Congress amended the Rural Electrification Act (REA) to authorize long-term, low-interest loans for telephone organizations to extend and improve rural service. In reporting the legislation, the House Agriculture Committee criticized the Bell System for "building lines where business is most profitable, establishing a rate structure on that profitable business, and then either refusing to extend lines into unprofitable pendents also established competing service in areas where there was public dissatisfaction with Bell Telephone's service.[44]

The Bell System responded to this competition aggressively. It orchestrated an intense campaign to undermine confidence in the independents on the part of the public, investors, and legislative bodies.[45] It refused to sell Western Electric equipment to the independents, and attempted to acquire control of alternative sources of equipment.[46] And it isolated competing independents by refusing to interconnect either its local exchanges or its long distance lines with them, while selectively acquiring independents in strategic positions.[47] Through these tactics, the Bell System aggressively reasserted control.

AT&T brazenly declared its monopolistic aims in its 1910 annual report:

> This process of combination will continue until all telephone exchanges and lines will be merged either into one company owning and operating the whole system, or until a number of companies with territories determined by political, business, or geographical conditions, each performing all functions pertaining to local management and operation, will be closely associated under the control of one central organization exercising all the functions of centralized general administration.[48]

By 1912 the Bell System again dominated the market.[49] By 1925, when it established Bell Telephone Laboratories to conduct its research and development, it was an entrenched nationwide monopoly.[50]

B. Early attempts at regulation, the first Sherman Act enforcement action, and the Kingsbury commitment

In their initial efforts to regulate the telephone industry, Congress and the States[51] established the pattern of paying little heed to competition as an objective.[52] The Mann-Elkins Act of 1910, in which Congress gave the Interstate Commerce Commission regulatory authority over long distance telephone service, required only

---

areas or requiring the consumer to bear the expense . . . relegating farmers in the less profitable areas perpetually to a nontelephone hinterland." H. Rep. No. 246, 81st Cong., 1st Sess. 8 (1949).

As a result of this legislation, telephone service was extended to 400,000 additional farms within 10 years. By 1979, 94 percent of American farms had telephone service. *1980 Justice Dep't Brief, supra* note 36, at 1809–1810; REA Telephone Annual Statistical Rep. 18 (1960); Dep't of Agriculture, *Agricultural Prices* 29–30 (October 31, 1979).

[44] J. Stehman, The Financial History of the American Telephone and Telegraph Company 84–95 (1967 reprint); *1980 Justice Dep't Brief, supra* note 36, at 1788.

[45] *1939 FCC Report, supra* note 36, at 136; *1980 Justice Dep't Brief, supra* note 36, at 1790.

[46] *1939 FCC Report, supra* note 36, at 137; *1980 Justice Dep't Brief, supra* note 36, at 1790–1791.

[47] *1939 FCC Report, supra* note 36, at 136–137; *1980 Justice Dep't Brief, supra* note 36, at 1791, 1798; Bornholz & Evans, *supra* note 33, at 13.

[48] *Quoted in* 1914 Att'y Gen. Ann. Rep. 13–14.

[49] Peters, *supra* note 33, at 253.

[50] *Decision to Divest, supra* note 35, at I–3. Across the country the Bell System owned 100 percent of 18 operating companies and had a majority interest in 3 others. Bornholz and Evans, *supra* note 33, at 10.

[51] By 1920 all but 3 States had established public utility commissions to regulate the practices and rates of telephone companies. *Decision to Divest, supra* note 35, at I–4.

[52] Bornholz & Evans, *supra* note 33, at 29–31. AT&T had persuaded the Congress and the States that the telephone industry would be most efficient without local competition—that it was a "natural monopoly."

that rates be "just and reasonable."[53] State utility commissions, for their part, generally *precluded* competition by refusing to certify any telephone company which would duplicate service already available.[54]

The isolated State efforts to check the consolidation of the Bell monopoly proved ineffectual. For example, when Massachusetts passed legislation during the 1890's prohibiting Bell Telephone from further expansion or acquisition in that State, Bell circumvented the prohibition by transferring control of its organization to what was until then a subsidiary, the American Telephone and Telegraph Company (AT&T).[55] AT&T then continued the expansion and acquisition efforts begun by Bell Telephone.[56]

In 1911 and 1912 several independent telephone companies complained about AT&T's acquisition practices to the Attorney General, who did nothing more than refer the complaints to the ICC for investigation.[57] In 1913, however—after a change in Administration—the new Attorney General concluded that the Justice Department's intervention was necessary.[58] AT&T was refusing to interconnect its long distance lines with competing local independents, in order to coerce them into selling out to AT&T.[59] When ordered by State regulators to interconnect, AT&T retaliated by cutting its rates to predatory levels and providing substandard interconnection service.[60] AT&T had succeeded in acquiring a number of independent long distance companies through these tactics, in-

---

[53] Pub. L. No. 218, 36 Stat. 539 (1910) (codified at 47 U.S.C. 601 (1934)). The Mann-Elkins Act was introduced to strengthen the ICC's regulatory authority over *railroads.* Extension of ICC authority to the telephone industry was accomplished abruptly by amendment on the House floor. Two of the chief sponsors of the act, Congressman Mann and Congressman Townsend, severely criticized the amendment as a hollow gesture. Congressman Mann stated:

> I think with other Members of Congress that it is desirable to include telephone and telegraph companies under government regulation. No one has yet worked out a bill which will do that. I do not know how easy that may be or how difficult it may be. I worked on it for some time myself, and did not succeed in preparing a bill or provision of law which seemed to me to amount to anything. . . .
>
> The provision of the law under which we authorize the Interstate Commerce Commission to regulate charges expressly provides that we authorize them to regulate charges for the transportation of passengers or property. Now, how ridiculous it is to stick into the amendment something which has nothing to do with either passengers or property. It amounts to nothing. It is an advertisement only of our own incompetency . . . .

45 Cong. Rec. 5533 (1910).

Mr. Townsend expressed similar concerns.

> I do not think there is any difference of opinion on the part of gentlemen on this floor as to whether the corporations named ought to be regulated or not. It is a question as to whether we do regulate them or not, and I do not believe the gentleman himself would have confidence in a proposition that he would submit thus hastily as being sufficient to cover the emergencies which he seeks to meet. Therefore, it seems to me we ought not to adopt an amendment here which practically accomplishes nothing, and the effect of which none of us understands.

45 Cong. Rec. 5534 (1910).

In the 24 years during which the ICC had jurisdiction over the telephone industry, only 24 long distance cases were brought before it and most of those were settled privately. The ICC never even established a separate office to carry out its regulatory responsibilities in telecommunications; those responsibilities were handled by scattered employees in the various offices engaged in railroad regulation. *Hearings on S. 6 Before the Senate Comm. on Interstate Commerce,* 71st Cong., 2d Sess. (1934), at 1566–1567 (statement of ICC Commissioner S. Eastman); *1980 Justice Dep't Brief, supra* note 36, at 1831; *Decision to Divest, supra* note 35, at I–5.

[54] *See Decision to Divest, supra* note 35, at I–4.

[55] Bornholz & Evans, *supra* note 33, at 11.

[56] *Id.*

[57] Peters, *supra* note 33, at 253–254.

[58] *Id.* at 254.

[59] *Id.*

[60] *Id.*

cluding Northwestern Long Distance, an independent in the Pacific Northwest.[61]

On July 24, 1913, the Department filed its first Sherman Act enforcement action against the Bell System, charging it with an unlawful combination to monopolize the transmission of telephone messages in the Pacific Northwest in violation of the Sherman Act.[62] On December 19, AT&T Vice President Nathan Kingsbury sent a letter to Attorney General J.C. McReynolds, which came to be known as the Kingsbury Commitment.[63] In the letter AT&T agreed to refrain from acquiring any additional competing telephone companies, to submit already pending acquisitions to the Department for approval, and to promptly provide interconnection to noncompeting telephone companies (but *not* necessarily to *competing* companies).[64] The Kingsbury Commitment was formalized in a March 26, 1914 consent decree in which AT&T also agreed to divest itself of Northwestern Long Distance, as well as an independent local telephone company in Spokane, Washington.[65] The consent decree terminated the Sherman Act enforcement action, as well as the ICC investigations.[66]

Within eight years, however, the Kingsbury Commitment and the 1914 consent decree had been completely nullified. After receiving complaints from some speculators who had purchased independent telephone systems with the intention of selling them to AT&T, the Attorney General "clarified" that the Commitment did not prohibit the Bell System from consolidating local telephone systems, but only from refusing to interconnect long distance companies.[67] When the citizens of Spokane voted to consolidate their independent into the Bell System—as permitted under the consent decree—the presiding court modified the decree to accommodate their desire.[68] A further modification in 1922 actually permitted AT&T to reacquire Northwestern.[69] And during the First World War, when the Nation's telephone system was under the nominal authority of the U.S. Post Office, the Postmaster General actively promoted the integration and consolidation of competing systems.[70] The Willis-Graham Act of 1921[71] nullified the remainder of the Kingsbury Commitment and the 1914 consent decree by exempting Bell acquisitions of competing telephone companies from the antitrust laws, so long as the ICC approved, thus placing sole reliance on ICC regulation to rein in the Bell System's anticompetitive ten-

---

[61] *Id.*

[62] *United States* v. *AT&T* (D. Or. 1913) (suit terminated by consent decree Mar. 26, 1914).

[63] Letter from Nathan C. Kingsbury to Attorney General J.C. McReynolds (Dec. 19, 1913).

[64] *Id.*

[65] *United States* v. *AT&T* (D. Or. 1914) (consent decree entered Mar. 26).

[66] Peters, *supra* note 33, at 255.

[67] 1914 Att'y Gen. Ann. Rep. 14; Peters, *supra* note 33, at 256.

[68] *United States* v. *AT&T* (D. Or. 1914) (order of Sept. 7, modifying decree of Mar. 26, 1914); Peters, *supra* note 33, at 255.

[69] *United States* v. *AT&T* (D. Or. 1922) (order of Oct. 20, modifying decree of Mar. 26, 1914); Peters, *supra* note 33, at 255.

[70] Actual control of the Bell System during this period remained with AT&T President Theodore Vail and Vice President U.N. Bethel. Mr. Bethel also served as chairman of the operating board overseeing all telephone and telegraph properties for the Post Office. N.C. Kingsbury, another AT&T vice president, was a member of the Committee handling telephone company consolidation matters pursuant to the Postmaster General's policy statement that consolidation should occur wherever it is "manifestly desired by the public." *1939 FCC Report, supra* note 36, at 100; *1980 Justice Dep't Brief, supra* note 36, at 1800–1801.

[71] Act of June 10, 1921, Pub. L. No. 15, Ch. 20, 42 Stat. 27 (1921) (amending Transportation Act of 1920, Pub. L. No. 152, Ch. 91 §407, 41 Stat. 456, 482) (repealed 1934).

dencies.[72] The pattern of deferring to the regulatory process until a crisis demanded antitrust action was thus established, only to be repeated to the distress of competitors and ratepayers alike.

C. Creation and early history of the Federal Communications Commission

On the ICC's regulatory watch, the Bell System continued to make acquisitions at a steady pace. The ICC rarely ever encountered an acquisition it could not find reason to approve; between 1921 and 1934 the ICC approved 272 of 275 acquisitions.[73]

Concerned about the growing size and power of AT&T, the House Committee on Interstate Commerce in 1931 commissioned Dr. Walter M. Splawn to investigate the structure and organization of the telephone industry.[74] In his 1934 final report to Congress, Dr. Splawn recommended creation of a new Federal commission with expanded powers to regulate the telephone industry.[75] A report by the Interdepartmental Committee on Communications, chaired by Commerce Secretary Daniel C. Roper, had also called for new Federal legislation to strengthen regulatory effectiveness.[76]

One area of particular concern to Dr. Splawn was the elusiveness of the Bell System's holding company structure with respect to regulatory supervision. Dr. Splawn stated:

> The holding company has been found as a result of this investigation to be as prolific of abuses in the field of communications as in other utilities already studied. . . . American Telephone and Telegraph Company, which is both a holding and an operating company, is more powerful and skilled than any State government with which it has to deal. A bill regulating communications in interstate commerce will fall far short of being effective unless it first restrict the use of the holding company to what is absolutely essential and necessary and second unless the regulation is extended to the holding company in like manner as to the operating company.[77]

---

[72] *See* Peters, *supra* note 33, at 257. The purpose of the Willis-Graham Act was described during the House debate as ensuring "that there will not be a universal monopoly existing all over the United States controlled by the Bell System, but there will be a unification of service in different localities, in some places the business being taken over by the Bell Co. and in others by the independent companies." 61 Cong. Rec. 1990 (1921) (statement of Rep. Barkley).

The Bell System, however, began aggressively acquiring independents immediately upon passage of the Willis-Graham Act. In response to expressions of alarm on the part of independents, in 1922 the Bell System sent the "Hall Memorandum" to the United States Independent Telephone Association. The Hall Memorandum assured the independents that AT&T would seek to acquire them only if such action was demanded for the convenience of the public, or for the protection of Bell property or general public telephone service. *1939 FCC Report, supra* note 36, at 142; *1980 Justice Dep't Brief, supra* note 36, at 1804.

[73] Peters, *supra* note 33, at 258. During this period the Bell monopoly was a party to another antitrust consent decree. In the early 1920's AT&T ventured into broadcasting. Despite a cross-licensing agreement with its competitors, AT&T impeded their growth by refusing them access to the Bell telephone wires to link up distant stations. When AT&T later decided to withdraw from broadcasting, it entered into an agreement with the broadcasters under which it would stay out of broadcasting and they would stay out of the telephone business. This agreement not to compete was dissolved in 1932 by an antitrust consent decree. *United States* v. *Radio Corp. of America*, 1932–39 Trade Cas. (CCH) ¶55,015 (D. Del. 1932).

[74] H.R. Res. 59, 72d Cong., 1st Sess. (1931); *Decision to Divest, supra* note 35, at I–7.

[75] *Report on Communication Companies*, H.R. Rep. No. 1273, 73d Cong., 2d Sess., pt. III, No. 1 at pp. IX–X (1934) [hereinafter *Splawn Report*].

[76] *Study of Communications by an Interdepartmental Committee*, 73d Cong., 2d Sess. (Jan. 23, 1934); *Decision to Divest, supra* note 35, at I–7.

[77] *Splawn Report, supra* note 75, at pt. I, pp. XXX–XXXI.

In response to the Splawn and Roper reports, Congress enacted the Communications Act of 1934,[78] consolidating Federal regulatory authority over the interstate operations of telephone, telegraph, and radio companies into a new Federal Communications Commission. As originally introduced, section 215 of the Communications Act would have given the FCC broad regulatory authority over contracts and transactions among the AT&T parent holding company and its various Bell System subsidiaries.[79] It would also have empowered the FCC to require competitive procurement bidding to supply the Bell System with equipment where it would be in the public interest to do so.[80]

During the hearings on the legislation, AT&T President Walter Gifford attacked these provisions as "drastic."[81] The offending provisions were stricken from the legislation; but in their place, section 215 directed the new FCC to examine and report to Congress regarding contracts and transactions between parent telecommunications companies and their subsidiaries.[82] As Senator Dill, Chairman of the Committee on Interstate Commerce explained:

> Mr. Gifford's strenuous opposition to some of the provisions of this bill has resulted in so much information being given me in the last few days as to what the subsidiaries are doing and as to the way the funds of the American Telephone & Telegraph Co. have been used that I am preparing a resolution to provide for an investigation of the American Telephone & Telegraph Co. . . . I am inclined to think that it will be a good thing for this country to have the full facts about this organization.[83]

The FCC examination of parent-subsidiary transactions that was originally directed by section 215 of the Communications Act of 1934 was absorbed the following year into a broader investigation Congress directed the FCC to conduct into all aspects of the Bell System's operations.[84] Much of the resulting 1939 FCC report focused on the relationship between AT&T and its wholly-owned subsidiary Western Electric, which gave Western Electric the exclusive contract to supply telephone and telegraph equipment to the Bell System.[85] Although the Bell Company had maintained to FCC investigators that the purpose of this relationship was simply to assure a steady supply of equipment to the network, the report concluded that its actual purpose was to secure monopoly profits for Western Electric by forcing all Bell System companies to use only Western Electric equipment.[86] Western Electric used creative accounting practices to artificially inflate the equipment's cost, the Commission found, which resulted in higher apparent operating

[78] Act of June 19, 1934, 48 Stat. 1064 (1934) (codified at 47 U.S.C. 151–609 (1982)). The Act repealed the Willis-Graham Act of 1921.

[79] *Hearings on S. 2910 before Senate Interstate Commerce Comm.*, 73d Cong., 2d Sess. 78–82 (1934) [hereinafter *1934 Hearings*]; *1980 Justice Dep't Brief, supra* note 36, at 1838.

[80] *1934 Hearings, supra* note 79, at 78–82; *1980 Justice Dep't Brief, supra* note 36, at 1838.

[81] *1934 Hearings, supra* note 79, at 78–82; *1980 Justice Dep't Brief, supra* note 36, at 1838.

[82] 78 Cong. Rec. 8824 (1934); *1980 Justice Dep't Brief, supra* note 36, at 1839.

[83] *1934 Hearings, supra* note 79, at 199; *1980 Justice Dep't Brief, supra* note 36, at 1839.

[84] Pub. Res. 8, 74th Cong. (1935); *see 1980 Justice Dep't Brief, supra* note 36, at 1841.

[85] H.R. Doc. No. 340, 76th Cong., 1st Sess. (1939).

[86] Peters, *supra* note 33, at 260–261.

company costs, and therefore higher rates charged to local telephone customers.[87]

The Second World War intervened before any response to the FCC report could be considered. During the war the Bell System worked closely with the Defense Department, devoting its resources to meeting the Government's requirements.[88]

D. The second Sherman Act enforcement action and the 1956 consent decree

As general price levels rose after World War II, the Bell operating companies subjected State regulators to repeated requests for rate increases.[89] The regulators complained to the Attorney General that they could not obtain adequate information regarding Western Electric's costs to determine whether the prices it charged the operating companies were reasonable.[90] Because Western Electric was neither a common carrier nor a public utility, it did not fall within the jurisdiction of either the FCC or the State regulatory commissions.[91]

After conducting an investigation and reviewing the FCC's 1939 report, the Department filed its second Sherman Act enforcement action against the Bell System in January 1949.[92] The complaint charged that Western Electric and AT&T had been engaged in a continuing conspiracy to monopolize and restrain trade in the manufacture, distribution, and sale of telephones and telephone equipment in violation of the Sherman Act.[93]

According to the complaint, the Bell monopoly's control of the market for telephone equipment permitted it to control the plant investments and operating expenses from which regulators determine rates to be charged subscribers for telephone service. The absence of effective competition had thus enabled the Bell System to inflate the equipment's cost, undermining the ability of Federal and State regulatory bodies to determine just and reasonable rates.

> Telephone rates are fixed upon the basis of a fair return on the investment in the telephone plant, and where such telephone plant is purchased from a single concern, it is obvious that the prices for such equipment are not determined by competition in a free market.[94]

---

[87] *Id.*

[88] Brooks, *supra* note 41, at 208–231.

[89] *See* National Ass'n of R.R. and Utils. Comm'rs, *Proceedings of the Fifty-Ninth Annual Convention* 342, 349, 354 (1948); National Ass'n of R.R. and Utils. Comm'rs, *Proceedings of the Sixty-First Annual Convention* 16 (1950); National Ass'n of R.R. and Utils. Comm'rs, *Proceedings of the Sixty-Second Annual Convention* 45 (1951); Peters, *supra* note 33, at 259.

[90] Peters, *supra* note 33, at 260.

[91] National Ass'n of R.R. and Utils. Comm'rs, *Proceedings of the Sixtieth Annual Convention* 92–95 (1949); Peters, *supra* note 33, at 260.

[92] *United States* v. *Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan. 24, 1956) (complaint filed Jan. 14, 1949), *reprinted in 1958 Hearings, infra* note 97, at 1719, *vacated and replaced*, 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24, 1982).

[93] The alleged conspiracy between AT&T and Western Electric consisted of continuing agreements: (i) to acquire control of the market in the United States for substantially all telephones, telephone apparatus, and equipment through predatory patent policies, acquisitions of independent telephone companies, and agreements with telegraph companies that the telegraph companies would not engage in telephone service; and (ii) to eliminate all substantial competition in the manufacture and sale of telephone equipment required by the Bell operating companies and the long lines department of AT&T. *Id.*

[94] *Id.*

The Department asked the court to require that Western Electric be divested from the Bell System and divided into three competing units which would sell equipment by competitive bidding to AT&T and its local Bell operating company subsidiaries.[95] The Department also asked that Western Electric and Bell Laboratories be required to license their patents to competitors on a reasonable basis.[96] In the words of the Justice Department's lead attorney in the case, the "basic purpose of the suit [was] to introduce some competition in the purchase [of telephone equipment] by the Bell operating companies and the long lines department of AT&T";[97] or, in the words of one industry analyst, "substitute the discipline of competition for the unattainable discipline of regulation."[98]

In 1956 the antitrust suit was settled by a consent decree[99] that contained virtually none of the relief originally sought in the Department's complaint. The decree did not require that Western Electric be divested from the Bell System, much less that AT&T and its operating companies buy telephone equipment under competitive bidding.[100] The Department abandoned this structural relief on the premise that Western Electric's sales to the Bell operating companies were subject to "indirect regulation."[101]

In keeping with this regulatory premise, the consent decree required Western Electric to "maintain" cost-accounting methods, consistent with generally accepted accounting principles, that would afford a valid basis for determining the cost to Western Electric of equipment sold to AT&T and the Bell operating companies.[102] But the Bell System, whose lawyers had suggested the use of the word "maintain" in the decree, decided that the accounting system already in effect at Western Electric met this requirement, and hence that no change was necessary.[103]

The consent decree also required that AT&T and the Bell operating companies confine themselves to the furnishing of basic common carrier communication services, and Western Electric to the manufacture and sale of equipment to the Bell System.[104] But this meant only that Western Electric had to stop making railroad signalling equipment and to spin off its sound recording and typesetting operations, and that AT&T and the Bell operating companies had to divest a handful of small private mobile communications leasing operations.[105]

Finally, the consent decree required Western Electric to grant any applicant a nonexclusive license for any existing Bell patent on

---

[95] *Id.; see also* Peters, *supra* note 33, at 261.

[96] *United States* v. *Western Elec. Co.,* 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan 24, 1956), *reprinted in 1958 Hearings, infra* note 97, at 1719, *vacated and replaced,* 1982–92 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug 24, 1982).

[97] *The Consent Decree Program of the Department of Justice: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary,* 85th Cong., 2d Sess. 3613 (1958) (statement of Holmes Baldridge) [hereinafter *1958 Hearings*].

[98] F. Scherer, Industrial Market Structure and Economic Performance 518–542 (1970).

[99] *United States* v. *Western Elec. Co.,* 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan. 24, 1956), *reprinted in 1958 Hearings, supra* note 97, at 1845, *vacated and replaced,* 1982–2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24, 1982).

[100] *Id.; Report of the Antitrust Subcomm. of the House Comm. on the Judiciary,* 86th Cong., 1st Sess. 35–39 (1959) [hereinafter *1959 Report*].

[101] *1958 Hearings, supra* note 97, at 3691.

[102] *1959 Report, supra* note 100, at 357.

[103] *1958 Hearings, supra* note 97, at 2620.

[104] *1959 Report, supra* note 100, at 355–356.

[105] *Id.* at 97–98.

a royalty-free basis and for any future Bell patents at a reasonable and nondiscriminatory royalty.[106] But potential manufacturers complained that this requirement was also meaningless, because as long as Western Electric remained wholly owned within the Bell System, there was no market for telephone equipment made by independent suppliers.[107]

Thus, the 1956 consent decree had little relevance to the original premise of the 1949 case: that the exclusive purchasing arrangement between Western Electric and the rest of the Bell monopoly was inherently anticompetitive and inflationary.[108] This disappointing and puzzling retreat of the Department from the original vigor of the case brought in 1949 did not go unnoticed by the House Judiciary Committee.

E. House Judiciary Committee investigation of the 1956 consent decree

Because of the vast disparity between the relief the Justice Department originally sought in the 1949 case and the relief it actually obtained in the 1956 consent decree,[109] the House Committee on the Judiciary conducted an investigation to determine whether the "Department of Justice had given AT&T special and preferred treatment."[110]

The Committee's investigation uncovered an elaborate campaign to undermine the case, orchestrated and executed by AT&T, in which AT&T enlisted the aid of top officials in the FCC, the Defense Department, and the Justice Department itself. The Committee findings were published in a 1959 report.[111]

Although AT&T had made no headway in undermining the Justice Department's resolve during the Truman Administration,[112] the Committee learned, President Eisenhower's Attorney General Herbert Brownell quickly telegraphed a significant shift in the Department's position by announcing in March 1953 that he was personally reviewing the Department's pending antitrust cases to de-

---

[106] *1958 Hearings, supra* note 97, at 4079 *et seq.*
[107] *1959 Report, supra* note 100, at 108.
[108] Peters, *supra* note 33, at 264.
[109] The Committee found that the consent decree was based on a "theoretically dubious, factually false, and legally irrelevant premise . . . ." *1959 Report, supra* note 100, at 290.
[110] *Id.* at 39. The Committee's suspicions were heightened when the Justice Department refused to provide any documentation related to the negotiations and settlement, forcing the Committee to rely on documents obtained from AT&T, the Defense Department, and the FCC. The Committee was also disturbed to learn that the Department of Defense was furnishing AT&T copies of all documents it was furnishing the Committee, including internal interoffice memoranda. *See id.* at 39–45.
Chairman Brooks is the only current Member of the Judiciary Committee who was a Member of the Committee during this investigation.
[111] *Report of the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. (1959).
[112] In February 1952, lawyers representing AT&T met with Attorney General Howard McGrath to seek postponement of the case until after the Korean War, on the basis that a trial would result in key personnel of Bell Laboratories being diverted from defense activity. In March, armed with a memo from AT&T counsel, Defense Secretary Robert Lovett wrote Attorney General McGrath advocating AT&T's position—without investigating whether Bell Laboratories personnel working on defense matters would actually be needed at trial. In April, the Attorney General denied the request on the ground that it would mean "a rather permanent abandonment of the Government's efforts to terminate acts by the defendants it believes are in violation of the antitrust laws and detrimental to the people of the country." *Id.* at 47–48. For the remainder of the Truman Administration, the Justice Department adhered to its refusal to suspend the case, despite persistent pressure from AT&T and the Defense Department. *Id.* at 45–51.

termine whether any should be dismissed.[113] At that invitation, AT&T arranged a series of meetings with top Justice Department officials, leading to a June 1953 visit between T. Brooke Price, AT&T's vice president and general counsel, and General Brownell at the Greenbrier Resort Hotel in White Sulphur Springs, West Virginia.[114]

During this visit General Brownell told Mr. Price "that a way ought to be found to get rid of the case."[115] He said AT&T "could readily find practices that [it] might agree to have enjoined with no real injury to [its] business—that if AT&T "tried" it "certainly would find things of that sort that could be used as a basis for a consent decree." He also told Mr. Price that "if a settlement was worked out, I could get the President's approval in 5 minutes."[116]

Shortly after the Greenbrier Resort rendezvous, Dr. M.J. Kelly, president of Bell Telephone Laboratories, who was fresh from a stint as a high-level unpaid Defense Department "consultant,"[117] supplied Defense Secretary Charles Wilson with a "ghost written" letter to General Brownell urging, "in the interests of national defense," settlement of the case without divestiture of Western Electric.[118] Secretary Wilson sent the letter over his own signature.[119]

Over the next 2½ years AT&T relentlessly pursued its objective. After General Brownell made clear to Mr. Price that he was not willing to dismiss the case outright, AT&T focused on achieving a painless settlement.[120]

In late 1954 General Brownell assigned Edward Foote, a new Justice Department lawyer "lacking in antitrust experience,"[121] to take charge of the settlement negotiations and report directly to him.[122] Mr. Foote soon invited Mr. Price to his home for dinner and, during their after-dinner chat, confided that he lacked confidence in the antitrust complaint and believed it would be "silly to consider trying" the case.[123]

---

[113] *1958 Hearings, supra* note 97, at 1946, 2017, 2165.

[114] *1959 Report, supra* note 100, at 52–53. AT&T's first meeting with General Brownell, in April 1953, was arranged by his friend Bayard Pope, a director of New York Telephone, a Bell subsidiary. *Id.* at 52.

[115] *Id.* at 53.

[116] *Id.* at 53. "In effect," the Judiciary Committee found, "the Attorney General of the United States was proposing that as a basis for concluding the litigation the defendants should submit to a face-saving decree that would omit the basic relief requested by the Government's complaint, namely, divorcement of Western Electric from the Bell System." *Id.* at 55.

[117] While Dr. Kelly was a consultant at the Defense Department, from January 9, 1953 through June 8, 1953, he continued to be paid as President of the Bell Telephone Laboratories. He used this position of public trust to actively lobby the Defense Department for assistance in obtaining dismissal of the antitrust suit. *See id.* at 59.

[118] *Id.* at 57.

[119] *Id.* at 56. The Defense Department soon provided additional reinforcements to AT&T. In November 1954 when Judge Stanley Barnes, head of the Antitrust Division, was continuing to press for divestiture of Western Electric as the only hope of fostering competition in equipment supply, Mr. Price visited the Defense Department's new general counsel, Wilbur Brucker, to "familiarize" him with the case. Mr. Brucker promptly wrote Judge Barnes, advocating the Bell position. *Id.* at 64.

[120] *Id.* at 59–60.

[121] *Id.* at 65.

[122] *Id.*

[123] *Id.* at 66. The Committee found that Mr. Foote's declaration—though at polar opposites with the considered judgments of the two Justice Department lawyers directing the case, who had been with the Antitrust Division 18 years and 13 years, respectively—had made a big impression on AT&T and had further undermined whatever was left of the Department's negotiating leverage. *Id.* at 67.

Mr. Foote was extremely solicitous of AT&T's perspective. For example, in August 1955, Mr. Foote called Horace Moulton, Mr. Price's successor as AT&T's general counsel, for input for a

Continued

In May 1955, General Brownell told AT&T Executive Vice President H.S. Dumas that the case "ought to be disposed of as quickly as possible" and that he would see what he could do to make it occur.[124] Mr. Foote followed up with several summer sessions with AT&T lawyers to work on a possible consent decree.[125]

During the fall of 1955, at the direction of General Brownell, Mr. Foote visited FCC Chairman George McConnaughy, accompanied by Judge Stanley Barnes, head of the Antitrust Division, to obtain the FCC's views regarding the choice between regulation and divestiture.[126] Mr. McConnaughy had formerly been counsel to Ohio Bell Telephone Company.[127] Alerted by Mr. Foote, AT&T contacted every Commissioner well in advance of the visit.[128] The FCC soon approved a letter to General Brownell adopting AT&T's point of view: "We are of the opinion that the powers encompassed within the existing regulatory framework can provide substantial safeguards against possible abuses in fixing the prices of Western [Electric] for equipment and services supplied to the telephone companies in the Bell System." [129]

With the FCC letter in hand, General Brownell met with Mr. Foote—apparently while Judge Barnes was out of town—and told him unequivocally to settle the case without divestiture of Western Electric or interference with its role as exclusive supplier to the Bell System.[130] Over the opposition of every Department lawyer involved in the litigation,[131] the Justice Department agreed to the painless settlement of which General Brownell had first hinted to AT&T General Counsel Price at the Greenbier Resort.[132]

F. Antitrust consent decree reforms and the Tunney Act

The revėlations from the hearings on the 1956 consent decree had a profound impact, not only on the House Judiciary Committee, but also on the entire Congress and—after a change in administration—the Executive Branch as well. The incoming Kennedy Administration moved quickly to address the Judiciary Commit-

memorandum he was preparing for Judge Barnes on the various alternatives under discussion for settlement. Mr. Moulton helpfully supplied Mr. Foote with a series of memoranda, on paper with no letterhead or references to authorship by AT&T, which purported to set forth objectively the pros and cons regarding each alternative, with conclusions in favor of AT&T's position. Mr. Foote met with General Brownell and Judge Barnes on August 25, informing Mr. Moulton the next day that he had advocated AT&T's position. *Id.* at 69–71.

[124] *Id.* at 68. This meeting was also arranged by General Brownell's friend Bayard Pope.

[125] *Id.* at 71.

[126] *1958 Hearings, supra* note 97, at 3686.

[127] *1959 Report, supra* note 100, at 72. The FCC had distinguished itself during this period by granting the Bell monopoly a $65 million increase in long distance tariffs—the first general increase in the FCC's history—without holding a hearing. *See id.* at 78.

[128] *1958 Hearings, supra* note 97, at 2423.

[129] *See id.* at 3692. The Commissioners had deleted key language from the draft submitted by the FCC's Common Carrier Bureau. The draft emphasized that regulation could be effective only if it were "properly and vigilantly administered," which was "largely dependent upon the resources [he did not mention resolve] of the respective agencies." The draft had deferred to the Justice Department on the central questions of whether a competitive market for telecommunications equipment was feasible and would be beneficial and whether Western Electric was inflating its prices. As indicated in a memorandum to the FCC from the Chief of the Common Carrier Bureau written six months after entry of the consent degree, adequate yardsticks by which to evaluate the reasonableness of Western Electric's prices had not been developed. *Id.* at 3521, 3542.

[130] *1959 Report, supra* note 100, at 83.

[131] *Id.* at 85. The two Department lawyers directing the litigation both refused to sign the consent decree, stating that they would rather see the case dismissed outright than settled without divestiture. *Id.* at 84–85, 90.

[132] *Id.* at 94.

tee's concern that the Justice Department's consent decree procedures were shrouded in a "twilight zone" of secrecy and unaccountability.[133]

The Justice Department soon initiated a more vigorous antitrust enforcement policy under Attorney General Robert Kennedy, which included consent decree procedures designed to encourage full public and court review before a consent decree became final.[134] However, revelations of secret ex-officio political deals and other questionable practices regarding the negotiation of antitrust consent decrees resurfaced under the Nixon Administration, when a 1971 consent decree with the International Telephone & Telegraph Co. (ITT) was reported to have been tailored in ITT's favor as a quid pro quo for ITT's donation of $400,000 to help underwrite the 1972 Republican national convention.[135] Renewed congressional concern led to enactment of the "Antitrust Protection and Procedures Act of 1974," commonly referred to as the Tunney Act,[136] to "substitute sunlight for twilight."[137]

The Tunney Act requires that a proposed antitrust consent decree be filed with the district court and published in the Federal Register at least sixty days before taking effect.[138] The proposed decree must be accompanied by a competitive impact statement, available to anyone upon request, explaining the antitrust problem which led to the Department's lawsuit and the reasons for the particular remedy chosen in the proposed decree.[139]

The primary purpose of public participation is to assist the district court in making an "independent determination" as to whether the proposed consent decree is in the "public interest."[140] Although negotiation of a consent decree is an enforcement function of the Executive Branch, "actual entry of the proposed consent decree is an exercise of judicial power."[141] The Department's consent decree proposals were, therefore, to be subjected to close judicial scrutiny rather than a judicial "rubber stamping."[142] The Tunney Act requires the court to make a public interest determination before entering a decree, and gives the court broad authority to consider all public and private ramifications of the decree and to conduct whatever procedures the court deems appropriate to assist in

---

133 *Id.* at 15.

134 In 1961 the Attorney General issued an order announcing that proposed consent judgments would be filed in court at least thirty days prior to entry, to afford persons who "may be affected by such judgment" opportunity to submit written comments to the Justice Department. The Department would reserve the right to "withdraw or withhold its consent to the proposed judgment if the comments, views or allegations submitted disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper or inadequate." American Bar Association, Antitrust Law Developments 239 (1975).

135 *The ITT Controversy Revisited,* Time, Aug. 13, 1973, at 18–19; Oppenheim et al., Federal Antitrust Laws Sec. 1, at 1036 & n.83 (4th ed. 1981).

"We don't know how the decree got entered, thanks to the operation of the shredding machine." *The Antitrust Procedures and Penalties Act: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 142 (1973) (testimony of Worth Rowley).

136 Pub. L. No. 93–528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(b)–(h)(1982)). *See* S. Rep. No. 93–298, 93d Cong., 1st Sess. (1973) [hereinafter *1973 Senate Report*]; H. Rep. No. 93–6535 [hereinafter *1973 House Report*].

137 *1973 House Report, supra* note 136, at 6–7.

138 Pub. L. No. 93–528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(b)(1982)).

139 *Id.*

140 *1973 Senate Report, supra* note 136, at 4.

141 *1973 House Report, supra* note 136, at 8.

142 *Id.*

that consideration.[143] The legislative history makes clear that Congress intended the court to play an active role, giving the court authority to condition entry of the decree on specific changes to it.[144] The court was also to play an active role in shaping the "appropriate judicial procedures" for "future modifications" to a consent decree.[145]

To put an end to secret ex parte "lobbying contacts" outside normal litigation channels, the Tunney Act requires the defendant to disclose all written or oral communications on its behalf with any U.S. Government official, other than those made by its counsel of record with Justice Department lawyers.[146] This disclosure includes any contact with another Federal agency, as well as any contact with the Justice Department by a representative of the defendant other than its counsel of record—even if its counsel of record is also present.[147]

G. Technological and regulatory developments following the 1956 consent decree

The 1956 consent decree left the FCC once again in the front lines of policing the telecommunications industry. It also left AT&T as the largest, most powerful corporation in the world.[148] The next two decades were marked by a series of technological developments—innovations which the Bell System mightily resisted—accompanied by marginal efforts by the FCC to cope with the competitive challenges brought on by these developments.

The first competitive challenge was in the field of telecommunications equipment. Immediately prior to and following the consent decree, a number of small manufacturers of various types of telecommunications equipment tried valiantly to compete for business with AT&T's subsidiary Western Electric.[149] AT&T responded to these threatened competitive incursions aggressively, by forbidding interconnection of competitors' terminal equipment with the Bell System and threatening to terminate phone service to any customer who disobeyed.[150] Protracted but ultimately ineffective FCC inquiries ensued, with AT&T arguing that to permit customers to attach non-Bell equipment to the network would degrade service and endanger telephone employees.[151]

The first of these inquiries[152] concerned the Hush-a-Phone, a cup-like device that attached to a telephone to enable a more private conversation.[153] In 1948 the Hush-a-Phone Corporation chal-

---

[143] Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(e)(f) (1982)).
[144] *1973 House Report, supra* note 136.
[145] *Id.* at 9.
[146] Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(g) (1982)).
[147] *1973 Senate Report, supra* note 136, at 7.
[148] *See* Fortune Directory, Fortune, July 1957 supp., at 28.
[149] David S. Evans, *Introduction, in* Breaking up Bell (D.S. Evans ed., 1983).
[150] Brooks, *supra* note 41, at 298.
[151] *Id.*
[152] An earlier competitive challenge to AT&T, which came before the FCC immediately following World War II, concerned telephone recording devices developed for military use during the war and of interest to business customers after the war. AT&T was prohibiting the attachment of these devices to its network because they were not made by Western Electric. In *Use of Recording Devices*, 11 F.C.C. 1022 (1947), the FCC ordered AT&T to allow attachment of these devices since Western Electric was not satisfying demand for them. Deferring to AT&T's professed need to protect the safety and integrity of its network, however, the FCC ruled that connection could only be made through a special apparatus "provided, maintained, and installed by AT&T."
[153] *Hush-a-Phone Corp.*, 20 F.C.C. 391, 392 (1955), *rev'd*, 238 F.2d 266 (D.C. Cir. 1956).

lenged the Bell System's policy prohibiting the attachment of non-Bell equipment; in 1955—more than four years after oral argument had concluded—the FCC ruled in favor of AT&T.[154] The United States Court of Appeals for the D.C. Circuit, however, reversed the FCC's decision as arbitrary because there was no evidence that use of the Hush-a-Phone would harm the network.[155]

AT&T's hostility toward "foreign" equipment persisted, however. In the mid-1960's Thomas F. Carter invented and marketed the "Carterfone," a device for interconnecting two-way radios with the telephone system, which involved some electrical connection to the Bell network.[156] AT&T informed Carterfone subscribers that use of the Carterfone was prohibited and would subject them to heavy penalties under AT&T's tariff provisions.[157] Rather than take his complaint to the FCC, Mr. Carter filed a private Federal antitrust suit.[158] The court ordered the case removed to the FCC—but retained jurisdiction to revisit the matter after the FCC had made its ruling.[159]

Thus prompted by the court, the FCC ruled the Bell System's prohibitive tariffs unlawful, since they frustrated a customer's right to attach any equipment that did not harm the network; but the FCC failed to provide guidelines on interconnection, leaving the decision up to AT&T.[160] AT&T's response was to allow unrestricted interconnection, but to require use of a special "protective connecting arrangement," available only through AT&T for a tidy fee.[161] The complaints continued, eventually forcing the FCC to establish its *own* pre-testing and registration program for AT&T's "protective connection arrangement" policy.[162]

At the same time that the FCC was struggling to come to grips with the implications of competition in the telecommunications equipment market, it was also confronting new horizons for competition in long distance service as a result of technological developments. In the 1950's scientists discovered that microwaves (later, supplemented by satellites) could be used to transmit telephone conversations; compared to the traditional pole and copper wire, microwave networks could be created—and duplicated—with ease.[163] Over the next two decades, various enterprising companies attempted to extend this microwave technology ever further into the long distance market in competition with AT&T's Long Lines

---

[154] *Id.* at 394.

[155] *Id.*

[156] *Carter* v. *AT&T,* 250 F. Supp. 188 (N.D. Tex.), *aff'd,* 365 F.2d. 486 (5th Cir. 1966), *cert. denied,* 385 U.S. 1008 (1967).

[157] *Id.*

[158] *Id.* at 189.

[159] *Id.* at 188.

[160] *Carterfone,* 13 F.C.C. 2d 430, *aff'd on recon.,* 14 F.C.C. 2d 605 (1968); *Decision to Divest, supra* note 35, at I–10.

[161] *See AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C. 2d 605 (1968).

[162] *Intrastate and Foreign Message Toll Telephone Service,* 56 F.C.C. 2d 593 (1975) (first report and order), *modified on recon.,* 58 F.C.C. 2d 716 (1976), 58 F.C.C. 2d 736 (1976) (second report and order), *aff'd sub nom. North Carolina Utils. Comm'n* v. *FCC,* 552 F.2d 1036 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977). During the course of the Justice Department's 1974 Sherman Act enforcement action, AT&T was unable to prove any harm to the network resulting from elimination of the "protective connecting arrangement" requirement. *See MFJ Opinion, supra* note 1, 552 F. Supp. at 163.

[163] Harold H. Greene, *The AT&T Litigation and Executive Policies Toward Judicial Action,* 24 Land & Water L. Rev. 229 (1989).

Division.[164] The Bell System's reaction was characteristically hostile; the FCC's attempt to ascertain the competitive implications proved characteristically halting.

In signature fashion the Bell System leveraged its local exchange bottleneck to preserve its long distance monopoly. It refused to interconnect its customers to its microwave competitors, or—when forced to interconnect—exacted an exorbitant price for interconnection; and no practical alternatives for interconnection existed.[165] The Bell System used its vast financial resources to wage protracted legal and administrative proceedings to delay or prevent a potential competitor's entry into the long distance market.[166]

The FCC's initial policy was to license private microwave systems only to organizations with specialized internal communication needs, such as broadcasters, railroads, and fire departments; but in 1956 the FCC began reviewing that policy to determine if a wider range of private microwave systems should be approved.[167] Despite Bell protests that it would result in enormous diversion of revenues from existing carriers, the FCC established a "liberal licensing" policy, concluding that there were sufficient frequencies to serve all applicants and that AT&T's warnings were exaggerated.[168]

Ten years after the FCC's review began, its "liberal licensing" policy was put to the test. Microwave Communications Inc. (MCI) filed an application to use a microwave system to provide specialized voice and data transmission service between Chicago and St. Louis to companies with offices in both cities, at a rate considerably less than that charged by AT&T.[169] AT&T vigorously opposed the application, realizing that the technology used to deliver private-line and specialized services could also be used to deliver basic long distance service to the public—and that if MCI were granted this limited service application, more extensive applications to provide long distance service would not be far behind.[170] After a protracted and costly three-year battle, the FCC ultimately granted MCI's application in a 4–3 decision, reasoning that MCI's proposed service was sufficiently different from the service provided by AT&T to be in the public interest.[171]

The FCC was quickly inundated with applications from companies seeking to offer more extensive long distance services, with MCI leading the way.[172] The FCC opened the floodgates, then beat a hasty retreat: it issued liberal guidelines for evaluating the multitude of applications before it—noting that competition was in the "public interest"[173]—but failed to issue guidelines regarding access to the Bell System's local exchange facilities.[174]

Thus left to its own devices by the FCC, AT&T exploited its monopoly bottleneck as it had throughout its history. Complaints

[164] *Id.* at 229–230.
[165] *See* Roger G. Noll & Bruce M. Owen, *United States* v. *AT&T: An Interim Assessment, in* Future Competition in Telecommunications 146–149 (Steven Bradley & Jerry Hausman eds., 1990).
[166] *See* Evans, *supra* note 149, at 1–2.
[167] *Allocation of the Frequencies in the Bands Above 890 MC.,* 27 F.C.C. 359, 360–361 (1959).
[168] *Id.* at 359.
[169] *Microwave Communications, Inc.,* 18 F.C.C. 2d 953 (1969).
[170] *Decision to Divest, supra* note 35, at I–10.
[171] *Microwave Communications, Inc.,* 18 F.C.C. 2d 953 (1969).
[172] Peters, *supra* note 33, at 266.
[173] *Specialized Common Carrier Decision,* 29 F.C.C. 2d 870 (1971).
[174] *Decision to Divest, supra* note 35, at I–10.

abounded that AT&T was delaying or denying interconnection to its competitors and was engaging in predatory pricing.[175]

When the complaints reached the FCC, however, they were met by regulatory paralysis. The FCC had already shown that it did not want to immerse itself into the details of interconnection by offering meaningful guidelines for "equal access."[176] As to the complaints regarding predatory pricing, the FCC had not investigated AT&T's pricing structure, and had no policy regarding telephone service pricing structure.[177] With no detailed cost data of its own on the Bell monopoly, nor a policy regarding pricing structure, the FCC was not prepared to address the numerous complaints.[178] MCI and other competitors and would-be competitors of the Bell system turned to the Justice Department for help.[179]

H. The third antitrust enforcement action and the 1984 Modification of Final Judgment

By the fall of 1974, it was again apparent that regulation would not curtail the Bell System's anticompetitive tendencies—indeed, that it was characterized by inaction and equivocation. As a result, on November 20, 1974, Attorney General William Saxbe authorized the Justice Department to file its third Sherman Act enforcement action against AT&T. The Department asserted that the Bell System was "leveraging" its monopoly position in local telephone exchange services—an "essential facility" or "strategic bottleneck" under antitrust doctrine[180]—to unlawfully impede competition in the markets for interexchange (long distance) services, customer premises equipment (such as telephones), and telecommunications equipment (such as network switching and transmission equipment).

The Bell System's anticompetitive conduct and behavior was similar to actions attacked in the earlier Sherman Act suits. For example, the Bell System was alleged to have discriminated against its competitors in the quality of access it provided to its local telephone network, by giving competing interexchange carriers technically inferior connections and charging them greater access charges, or by denying equipment manufacturers essential in-

---

[175] Peters, *supra* note 33, at 267.

[176] In *MCI* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) and *MCI* v. *FCC*, 580 F.2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980 (1978) [hereinafter the *Execunet Decisions*], the FCC eventually ordered the Bell System to permit competitors to interconnect. The FCC, however, was never able to establish standards or rates for interconnection; the standards were ultimately established in the MFJ. *See MFJ Opinion*, *supra* note 1, 552 F. Supp. at 131.

[177] Not until the end of 1965 did the FCC even *begin* a comprehensive investigation of AT&T's interstate rate structure. The FCC discontinued the investigation in 1971 because of limited resources, prompting Congress to appropriate supplemental funds. With the additional, earmarked funds, the FCC established a special task force to resume the investigation, including 15 accountants and 7 economists. Even then, the investigation was not completed until 1977. *The Associated Bell Companies Charges for Interstate Telephone Service*, FCC Docket 19129 Phase II Final Decision and Order (March 1, 1977); *1980 Justice Dep't Brief*, *supra* note 36, at 1843–1844; *Overview of the Federal Communications Commission: Hearings before Subcomm. on Telecommunications of the Senate Commerce Comm.*, 92d Cong., 2d Sess. 24–29 (1972).

[178] Noll & Owen, *supra* note 165, at 147.

[179] *See infra* text accompanying note 313.

[180] The essential facilities antitrust doctrine applies where one firm controls a facility for which duplication is infeasible and denies a second firm reasonable access to that facility, thereby inflicting severe hardship. *See United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Otter Tail Power Co.* v. *United States*, 410 U.S. 360, 377 (1972); *Hecht* v. *Pro-Football, Inc.* 570 F.2d 982, 992 (D.C. Cir. 1977); *MCI* v. *AT&T*, 708 F.2d 1081 (7th Cir. 1983); *Alaska Airlines* v. *United Airlines*, 948 F.2d 539 (9th Cir. 1991).

formation regarding the local exchange network. The Bell System was also engaging in predatory cross-subsidization by artificially depressing the prices it paid for Western Electric equipment and by allocating Western Electric's costs to the ratemaking base borne by telephone customers. The Department further asserted that the Bell System was engaging in monopolistic self dealing—for example, by requiring affiliated local operating companies to acquire switching equipment from Western Electric rather than a lower-priced or higher-quality competitor.[181]

The Department had concluded that the vertically integrated structure of the Bell System—combining the local exchange monopolies with related competitive functions—was inherently anti-competitive.[182] The very existence of the Bell monopoly discouraged other firms from attempting to compete in telecommunications markets. So the Department again sought, as it had in its 1949 Sherman Act action, divestiture of those lines of business in which the promise of competition was being squelched by the Bell System's anticompetitive practices.

Immediately prior to and during the course of the Justice Department litigation, the FCC attempted—again without success—to find a regulatory response to the Bell System's anticompetitive structure and practices. The FCC commenced a number of actions designed to prevent discrimination and cross-subsidization. These proceedings were generally complex and protracted and the FCC ultimately either abandoned the actions as being unworkable or adopted rules without any appreciable impact on the telecommunications problems alleged.[183]

Congress also considered a number of legislative responses to the competitive issues raised by AT&T's vertically integrated monopoly.[184] Many of these bills, rather than seeking to separate the bot-

---

[181] In its opening memorandum on jurisdictional issues, the Department of Justice detailed 30 specific acts which the Bell System had committed in violation of the antitrust laws.

[182] In 1983, immediately prior to divestiture, AT&T had $150 billion in assets, $70 billion in gross revenues and nearly one million employees. Its subsidiaries were the dominant monopoly providers in the areas of local exchange services (22 wholly-owned local operating companies), equipment manufacturing (Western Electric Company, Inc.), interexchange services (Long Lines Division) and research and development (Bell Laboratories Inc.).

[183] The difficulty of regulating the telecommunications manufacturing line of business was exemplified in FCC Docket No. 19129. The initial investigation was terminated due to insufficient funds. *See* 32 F.C.C. 2d 691, 692 (1971). Congress subsequently appropriated additional funds to complete the investigation, but six years later the FCC concluded that it could not meaningfully audit AT&T pricing activities with regard to equipment:

> In sum then, this record shows that the result of the entire Bell System procurement . . . processes is that the preponderant portion of the BOCs' telecommunications equipment requirements would be provided by Western, not necessarily due to product superiority in terms of quality and price, but merely as a result of the present organization and functioning of the Bell System entities themselves. This resultant bias in favor of Western products limits not only the autonomy and independence of the BOCs to procure equipment and better serve their ratepayers, but also precludes a fair opportunity for the general trade to serve BOCs' equipment needs.

64 F.C.C. 2d 1, 41 (1977).

In the area of long distance, although the *Execunet Decisions, supra* note 176, required the Bell System to permit its long distance competitors to interconnect with the local operating company networks, the FCC was never able to establish standards and rates for the interconnections. FCC Dockets 16258 and 18128 (which continued for a total of 12 years, ending in 1977) unsuccessfully sought to address cost allocation questions. It was left for the Department of Justice and the courts, through the MFJ, to ultimately impose appropriate interconnection standards.

[184] *See* H.R. 12312, 94th Cong., 2d Sess. (1976) (intricate requirements for franchise termination); H.R. 12323, 94th Cong., 2d Sess. (1976) (stringent FCC and State regulatory authority); H.R. 12816, 94th Cong., 2d Sess. (1976) (FCC authority to preempt any Act of Congress designed to regulate domestic common carrier acquisitions); H.R. 13015, 95th Cong., 2d Sess.

tleneck local exchange monopolies from the related competitive functions, proposed a detailed set of rules to prevent Bell System cross-subsidies, discriminatory access, and related anticompetitive abuses. Because of the complexity, and ultimately, insolubility of the competitive problem through any sort of regulatory response, Congress was unable to reach a consensus on any of these proposals.

The only bill to be favorably reported by a committee of the House of Representatives during this period was H.R. 6121, the "Telecommunications Act of 1980." This bill would have deregulated substantial portions of AT&T's activities, without mandating any sort of divestiture of those subsidiaries active in the competitive lines of business. H.R. 6121 was approved by the House Committee on Interstate and Foreign Commerce on August 25, 1980, with the backing of the White House, the Commerce Department, the Department of Defense, and AT&T. The supporters of H.R. 6121 claimed it was in the "national interest," because "deregulation" of the Bell System and the telecommunications industry was necessary to foster competition.[185] Once again, at the first prospect of more favorable treatment in an alternative forum, AT&T sought to derail the antitrust enforcement effort and have the 1974 Sherman Act suit dismissed. Accordingly, AT&T argued that Congress "is a more appropriate forum for a resolution of this fundamental issue of industry structure than are the courts."[186] In April 1980, the chairman of the board of AT&T testified that H.R. 6121 rendered the Justice Department antitrust suit unnecessary: "[I]t seems to me that the suit is obsolete . . . . Anyway, if the administration is in favor of [H.R. 6121, which does not require divestiture], I don't understand what the Justice Antitrust Division is doing off on some other tack."[187]

The House Judiciary Committee, after conducting several hearings on the serious antitrust implications of H.R. 6121, reported the legislation adversely. In contrast to the structural relief sought by the Justice Department in its antitrust suit, the Committee noted, H.R. 6121 would require no divestiture of any sort; indeed, it permitted AT&T to enter substantial new areas of business activity which were off-limits even under the diluted 1956 consent decree. In additional views published in the Committee's Report, Congressman Jack Brooks emphasized the enormity of the competitive stakes involved:

> Despite claims that the purpose of this bill is to promote competition, it is clear that the effect will simply be to permit AT&T and other monopoly carriers to enter unregulated areas, such as computers, information services, and data communications. This area, commonly referred to as

---

(1978) (extensive exemptions from judicial restrictions on holdings and acquisitions); S. 611, 96th Cong., 1st Sess. (1979) (detailed classification and regulation); H.R. 3333, 96th Cong., 1st Sess. (1979) (denial of antitrust exemptions); H.R. 6121, 96th Cong., 1st Sess. (1979) (comprehensive regulations); S. 2827, 96th Cong., 2d Sess. (1980) (exempting the Bell System from restrictions on providing telecommunication facilities, services, and equipment); S. 898, 97th Cong., 1st Sess. (1981) (same); H.R. 5158, 97th Cong., 1st Sess. (1981) (same).

[185] H.R. Rep. 1252, 96th Cong., 2d Sess., pt. 2, at 15 (1980).

[186] *Id.* at 2.

[187] *Id.* at 2–3, *citing* Merrill Brown, *AT&T Chairman—Congress Should Set Policy, Not F.C.C.*, Wash. Post, Apr. 16, 1980, at B1.

> the information industry, is already highly competitive and consists of thousands of firms. It is also an industry that has made great advances in technology and innovation, which has put this country far ahead of foreign competitors.
>
> The sudden entry of a giant competitor the size of AT&T into this market will have a profound impact on the industry and on the consumer. It is impossible to measure that impact with any precision. In fact, the result may be exactly the opposite of what is intended. The result is as likely to smother competition and innovation as it is to enhance those objectives.[188]

The Judiciary Committee's adverse report sounded the death knell for H.R. 6121. Despite the broad apparent support for the bill initially, it was not taken up by the full House of Representatives, and never reached the Senate.

During this period a number of Bell System competitors, unable to achieve a "level playing field" through statutory or regulatory action, were forced to seek private antitrust relief based on grounds and theories similar to the Justice Department's antitrust suit. Although these actions also proved to be costly, complex, and time consuming, many competitors were ultimately successful in proving antitrust violations on the part of AT&T and obtaining monetary damages.[189]

Due to a number of jurisdictional[190] and discovery disputes, the Justice Department antitrust litigation continued through the beginning of President Reagan's new administration in 1981, at which time Assistant Attorney General William F. Baxter assumed responsibility for the case.[191] Several Reagan Cabinet members, including Commerce Secretary Malcolm Baldrige and Defense Secretary Caspar Weinberger, sought to undermine the Justice Department's case.[192] But Mr. Baxter, though a judicial conservative, proved an uncompromising prosecutor in this case. He insisted, as one of the trial team lawyers put it later, that bringing the Sherman Act case against the Bell System "was the one good thing the [Justice Department's] Antitrust Division had done in the last 30 years."[193] The trial of the Justice Department's case began on January 15, 1981, in the United States District Court for the District of Columbia before Judge Harold H. Greene. At the conclusion of opening arguments, Judge Greene suspended proceedings, at the

---

[188] H.R. Rep. 1252, 96th Cong., 2d Sess., pt. 2, at 41 (1980).

[189] *See, e.g., MCI* v. *AT&T,* 708 F.2d 1081 (7th Cir. 1982), *cert. denied,* 464 U.S. 891 (1983) (on remand, MCI obtained a $111 million jury verdict against AT&T for antitrust violations relating to the long distance market); *Litton Sys., Inc.* v. *AT&T,* 700 F.2d 785 (2d Cir. 1983), *cert. denied,* 464 U.S. 1073 (1983) ($276 million jury verdict against AT&T for antitrust violations relating to the equipment market).

[190] AT&T contended telecommunications industry regulation had conferred antitrust immunity on the Bell System and provided exclusive jurisdiction to the FCC. The court twice rejected these contentions. *United States* v. *AT&T,* 427 F. Supp. 57 (D.D.C. 1976); *United States* v. *AT&T,* 461 F. Supp. 1314 (D.D.C. 1978). *See also Southern Pac. Communications Co.* v. *AT&T,* 740 F.2d 980, 999 (1984); *Otter Tail Power Co.* v. *United States,* 410 U.S. 360, 377 (1972); *MCI* v. *AT&T,* 708 F.2d 1081, 1101 (7th Cir. 1983); *Phonetele* v. *AT&T,* 664 F.2d 716 (9th Cir. 1981); *Mid-Texas Communications Sys.* v. *AT&T,* 615 F.2d 1372 (5th Cir. 1980).

[191] Attorney General William French Smith recused himself from the AT&T case because he had previously served on the board of directors of Pacific Telephone, an AT&T subsidiary.

[192] *See* Steve Coll, The Deal of the Century: The Break Up of AT&T 185–186, 189, 211 (Atheneum 1986).

[193] *Id.* at 182.

parties' request, to give them another opportunity to negotiate a settlement. The parties attempted to work out a partial divestiture, involving some of the Bell operating companies, accompanied by comprehensive rules which would prevent AT&T from leveraging its remaining control of the local exchange into other lines of business. The parties found it impossible, however—as had others in the legislative and regulatory arenas—to develop rules that would satisfactorily protect competition if AT&T were permitted to retain any control of the local exchange bottleneck. As a result, the negotiations were abandoned.

Twelve months into the trial, after the Department had completed its case, hundreds of witnesses had testified, and the court had rejected AT&T's motion to dismiss,[194] the parties commenced further negotiations. On January 8, 1982, the Antitrust Division and AT&T agreed to a proposed settlement under which the local Bell operating companies would be divested from AT&T. As a "prophylactic measure," the divested local Bells would be barred from entering the lines of business which were dependent on the local exchange bottleneck—interexchange services, customer premises equipment and telecommunications equipment manufacturing, and information services—as well as all non-telecommunications businesses. AT&T would be permitted to retain its competitive interexchange and equipment manufacturing businesses.

The Bell operating companies would be required to provide all long distance carriers and information service providers with exchange services equal to those provided to their former parent AT&T, and would be prohibited from discriminating between AT&T and other persons with regard to the procurement and provision of products and services. The Bell operating companies would be authorized to participate jointly in providing engineering and technical services and in meeting national security and emergency preparedness needs.[195]

While the district court was to retain antitrust jurisdiction to resolve issues and disputes arising under the consent decree, the settlement would not preempt the ability of Federal or State regulators to continue their supervision of the telecommunications industry. The compatibility of complementary antitrust and regulatory oversight was thus expressly reaffirmed.[196]

With keen awareness of the broad-based dissatisfaction with what many viewed as the politically influenced settlement of the 1949 Justice Department antitrust action, the court decided to conduct extensive proceedings under the Tunney Act to determine whether the proposal was in the "public interest."[197] Based on evi-

---

[194] *United States* v. *AT&T,* 524 F. Supp. 1336 (D.D.C. 1981).

[195] A centralized staff organization pertaining to these services and needs was proposed in the plan of reorganization submitted by AT&T and approved by the district court. This organization subsequently evolved into Bell Communications Research (commonly referred to as "Bellcore"), which is jointly owned and controlled by the seven RBOCs.

[196] *MFJ Opinion, supra* note 1, 552 F. Supp. at 212 ("the FCC itself has conceded . . . that it has limited authority with respect to the structure of the telephone industry"). *See also United States* v. *AT&T,* 427 F. Supp. 57 (D.D.C. 1976) (holding FCC regulation was not incompatible with Justice Department antitrust action); *United States* v. *AT&T,* 461 F. Supp. 1314 (D.D.C. 1978) (same).

[197] The Justice Department initially asserted the proceeding was not subject to Tunney Act procedures, arguing that modifications of preexisting antitrust decrees were not subject to Tunney Act protections. *See, e.g.,* Celillianne Greene, *The 1982 Consent Decree—Strengthening the*

Continued

dence introduced at trial and comments submitted by more than 600 interested persons, Judge Greene found the basic framework of the proposal to be clearly justified by the extent of the Bell System's anticompetitive conduct and the manifest failure of regulatory efforts to curtail it. The court agreed with the central premise of the case—that the local exchange monopoly was an "essential facility," which the Bell System had been unlawfully leveraging into related competitive markets:

> The key to the Bell System's power to impede competition has been its control of local telephone service. The local telephone network function is the gateway to individual telephone subscribers. It must be used by long-distance carriers seeking to connect one caller to another. Customers will only purchase equipment which can readily be connected to the local network through the telephone outlets in their homes and offices. . . . [A]ccess to AT&T's local network is crucial if long distance carriers and equipment manufacturers are to be viable competitors.[198]

The court also cited specific instances in which the Bell System was abusing its bottleneck control of the local exchange. For example, in the area of interexchange services the court found that "it was because of [AT&T's] ownership and control of the local Operating Companies—whose facilities were and are needed for interconnection purposes by AT&T's competitors—that AT&T was able to prevent those competitors from offering FX [foreign exchange] and CCSA [common control switching arrangement] services [two specialized forms of long distance]."[199] With regard to customer premises equipment, the court noted that "AT&T's control over the local Operating Companies was central . . . to [its] anticompetitive behavior."[200] In the telecommunications equipment market, the court found:

> AT&T used its control over the local Operating Companies to force them to buy products from Western Electric even though other equipment manufacturers produced better products or products of identical quality at lower prices.[201]

Although the information services industry was then in its infancy, the court concurred with the Bell System and the Department in finding that a continued prohibition on local operating company participation was justified due to the strong likelihood of future anticompetitive conduct in this vital marketplace:

> All information services are provided directly via the telecommunications network. The Operating Companies would therefore have the same incentives and the same ability to discriminate against competing information service providers that they would have with respect to competing interexchange carriers. . . . [T]he Operating Compa-

Antitrust Procedures and Penalties Act, 27 How. L.J. 1611, 1630 (1984). The Department ultimately acquiesced, however, and Tunney Act procedures were administered.

[198] *MFJ Opinion, supra* note 1, 552 F. Supp. at 223.
[199] *Id.* at 162.
[200] *Id.*
[201] *Id.* at 163.

> nies could discriminate by providing more favorable access to the local network for their own information services than [for] the information services provided by competitors, and . . . would be able to subsidize the prices of their services with revenues from the local exchange monopoly.[202]

The Justice Department presented substantial evidence that the Bell System's monopolistic tendencies were impervious to regulatory remedies, which had served as ineffective resolutions to the two previous Sherman Act prosecutions. As Judge Greene recalled later in his 1987 triennial review opinion:

> Walter Hinchman, who was chief of the [FCC] Common Carrier Bureau from 1974 to 1978, said that "I didn't feel that . . . we were at all effective in . . . controlling competitive practices or creating an environment for really full and fair competition," and that, for a variety of reasons, there was a special regulatory void with respect to the Operating Companies. Bernard Strassburg, chief of the Common Carrier Bureau from 1963 to 1973, concurred, testifying that the Commission had a limited budget; that it had to rely to a large extent upon the Bell System to supply it with technical information; and that its expertise to go behind the Bell System's representations was also extremely limited.[203]

Based on this evidence and other submissions, the court concluded that "[f]or a great many years, the Federal Communications Commission has struggled, largely without success, to stop [anticompetitive] practices . . . through the regulatory tools at its command."[204]

Judge Greene approved the settlement, subject to a few modifications,[205] and on August 24, 1982, the consent decree became final.[206] The most important of Judge Greene's changes to the proposed decree was a provision permitting the divested local Bell operating companies to eventually enter the interexchange, equipment manufacturing, information services, and non-telecommunications markets. Although the initial proposed decree contained an absolute bar to Bell entry into these markets, Judge Greene concluded that "over time, the Operating Companies will lose the ability to leverage their monopoly power into the competitive markets from which they must now be barred."[207] Judge Greene's "competitive entry test," now found in section VIII(C) of the MFJ, therefore provided that an operating company was to be permitted entry into a competitive line of business "upon a showing by the petitioning BOC [Bell operating company] that there is no substantial possibil-

[202] *Id.* at 189 (footnote omitted).
[203] *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 531 (D.D.C. 1987) (citations and footnotes omitted) [hereinafter *District Court Triennial Review Opinion*], *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).
[204] *MFJ Opinion*, *supra* note 1, 552 F. Supp. at 223.
[205] *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1982).
[206] Because it constituted a modification of the 1956 consent decree, it is known as the "Modification of Final Judgment," or "MFJ."
[207] *MFJ Opinion*, *supra* note 1, 552 F. Supp. at 194.

ity that it could use its monopoly power to impede competition in the market it seeks to enter."[208]

Other modifications to the proposed settlement included permitting the local operating companies to provide (but not manufacture) customer premises equipment and to publish "yellow page" directories, and temporarily prohibiting AT&T from providing electronic publishing over its own transmission lines. Judge Greene had concluded that it was unlikely that the local operating companies could leverage their monopoly power into the yellow pages market or the customer premises equipment supply market. On the other hand, he was concerned that, initially at least, AT&T could use its market power in interexchange services to impair competition in the markets for electronic publishing, which—as the subset of information services involving control of information content—implicated important First Amendment values.[209]

The AT&T divestiture became effective on January 1, 1984, creating seven independent regional Bell operating companies (RBOCs) out of the 22 local Bell operating companies.[210] The Bell System reorganization was the largest corporate restructuring in American history. Pursuant to the divestiture plan, 77 percent of the Bell System's assets and nearly 600,000 employees were assigned to the RBOCs, which at the time of their "birth" retained aggregate revenues of $60 billion.[211]

The Department of Justice agreed to make recommendations to Judge Greene every three years concerning the continuing need for the antitrust-based line-of-business restrictions imposed under the MFJ;[212] this process has become known as the MFJ's "triennial review."[213] In addition to this periodic review, the court has considered hundreds of RBOC requests for limited waivers from the line-of-business restrictions. These requests are initially reviewed by the Department of Justice and, if approved by the Department, are forwarded to the court for examination under the MFJ's competitive entry test.[214]

---

[208] *Id.* at 225. This test finds its basis directly in Sherman Act doctrine—described as early as 1912 in *United States* v. *Terminal R.R. Ass'n., supra* note 225—regarding "essential facilities" or "strategic bottlenecks." *See District Court Triennial Review Opinion, supra* note 203, 673 F. Supp. at 536.

[209] On July 28, 1989, the court found that AT&T did not have bottleneck control of the interexchange services market and was, therefore, permitted to enter the electronic publishing market. *United States* v. *Western Elec. Co.,* 1989-2 Trade Cas. (CCH) ¶68,673 (D.D.C. 1989).

[210] The AT&T proposed plan of reorganization was filed on December 16, 1982, and was approved by the court with minor modifications on August 5, 1983. *United States* v. *Western Elec. Co.,* 569 F. Supp. 1057 (D.D.C.), *aff'd mem. sub nom. California* v. *United States,* 464 U.S. 1013 (1983).

[211] As of the end of 1991 the seven RBOCs (sometimes referred to as "Baby Bells") had aggregate revenues of $80 billion. If they were ranked by assets on the "Fortune 500" list, they would separately constitute 7 of the largest 20 corporations in the United States.

[212] *MFJ Opinion, supra* note 1, 552 F. Supp. at 195.

[213] The first recommendations by the Department of Justice were made in 1987. On July 17, 1989, with the court's rulings on the Department's 1987 recommendations still on appeal, the court ruled that the Department could postpone filing its next triennial review recommendations until the appellate review process was completed. *United States* v. *Western Elec. Co.,* 1989-2 Trade Cas. (CCH) ¶68,670 (D.D.C. 1989). The last appeal of the first triennial review was concluded November 15, 1993, when the Supreme Court declined to grant a petition for certiorari regarding Judge Greene's decision removing the information services restriction. *Consumer Federation of America* v. *United States,* 114 S. Ct. 487 (1993).

[214] *See United States* v. *Western Elec. Co.,* 592 F. Supp. 846 (D.D.C. 1984); U.S. Department of Justice, *Revised Procedures For Line-of-Business Waiver Request, Comments, and Responses* (Jan. 19, 1990). Judge Greene has granted some 150 waivers, permitting the RBOCs entry into a variety of businesses. The fields of business into which the RBOCs have been permitted entry pursuant to the waiver procedure include (i) the provision of relay services to deaf and speech-impaired customers; (ii) the offering of cellular services between designated geographic areas;

Interested third parties have played a significant role under the MFJ. While Judge Greene did not grant these entities the status of original parties to the MFJ, they have been permitted to intervene in a number of proceedings.[215] Judge Greene has noted that such groups have been granted "substantive rights in these proceedings—rights which for all intents and purposes have been equal to those possessed . . . by the parties to these lawsuits."[216]

I. Competitive Fruits of the Modification of Final Judgment

Before its divestiture under the MFJ, AT&T was a fully integrated vertical monopoly, maintaining a bottleneck monopoly of the local exchange while controlling approximately 95 percent of the long distance market and well in excess of 90 percent of many equipment manufacturing markets.[217] Since the AT&T divestiture, competition and its attendant benefits—lower costs and increased innovation—have taken hold and begun to flourish in the telecommunications marketplace.

Under the competitive influence of the MFJ, AT&T's market shares in long distance service and equipment manufacturing have both dropped substantially from their previous monopoly levels, as other companies have been able to enter the field. AT&T's share of the long distance market has dropped to 60 percent.[218] Its market share in equipment manufacturing has fallen even more dramatically; for example, its share of the business premises systems equipment market has dropped under 30 percent domestically and under 10 percent worldwide.[219] Federal Communications Comm'n, *Trends in Telephone Service* 9 (October 1993) (second quarter 1993 data, measured in switched access minutes).

Simultaneous with the steep decline in AT&T market shares, the equipment and long distance markets have experienced striking price reductions, as acknowledged in the Justice Department's 1987 triennial review report to Judge Greene.[220] A 1991 study of the post-divestiture U.S. telecommunications equipment market notes that since divestiture "prices for many [telecommunications equipment] products have been dropping steadily,"[221] and *Telephony*

(iii) interexchange services in connection with emergency 911 services; and (iv) time and weather information services.

[215] *See, e.g., District Court Triennial Review Opinion, supra* note 203, 673 F. Supp. at 529 (approximately 170 organizations and individuals permitted to intervene in triennial review proceedings).

[216] *MFJ Opinion, supra* note 1, 552 F. Supp. at 218–219.

[217] *See Competition in the Interstate Interexchange Marketplace,* 5 F.C.C.R. 2627, 2630 (1990) (notice of proposed rulemaking), 6 F.C.C.R. 5880 (1991) (report and order), *recon.,* 6 F.C.C.R. 7569 (1991), *further recon.,* 7 F.C.C.R. 2677 (1992), *petitions for recon. pending;* Antitrust Div., U.S. Dep't of Justice, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry* (prepared by Peter W. Huber as consultant to the Department) at 14.9 Table CO.6 (January 1987) [hereinafter *Huber Report*].

[218] Federal Communications Comm'n *Trends in Telephone Service* 9 (October 1993) (second quarter 1993 data, measured in switched access minutes).

[219] *AT&T Investor Relations Bulletin* (March 31, 1992) (1992 data, taken from Northern Business Information and Dataquest).

[220] U.S. Dep't of Justice, *Report and Recommendation Concerning the Line of Business Restrictions Imposed on the Bell Operating Companies by the Modification of Final Judgment* 183 (transmission systems have "declined sharply in cost"), 190–191 ("significant price decreases" for public branch exchanges), 200 ("prices of handsets, paging sets and key system have fallen steadily in recent years"); *Huber Report, supra* note 217, at 15.1 ("large declines in the cost of fiber-optic equipment and cable"), 17.1 ("prices have dropped steadily" for handsets), 17.2 table T.3 (prices for key systems "falling steadily").

[221] Independent Data Communications Mfrs. Ass'n, Northern Am. Telecommunications Ass'n, and Telecommunications Indus. Ass'n, *The Post-Divestiture U.S. Telecommunications Equipment*

Continued

magazine stated in its 1991 domestic review that "there is ample evidence that [telephone exchange carriers] are getting more bang for their equipment buck as a combination of technology improvements and competitive pressure drives down the cost of equipment."[222] The long distance market has also seen significant price reductions since the MFJ. According to the FCC, during the period from January 1984 to September 1993, AT&T's charges for interstate calls have been reduced approximately 40 percent—by more than *half* when adjusted for inflation.[223]

The telecommunications equipment and long distance markets—as well as the information services markets—have been characterized by an unprecedented degree of innovation since the entry of the MFJ.[224] In describing the domestic telecommunications network equipment market, the Commerce Department recently noted that "[o]ne of the benefits of the intense competition in the U.S. marketplace has been strong technological and manufacturing innovation in the network equipment sector."[225] This competitive innovation has resulted in dramatic improvements in the balance of trade in telecommunications equipment—with an overall surplus of $578 million for 1993 and a surplus in the more sophisticated "high end" equipment market of $3.7 billion.[226]

The long distance sector has also been characterized by the creation of numerous significant competitors and innovations. There are currently in excess of 400 long distance competitors—in addition to AT&T, MCI and US Sprint, the market includes ten long distance carriers with annual revenues totalling in excess of $130

Manufacturing Industry: The Benefits of Competition 3–5 (March 2, 1990). *See also* Walter G. Bolter & James W. McConnaughey, *Innovation and New Services, in* After the Breakup: Assessing the New Post-AT&T Divestiture Era (1991) (A "decline in prices has also been experienced by terminal equipment for fiber systems. This is due in part to the fact that manufacturers' input prices have been rapidly declining. . . . These price declines are in turn reflected through lower costs for the local exchange carriers"); Lawrence Sullivan and Ellen Hertz, *The AT&T Antitrust Decree: Should Congress Change the Rules?*, 5 High Tech. L.J. 233, 242 (prices for customer premises equipment have "dropped significantly" since divestiture).

[222] Telephony, Dec. 16, 1991, at 16, 24.

[223] Federal Communications Comm'n, *Trends in Telephone Service* 9 (Oct. 1993); *see also* U.S. Dep't of Commerce, *U.S. Indus. Outlook 1991*, 29–3 (1991) ("[t]he key factor driving the long distance industry, especially the residential market, is price competition"); Applied Economics Partners, *Long Distance: Public Benefits from Increased Competition* (Oct. 1993) (63% real price decline in long distance rates since 1985). While the dramatic price reduction experienced in the long distance market results, to some extent, from a reduction in long distance access charges, the FCC has determined that AT&T long distance rates have declined in real terms even after taking account of the reduction in access charges. *See Policy and Rules Concerning Rates for Dominant Carriers*, 4 F.C.C.R. 2873, 2995, 3339-3340 (1989) (report and order and second further notice of proposed rulemaking), *modified on recon.*, 6 F.C.C.R. 665 (1990), *remanded, AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992).

[224] The FCC described the post-MFJ telecommunications market as follows: "In place of the monolithic Bell System, customers may now select their telecommunications equipment and services from hundreds of suppliers offering an ever-expanding menu of choices." *Price Cap Performance Review for AT&T*, 7 F.C.C.R. 5322 (1992) (notice of inquiry), 8 F.C.C.R. 5165 (1993) (report).

The Bell System had only a very limited presence in the information services industry before the MFJ, due to restrictions in the 1956 Consent Decree. *See supra* note 105 and accompanying text; *MFJ Opinion, supra* note 1, at 138 n.17, 178 n.198. Nevertheless, the competitive environment nurtured by the MFJ has enabled this industry to flourish as well. Department of Commerce figures showed that in 1992, the U.S. information services industry comprised almost 25,000 independent businesses directly employing nearly a million people, who were "finding innovative and cost effective ways to create, store, manipulate, and cross-correlate information . . . ." U.S. Dep't of Commerce, *U.S. Indus. Outlook 1992*, at 26–1, 26–2. The Commerce Department also found that the United States information services industry accounted for more than half of the world's 6200 data bases and that the major U.S. firms had a strong presence overseas, deriving 30 percent of their revenues from foreign customers. *Id.*

[225] U.S. Dep't of Commerce, *U.S. Indus. Outlook 1994*, at 30-4 (1994).

[226] U.S. Dep't of Commerce, *U.S. Telecommunications Trade in 1993* (year-end 1993).

million.[227] The high degree of innovation in long distance is indicated by the fact that between July 1989 and March 1992, AT&T introduced 77 new long distance services, including incoming and outgoing 800 service, teleconferencing, video conferencing, and least-cost long distance routing.[228]

The competitive environment stimulated by the MFJ stands in stark contrast to the local exchange business, in which the RBOCs continue to hold monopoly power. Since the effective date of the MFJ, local exchange rates have continued to increase,[229] even as the RBOCs have *eliminated* more than 100,000 jobs.[230]

J. Recent regulatory experience

Federal Communications Commission regulatory proceedings since divestiture have focused on various information services and other "enhanced" telecommunications services not governed by the MFJ. In part because of characteristic shortages in regulatory resources, it has proven difficult to devise any regulatory scheme that will enable the FCC to effectively challenge the Bells' subjective engineering and procurement judgment. In a 1993 report on the FCC's efforts to control cross-subsidization, the General Accounting Office found that while the FCC's responsibility for overseeing carrier cost allocations has continued to grow, "the staff resources allocated to this function have declined rather than increased . . . [and] the number of FCC auditors remains inadequate to provide a positive assurance that ratepayers are protected from cross-subsidization."[231] Limited FCC enforcement resources have, in turn, resulted in a significant backlog of complaints.[232] These and other

---

[227] *See AT&T Communications*, 7 F.C.C.R. 807, 808 (1992), *rev'd, AT&T* v. *Federal Communications Comm'n*, 978 F.2d 727 (D.C. Cir. 1992); *Trends in Telephone Service, supra* note 218, at table 24.

[228] *Price Cap Performance Review for AT&T, supra* note 224, at 5325.

[229] *See Trends in Telephone Service, supra* note 218, at table 5, 6.

[230] *See* AT&T, *Information Statement and Prospectus* (Nov. 8, 1983); 1992 RBOC Annual Reports. In recent years, there have been a number of sometimes conflicting studies relating to the possible effects on jobs resulting from RBOC entry into competitive lines of business. *See* U.S. Dep't of Labor, *Employment Implications of Eliminating the Domestic Manufacturing Prohibition of the AT&T Consent Decree* (Dec. 1989) (transmittal memorandum from Roderick A. DeArment, Deputy Secretary of Labor, to Michael Boskin, Chairman of the Council of Economic Advisors, Jan. 19, 1990) (Department of Labor staff study concluded that lifting MFJ's manufacturing restriction could cost an estimated 18,000-27,000 U.S. jobs if two or three RBOCs joint venture with foreign firms to manufacture switching equipment); WEFA Group, *The Economic Impact of BOC Participation in the Information Services Industry* (May 1992) and *Economic Impact of Eliminating the Line of Business Restrictions on Bell Companies* (July 1993) (commissioned by the RBOCs) (projected significant job increases subsequent to RBOC entry into information services and long distance); Letter from Dr. Paul Craig Roberts to John D. Zeglis, Senior Vice President and General Counsel, AT&T (Sept. 10, 1992) (projected that allowing RBOC equipment market entry would cost jobs and put telephone ratepayers at risk of higher rates); Professor Ray Marshall, *The Employment Impact of Repealing the AT&T Divestiture Consent Decree* (Sept. 29, 1992) (commissioned by Unity Coalition) (predicted that codifying restrictions would increase employment by removing business expectations of RBOC monopoly abuse); Economics and Technology, Inc/Hatfield Associates, *The Enduring Local Bottleneck: Monopoly Power and the Local Exchange Carriers* (Feb. 1994) (commissioned by AT&T, MCI, and the Competitive Telecommunications Ass'n) (projected loss of 600,000 jobs resulting from premature MFJ relief to RBOCs). These widely divergent studies indicate the high economic stakes involved and demonstrate why extreme care must be taken in deciding when, and under what conditions, to permit RBOC entry into restricted lines of business.

[231] U.S. General Accounting Office, *Telecommunications—FCC's Oversight Efforts to Control Cross-Subsidization*, RCED-93034, at 12 (Feb. 1993). This report was a follow-up to a 1987 GAO report which had found that the FCC may only be able to audit carriers once every 16 years. *Telephone Communications—Controlling Cross-Subsidy Between Regulated and Competitive Services*, RCED-88-34, at 54 (Oct. 1987).

[232] Roy Morris & J. Scott Nichols, *Federal Communications Commission Enforcement: Telecommunications Crisis for the 1990's*, at 1 (1992) (FCC able to meet the statutory deadline in

Continued

inherent regulatory limitations underscore the danger of diminishing the role of antitrust enforcement in deciding when the Bells should be granted entry into adjacent competitive telecommunications markets.

The FCC's "Computer III" decision offers an instructive example. In that decision, the FCC removed the structural safeguard it had previously imposed on RBOC provision of enhanced services, that they be provided only through separate subsidiaries.[233] In place of that safeguard, the FCC attempted to devise nonstructural approaches such as "open network architecture" rules requiring RBOCs to "unbundle" their monopoly exchange services so that they can be purchased separately,[234] and special cost accounting requirements.[235] In 1990, the FCC's removal of the structural safeguard was overturned by the Ninth Circuit Court of Appeals.[236] The court held that there was no support for the FCC's determination that market and technological changes had reduced the danger of RBOC cross-subsidization, and that it was "arbitrary and capricious" for the FCC to rely on cost accounting regulations to provide adequate regulatory protections.[237]

Since divestiture, the RBOCs have been found to have committed a number of anticompetitive acts,[238] including impeding competi-

less than 5 percent of the cases); *see also* letter from Alfred C. Sikes, Chairman of the Federal Communications Comm'n, to the Honorable John D. Dingell, Chairman of the House Committee on Energy and Commerce (November 15, 1991) (responding to Morris & Nichols study and, among other things, asserting that the statutory deadline does not apply to all complaints filed); U.S. General Accounting Office, *Telecommunications—FCC's Handling of Formal Complaints Filed Against Common Carriers,* RCED-93-83 (March 1993) (FCC took an average of 18 months to close formal tariff complaints and 21 months to close nontariff complaints).

[233] Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, 104 F.C.C. 2d 958 (1986), *recon.,* 2 F.C.C.R. 3035 (1987), *further recon.,* 3 F.C.C.R. 1135 (1988), *second further recon.,* 4 F.C.C.R. 5927 (1989), *vacated, California* v. *FCC,* 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 F.C.C.R. 3072 (1987), *recon.,* 3 F.C.C.R. 1150 (1988), *further recon.,* 4 F.C.C.R. 5927 (1988), *vacated, California* v. *FCC,* 905 F.2d 1217 (9th Cir. 1990).

[234] *Filing and Review of Open Network Architecture Plans,* 4 F.C.C.R. 1 (1988), *recon.,* 5 F.C.C.R. 3084 (1990), *amended,* 5 F.C.C.R. 3103 (1990), *erratum,* 5 F.C.C.R. 4045, *recon.,* 8 F.C.C.R. 97 (1993), *petitions for review denied, California* v. *FCC,* 4 F.3d 1505 (9th Cir. 1993), *further amended,* 6 F.C.C.R. 7646 (1991), *petition for review denied, MCI* v. *FCC,* No. 92-70189 (9th Cir. Dec. 8, 1993).

[235] *See Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards,* 6 F.C.C.R. 7571 (1991) [hereinafter *BOC Safeguard Order*], *petitions for recon. pending, petitions for review filed, California* v. *FCC,* No. 92-70083 (9th Cir. Feb. 14, 1992).

[236] *California* v. *FCC,* 905 F.2d 1217 (9th Cir. 1990).

[237] *Id.* at 1238. In response to the Ninth Circuit reversal, the FCC has reinstated the RBOC ONA obligations on an interim basis. *Computer III Remand Proceeding,* 5 F.C.C.R. 7719 (1990), *recon.,* 7 F.C.C.R. 909 (1992), *petitions for review denied, California* v. *FCC,* 4 F.3d 1505 (9th Cir. 1993); *BOC Safeguard Order, supra* note 235.

[238] The Committee does not attempt to describe all of the allegations of anticompetitive conduct by the RBOCs since divestiture. For a detailed description of the numerous complaints of RBOC post-divestiture abuses, see Dr. Mark N. Cooper, *Divestiture Plus Eight: The Record of Bell Company Abuses Since the Break-Up of AT&T* (Dec. 1991); National Cable Television Ass'n, *The Never-Ending Story: Telephone Company Anticompetitive Behavior Since the Break-Up of AT&T* (April 1991); Association of Telemessaging Services Int'l, *Incidents of Telco Abuse* (Feb. 21, 1992); Unity Coalition, *Anticompetitive and Anticonsumer Practices of the Regional Bell Operating Companies Since the Break-up of the Bell System* (1993). The RBOCs responded to a number of these assertions in connection with hearings held during the 102d Congress. *See Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 2), Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* Serial No. 60, 102d Cong., 2d Sess. 221-276 (Feb. 19, 1992) (response of Ivan Seidenberg, Vice Chairman of NYNEX).

tion in voice storage and retrieval,[239] directory publishing,[240] cellular telephone services,[241] interactive video,[242] and coinless telephones.[243] In addition, the RBOCs have been found to have illegally cross-subsidized their affiliates,[244] and to have violated the MFJ's core line-of-business restrictions.[245] These experiences highlight the propensity of various RBOCs to exploit their monopoly power and indicate the continuing limitations of Federal and State regulatory capabilities.[246]

K. The unraveling of the Modification of Final Judgment

The core of the MFJ has been its competitive entry test, which prohibited RBOC entry into the information services, equipment manufacturing, and long distance markets until there is "no sub-

---

[239] *See, e.g., Southern Bell Tel. and Tel. Co.'s Provision of Memory Call Service,* No. 4000–U (Georgia Public Service Comm'n, June 4, 1991) (Commission found that Southern Bell had undermined competition in the voice mail market by providing its rivals inferior service). The FCC subsequently asserted jurisdiction over this matter. *BellSouth,* 7 F.C.C.R. 1619 (1992), *aff'd per curiam sub nom. Georgia Pub. Serv. Comm'n* v. *FCC,* 5 F.3d 1499 (11th Cir. 1993).

[240] *See, e.g., Great Western Directories* v. *Southwestern Bell Tel. Co.,* No. CA–2–88–0218 (N.D. Tex. Dec. 7, 1993) (Southwestern Bell assessed $15 million in antitrust damages for anticompetitive conduct), *appeal docketed,* No. 93-1715 (5th Cir. Jan. 7, 1994).

[241] *See, e.g., Huber Report, supra* note 217, at 4.9–4.19 (several RBOCs offering technically inferior interconnection to cellular competitors and charging discriminatory interconnection rates).

[242] *City Signal, Inc.,* No. U-10225 (Mich. Public Service Comm'n, May 21, 1993) (Michigan Bell found to have priced its interactive video service at an anticompetitive below-cost level).

[243] *United States* v. *Western Elec. Co.,* 583 F. Supp. 1257 (D.D.C. 1984) (Pacific Bell found to have discriminated against coinless phone competitors by refusing to provide service unless expressly ordered to do so by the California Public Utilities Commission).

[244] The most publicized cross-subsidization case involved allegations that NYNEX had diverted $118 million in excess profits from its regulated subsidiaries through equipment purchases. *See* John R. Wilke and Mary Lu Carnevale, *Wrong Numbers: NYNEX Overcharged Phone Units for Years, FCC Audit Says,* Wall St. J., Jan. 9, 1990, at A1. Although the allegations were originally brought to light as a result of a series of newspaper articles, investigations subsequently ensued at the Federal and State regulatory levels. *See New York Tel. Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates,* 5 F.C.C.R. 5892 (1990), *recon. denied,* 6 F.C.C.R. 3303, *aff'd sub nom. New York State Dep't of Law* v. *FCC,* 994 F.2d 1209 (D.C. Cir. 1993) (consent decree whereby NYNEX reduced its interstate prices by $35.5 million, had an investment write-down of $32.6 million, and contributed approximately $1.4 million to the Federal Treasury); *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 3), Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* Serial No. 60, 102d Cong., 2d Sess. 120–133 (March 18, 1992) (testimony of Charlie Donaldson, Assistant Attorney General, New York) (New York Public Service Commission continued investigation after FCC had ceased its inquiry). Ultimately, NYNEX agreed to restrict all contacts between its regulated and unregulated subsidiaries. New York Public Serv. Comm'n, Press Release, February 20, 1992. In addition to the NYNEX matter, a number of additional cross-subsidy allegations have been lodged against the RBOCs. *See, e.g., Anticompetitive and Anticonsumer Practices of RBOCs Since the Break-up of the Bell System, supra* note 238. The RBOCs respond that very few of these allegations have been proven in a court or administrative proceeding.

[245] *United States* v. *Western Elec. Co.,* 1989–1 Trade Cas. (CCH) ¶68,421 (D.D.C. 1989)(U.S. West entered a civil enforcement consent order acknowledging violations of the MFJ's prohibitions against offering information services); *United States* v. *Western Elec. Co.,* 1991–1 Trade Cas. (CCH) ¶69,329 (D.D.C. Feb. 15, 1991)(U.S. West agreed to pay a $10 million criminal fine for violating the line-of-business restrictions).

[246] Some have asserted that the current regulatory scheme limits the potential for anticompetitive conduct because of regulations such as price caps, automated reporting, non-discrimination reports, and State safeguards. To a large extent, the value of regulatory oversight depends upon enforcement resources which, as noted above, do not presently exist. The regulatory problem is exacerbated with regard to the RBOCs because they dominate entire geographic regions and overlap Federal and State regulatory jurisdictions. *See, e.g.,* National Ass'n of Regulatory Util. Comm'rs, *Some RBOCs Are Not Cooperating With The NARUC's Joint State/Federal Audit Efforts* (NARUC Summer Meeting, July 28, 1992) (detailing difficulties in coordinating overlapping State and Federal audits of the RBOCs.) In addition, it is widely understood that regulations are incapable of preventing anticompetitive conduct by monopoly utilities because of the inherent difficulty for regulators to second-guess a utility's subjective engineering and procurement judgment. *See, e.g.,* 3 Phillip Areeda & Donald Turner, Antitrust Laws ¶726, p. 219 (1978) ("the integrated utility can always argue that its product, though more expensive, is 'better.'"); Bruce Owen, *Determining Optimal Access to Regulated Essential Facilities,* 58 Antitrust L.J. 887, 890, 893 (1990); George Stigler, *The Theory of Economic Regulation, in* The Citizen and the State 114, 118, 132 (1975).

stantial possibility [the RBOC] could use its monopoly power to impede competition in the market it seeks to enter." Prior to divestiture, the prohibitions themselves were agreed to by the Bell System and the Justice Department, and approved by Judge Greene in light of the overwhelming evidence of the Bell System's anticompetitive structure, which combined a local exchange monopoly bottleneck with businesses that were dependent on the local exchange. The Bell System's use of this structure over the decades to anticompetitively further its own economic ends had severely impeded the development of healthy competition and innovation in the telecommunications industry.

Since the MFJ took effect in 1984, the RBOCs have conducted a steady and far-reaching political and public relations campaign to remove these core line-of-business restrictions without the requisite showing that the competitive entry test could be met. Reminiscent of the political efforts surrounding the dilution of the prior Sherman Act case resulting in the 1956 Consent Decree, an initial focus of the RBOCs' strategy was to persuade the Justice Department to reverse its position regarding the continued need for the restrictions. The Department did so with surprising speed, given how doggedly it had prosecuted the case and how uncompromising a position it had taken during settlement negotiations.

The Department first formally acknowledged its change of position regarding the restrictions in 1987, "[w]ith little warning or explanation,"[247] when it submitted its triennial review report to the district court. However, a court-appointed Independent Counsel[248] determined that well in advance of the Department's announced switch, considerable behind-the-scenes pressure had been applied on the Department by senior Administration officials on the RBOCs' behalf. This pressure was applied both directly through then-Attorney General Edwin Meese III, and indirectly through his personal associates, including E. Bob Wallach (long-time friend and "personal advisor" to Mr. Meese, and later "of counsel" to a law firm retained by the RBOCs in connection with the triennial review proceeding)[249] and William Clark (former Interior Secretary and National Security Advisor to President Reagan, and later a director of the RBOC Pacific Telesis).[250] According to then-Assistant Attorney General William Weld, Mr. Meese during this period took "unusual steps" to continue to participate in the Department's MFJ determinations.[251]

The groundwork for the Department's reversal in position was laid as early as February 1985, when Mr. Wallach wrote new Attorney General Meese recommending that the Department consider conducting a review of the MFJ.[252] Shortly thereafter, at Mr. Meese's request, Mr. Wallach interviewed candidates for the posi-

[247] *United States* v. *Western Elec. Co.,* 900 F.2d 283, 288 (D.C. Cir.), *cert. denied,* 498 U.S. 911 (1990).

[248] Independent Counsel James McKay determined that Attorney General Meese's ownership of RBOC stock (constituting one-fifth of his liquid portfolio) probably violated conflict of interest laws, but that prosecution was not warranted. *Report of Indep. Counsel In Re Edwin Meese III,* Division No. 87–1, at 27 (1988).

[249] *Id.* at 457.

[250] *Proposed Modifications to the AT&T Consent Decree, Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary,* 100th Cong., 1st Sess. 25, 29–30 (1987).

[251] *See Report of Indep. Counsel In Re Edwin Meese III, supra* note 248, at 26.

[252] *Id.* at 457.

tion of Assistant Attorney General for Antitrust—including the eventual choice, Douglas Ginsburg, with whom Mr. Wallach directly discussed the issue of the Department's approach to the MFJ.[253] In October 1985, a mere six weeks after taking office, and well in advance of the official change in the Department's position, Mr. Ginsburg delivered a crucial memorandum to Mr. Meese proposing to remove the MFJ's line-of-business restrictions:

> I propose to move toward removal of the decree's restrictions just as quickly as is reasonably prudent. This effort, however, requires careful study, planning, timing, and implementation. Moreover, such a strategy will not be met with universal approval—Judge Greene, AT&T, and the other IX [interexchange] and IS [information services] providers are likely to resist such a change. We must therefore carefully develop the public record for our policy and cautiously (but steadily) pursue a course that removes the decree's restrictions as early as possible.[254]

Mr. Ginsburg's memorandum continued with an eight-point plan for implementing this policy.[255]

The very next day, on October 17, 1985, the Department's Antitrust Division developed a plan to set up a telecommunications study group to be headed by Dr. Peter Huber. Dr. Huber's report served as the purported basis for the Department's 1987 report seeking to lift the information services and equipment manufacturing prohibitions and sharply curtail the interexchange services restriction.[256]

Having persuaded the Department of Justice to reverse its position on the line-of-business restrictions, the RBOCs next sought, during the district court's triennial review, to convince presiding Judge Harold Greene that the restrictions should be lifted. Judge Greene flatly rejected that proposition, finding that the RBOCs had continued to maintain bottleneck monopoly control over the local exchange, and that regulation continued to be ineffective for curbing potential RBOC anticompetitive abuses.[257] With respect to the continuing RBOC monopoly, the district court stated:

> The complete lack of merit of arguments that economic, technological, or legal changes have substantially eroded or impaired the Regional Company bottleneck monopoly power is demonstrated by the fact that *only one-tenth of one percent of inter-LATA traffic volume, generated by one customer out of one million, is carried through non-Regional Company facilities* to reach an interexchange carrier. . . . *The Department of Justice found only twenty-four customers in the entire United States who managed to de-*

---

[253] *Id.* at 402–403.

[254] *Id.* at 411.

[255] *Id.*

[256] *Huber Report, supra* note 217. Dr. Huber has said that the Department may have been a bit too "aggressive" in its use of his research. "By the time my report was in hand, they apparently had determined that the restrictions should be removed." *1/1/84–1/1/89: Five Years That Changed the Way the World Communicates,* Information Quarterly (supplement to Communications Week), Dec. 1988, at 72.

[257] *United States* v. *Western Elec. Co.,* 673 F. Supp. 525 (D.D.C. 1987) *aff'd in part, rev'd in part,* 900 F.2d 283 (D.C. Cir.), *cert. denied,* 498 U.S. 911 (1990).

> *liver their interexchange traffic directly to their interexchange carriers, bypassing the Regional Companies.* It is clear, therefore, and the Court finds, that no substantial competition exists at the present time in the local exchange service, and that the Regional Companies have retained control of the local bottlenecks.[258]

With respect to the continuing shortcomings in telecommunications regulatory capabilities, the district court stated:

> [T]he regulations relied upon by the Regional Companies and the Department of Justice to curb discrimination by the Regional Companies against their putative competitors in the markets they seek to enter are entirely inadequate: they either predate the decree and were found at the trial to be ineffective; they are not sufficiently comprehensive; they contain large loopholes; or they are a long way from being promulgated, let alone being implemented.[259]

Judge Greene also noted that the telecommunications industry had become much more complex since 1982, not only technologically, but also in organizational structure and in the mixture of regulated, unregulated, and partially regulated activities. Because of this increased complexity, he said, "discrimination against competitors and cross-subsidization are far more difficult to detect, prevent, and rectify through regulation now than they were in 1982."[260]

As a result of these findings, the district court held that the record did not warrant removal of the MFJ's core line-of-business restrictions: information services,[261] equipment manufacturing,[262] and interexchange (long distance) services.[263] The court did hold, however, that the record justified removing the MFJ's restriction against RBOC entry into non-telecommunications businesses, as well as lifting the information services restriction as to information "gateways" that transmit information generated by others.[264]

---

[258] *Id.* at 540 (emphasis in original) (footnotes omitted).
[259] *Id.* at 579.
[260] *Id.* at 569.
[261] With regard to the information services restriction, the district court stated:

> In short, the reasons cited by the Court in 1982 and in 1984 are as valid today as they were then. There is no question but that the Regional Companies would have the same incentives and the same abilities attributed to them at that time, and that to open up the information services market to its full extent, as requested by some, would be to take the very risks that neither the Department of Justice nor the Court were willing to take three years ago, and that the decree plainly forbids.

[262] With regard to the equipment manufacturing restriction, the district court stated:

> [N]ot only has no change occurred in telecommunications and [customer premises equipment] manufacturing since 1982 that would justify the removal of the restriction under the section VIII(C) [competitive entry] standard, but the opposite is true: a removal of the restriction would be likely to extinguish or substantially curtail the healthy competitive domestic market that has emerged in the last three years.

Id. at 562.

[263] With regard to the interexchange restriction, the district court stated:

> [W]ith the exception of the minuscule amount of traffic that bypasses the Regional Companies' facilities, their monopoly bottlenecks are as solid and pervasive as they were when the decree was entered. It is equally clear that nothing has occurred to change the decree conclusion that those in control of the local bottlenecks have the incentive and ability to use their monopoly power anticompetitively in the interexchange market.

Id. at 546.

[264] "Gateways" are similar to the "Teletel" and "Minitel" interactive data systems offered by the French state-owned telephone company. The court subsequently elaborated on the meaning

In 1990, the United States Court of Appeals for the D.C. Circuit upheld Judge Greene's decision to maintain the prohibitions against RBOC entry into equipment manufacturing and interexchange services.[265] The circuit court reversed the district court's decision to maintain the information services restriction, however, accepting a novel "procedural" argument offered by the RBOCs to eschew the usual competitive analysis.

In their appeal, the RBOCs had noted that even though scores of third party intervenors were opposing RBOC entry into information services, none of the original "parties" to the MFJ—the Department of Justice, AT&T, or the RBOCs—opposed such entry. Because this motion was "uncontested" by the "parties," the RBOCs argued, the court-supervised section VIII(C) competitive entry test should not apply. The circuit court accepted this argument[266] and remanded the information services question to the district court with instructions to apply a so-called "public interest" test rather than the competitive entry test. Under this "public interest" test, the circuit court held, the district court could only disallow RBOC entry that would be "*certain* to lessen competition in the relevant market."[267] The district court could consider only actual, present market conditions in its analysis—not market conditions that might well result—and would be expected to defer to the Department of Justice.

The circuit court's rationale for reversing the district court's information services ruling contradicted established law regarding antitrust consent decrees in several fundamental respects. First, it was inconsistent with Supreme Court precedent which generally requires appellate courts to defer to the trial court regarding the interpretation of a consent decree provision—and in this case, the trial court had actually drafted the language in question.[268] Second, it contradicted the MFJ interpretation long accepted by the parties, who had never previously objected to the application of the competitive entry test.[269] Third, it constituted a significant abdication of the Judiciary's responsibility, elaborated in the Tunney Act, to independently determine the proper application of the antitrust laws in consent decree situations.[270] Fourth, it ignored longstanding antitrust jurisprudence regarding the measure of evidence required to predict effects on competition: as the Supreme Court noted in the landmark case of *Brown Shoe Co.* v. *United States,*

---

of information gateways and permitted the RBOCs to enter the voice storage and retrieval markets (such as voice messaging and sophisticated answering machine-type services, and electronic mail). *United States* v. *Western Elec. Co.,* 714 F. Supp. 1 (D.D.C. 1988), *modified,* 900 F.2d 283 (D.C. Cir.), *cert. denied,* 498 U.S. 911 (1990).
Id. at 567.

[265] *United States* v. *Western Elec. Co.,* 900 F.2d 283 (D.C. Cir.), *cert. denied,* 498 U.S. 911 (1990).

[266] *Id.* at 305–307.

[267] *Id.* at 308 (emphasis added). This test establishes a burden of proof on the trial court which is even more stringent than the "beyond a reasonable doubt" standard prosecutors must meet in criminal trials.

[268] In *United States* v. *Atlantic Ref. Co.,* 360 U.S. 19, 23–24 (1959), the Supreme Court held that a reviewing court should affirm the district court's interpretation of a consent decree provision where the language of a consent decree in its normal meaning supports the interpretation; where the interpretation has been adhered to over many years by all the parties, including those government officials who drew up the decree and administered it from the start; and where the trial court concludes that the interpretation is in fact the one the parties intended.

[269] *See* Petition for Certiorari at 9–11, *MCI* v. *United States,* 498 U.S. 911 (1990).

[270] *See supra* text accompanying notes 137–147.

370 U.S. 294 (1962), antitrust law is based on "probabilities not certainties."[271]

On remand the district court concluded that under the circuit court's unexpected interpretation of the MFJ, it no longer had any significant independent role in reviewing the proposed removal of the information services restriction.[272] On July 25, 1991, Judge Greene reluctantly lifted the restriction on RBOC entry into information services, while providing a dire warning of the likely anticompetitive consequences:

> In the opinion of this Court, informed by over twelve years of experience with evidence in the telecommunications field, the most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates, with the captive local telephone monopolies as their base. Such a development would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic well being of the American people.[273]

The district court's stay of its decision allowing the RBOCs into the field of information services was vacated in short order by the circuit court.[274] The circuit court ultimately affirmed the decision, and the Supreme Court denied certiorari on November 15, 1993.[275]

These judicial developments have not only caused considerable uncertainty in the information services markets,[276] but have also led to uncertainty regarding application of the MFJ's section VIII(C) competitive entry test to the equipment manufacturing and long distance restrictions. In the wake of the circuit court's opinion regarding information services, the RBOCs sought to take its rationale one step further, arguing that any time Justice Department support for lifting or waiving a restriction was secured, the court should abandon the section VIII(C) competitive entry test and use the newly devised "certainty" test—even when AT&T, an original party to the MFJ, is opposed. (The D.C. Circuit ultimately rejected this argument.)[277]

Simultaneous with their court assault on the MFJ line-of-business restrictions, the RBOCs have also been seeking legislative relief from them. RBOC legislative advocacy has often been accompanied by unusually aggressive overtures to their employees, sup-

[271] *See also Hospital Corp. of Am.* v. *FTC,* 807 F.2d 1381, 1389 (7th Cir. 1986) (Judge Posner noted that predicting the effect on competition is "necessarily probabilistic and judgmental rather than demonstrable").

[272] *United States* v. *Western Elec. Co.,* 767 F. Supp. 308 (D.D.C. 1991), *aff'd,* 993 F.2d 1572 (D.C. Cir.), *cert. denied,* 114 S. Ct. 487 (1993).

[273] *Id.* at 326 (footnotes omitted).

[274] *United States* v. *Western Elec. Co.,* 1991-2 Trade Cas. (CCH) ¶69,610 (D.C. Cir.), *cert. denied,* 112 S. Ct. 336 (1991).

[275] *United States* v. *Western Elec. Co.,* 993 F.2d 1572 (D.C. Cir.), *cert. denied,* 114 S. Ct. 487 (1993).

[276] In its annual review of the information services industry, the Commerce Department concluded that the removal of the information services restriction "has added a substantial dimension of uncertainty to all market planning within [the information services] sector." *U.S. Indus. Outlook 1992, supra* note 224, at 26–1.

[277] *United States* v. *Western Elec. Co.,* 969 F.2d 1231 (D.C. Cir. 1992), *cert. denied,* 113 S. Ct. 1363 (1993).

pliers, and customers.[278] Several legislative initiatives have been introduced to lift line-of-business restrictions entirely,[279] weaken the competitive entry test,[280] or alter the Justice Department's jurisdiction to enforce the antitrust principles of the MFJ.[281] During the 102d Congress, the Senate approved a bill, S. 173, the "Telecommunications Equipment Research and Manufacturing Competition Act of 1991," which would have removed the MFJ's equipment manufacturing restriction without regard to the competitive entry test.

II. COMMITTEE RESPONSE

Soon after Congressman Brooks assumed the Chairmanship of the Committee on the Judiciary in January 1989, he again turned the Committee's attention to an examination of antitrust policy in the telecommunications industry. As efforts proceeded in a variety of forums to unravel piecemeal the MFJ's line-of-business restrictions, the Subcommittee on Economic and Commercial Law began developing a record for possible legislation to replace them with a statutory framework, balanced to permit the Bell operating companies to enter the competitive lines of business under procedures and conditions that properly safeguard competition without stifling

[278] The RBOCs are reported to have expended more than $20 million per year on grassroots lobbying. *See* The American Lawyer, May 1992, at 56, 61. RBOC customers and employees have complained that they have been unfairly pressured into supporting RBOC legislative positions. During consideration of H.R. 5096 in the 102d Congress, a Member of Congress received a letter from an officer of the Communication Workers of America, who complained that the Bell monopolies were coercing their employees into writing and calling their Representatives in Congress in opposition to the bill:

> The C&P Companies, under the direction of their parent company, Bell Atlantic, are presently encouraging all of their employees to contact their Congressional Representatives and ask them to vote against H.R. 5096.
>
> Our members and your constituents are being intimidated and harassed by C&P into contacting their Congressman and urge defeat of H.R. 5096 in a way which I believe is unprofessional, unacceptable and un-American.
>
> It is one thing to ask employees to lobby for or against legislation, but to conduct one-on-one meetings and demand acknowledgement of their actions is wrong. This *is* America and everyone has the right to participate, or not, without fear of intimidation. My office has received numerous calls from our members complaining about C&P and their tactics. These tactics send a false message from your constituents and certainly one that was not made freely.
>
> * * * * * * *
>
> We in the Labor Movement are strong advocates of political involvement, but unlike Bell Atlantic management, we believe that if your case is just, you don't have to intimidate people to gain their support.

Letter from Peter G. Catucci, vice president, Communications Workers of America (July 24, 1992).

Meanwhile, many suppliers, in fear of RBOC retribution, have felt forced to organize anonymously, through a "No Name" Coalition.

[279] *See* H.R. 3687, 99th Cong., 1st Sess. (1985); H.R. 3800, 99th Cong., 2d Sess. (1985); S. 2362, 99th Cong., 2d Sess. (1986); H.R. 15, 100th Cong., 1st Sess. (1987); S. 209, 100th Cong., 1st Sess. (1987); H.R. 2030, 100th Cong., 1st Sess. (1987); H. Con. Res. 339, 100th Cong., 2d Sess. (1988); H.R. 2140, 101st Cong., 1st Sess. (1989); S. 1981, 101st Cong., (1989); H.R. 1523, 102d Cong., 1st Sess. (1991); H.R. 1527, 102d Cong., 1st Sess. (1991); S. 173, 102d Cong., 1st Sess. (1991).

[280] *See* H.R. 3687, 99th Cong., 1st Sess. (1985); H.R. 3800, 99th Cong., 2d Sess. (1985); H.R. 2030, 100th Cong., 1st Sess. (1987); H. Con. Res. 339, 100th Cong., 2d Sess. (1988); H.R. 2140, 101st Cong., 1st Sess. (1989); S. 1981, 101st Cong., 1st Sess. (1989); H.R. 3515, 102d Cong., 1st Sess. (1991).

[281] *See* S. 2362, 99th Cong., 2d Sess. (1986); H.R. 3800, 99th Cong., 2d Sess. (1985); H.R. 15, 100th Cong., 1st Sess. (1987); S. 209, 100th Cong., 1st Sess. (1987); H.R. 2030, 100th Cong., 1st Sess. (1987); H.R. 2030, 100th Cong., 1st Sess. (1987); H.R. 2140, 101st Cong., 1st Sess. (1989); S. 1981, 101st Cong., 1st Sess. (1989); H.R. 3515, 102d Cong., 1st Sess. (1991).

innovation gains. H.R. 3626 is the product of five hearings before the Subcommittee over the past five years.[282]

A. Hearings in the 101st Congress

On August 1 and 2, 1989, the Subcommittee held general oversight hearings regarding the MFJ and competition policy in the telecommunications industry.[283] At that time Judge Greene had just released—on schedule—AT&T from the ban on its engaging in electronic publishing. His triennial review decision—maintaining the three core restrictions while lifting the broad non-telecommunications restriction and authorizing the regional Bell monopolies to engage in "gateway" information services—was under challenge by the RBOCs and the Justice Department in the United States Court of Appeals for the D.C. Circuit. The RBOCs and the Department were also working to abolish the MFJ's manufacturing and information services restrictions legislatively.

The witnesses represented every facet of the telecommunications industry. During the hearing, Chairman Brooks strongly suggested that all witnesses (1) begin contemplating eventual RBOC entry under legislation setting the appropriate competitive conditions, based on the fundamental principles of the MFJ, and (2) begin considering what standard should be used for permitting RBOC entry into restricted lines of business and what sort of phased transition period should be structured.[284]

The three witnesses representing the RBOC monopolies criticized the MFJ and called for repeal of the line-of-business restrictions, especially manufacturing and information services. Three other witnesses associated with the RBOCs also called for repeal or scaling back of these restrictions. Much of their emphasis was on research and development relating to telecommunications equipment, which Judge Greene had interpreted as falling within the manufacturing restriction.[285]

Sam Ginn, chairman and CEO of Pacific Telesis Corp., one of the RBOCs, asserted that because of the MFJ line-of-business restrictions, particularly the restriction on research and development, America was "losing our edge"[286] in technological innovation. "Our ideas, our thoughts cannot make their way back through the manufacturing process and produce new products. And then we wonder why our balance of payments in communications is as negative as it is."[287] He also proffered, as examples of how the MFJ was keeping the RBOCs from fulfilling important unmet needs in society,

---

[282] The Subcommittee has also held several hearings on issues related to competition in the telecommunications industry in previous Congresses. *See, e.g., Competition in the Telecommunications Industry: Oversight Hearings before the Monopolies and Commercial Law Subcomm. of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (April 29, 1987); *Proposed Antitrust Settlement of United States v. AT&T: Oversight Hearings before the Monopolies and Commercial Law Subcomm. of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (Jan. 26 and 28, 1982); *Telecommunications Act of 1980: Hearings on H.R. 6121 before the Monopolies and Commercial Law Subcomm. of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (Sept. 9 and 10, 1980).

[283] *AT&T Consent Decree: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, Serial No. 148, 101st Cong., 1st Sess. (1989) [hereinafter *1989 Hearings*].

[284] *See id.* at 97, 328, 400, 478.

[285] *United States* v. *Western Elec. Co.*, 675 F. Supp. 655 (D.D.C. 1987), *aff'd*, 894 F.2d 1387 (D.C. Cir. 1990).

[286] *1989 Hearings, supra* note 283, at 134.

[287] *Id.* at 132–133.

two information services which he claimed were unavailable despite a demand for them.[288] He called for "decisive Congressional action to get rid of the basic MFJ prohibitions, and then we can focus our resources and energies on the . . . appropriate safeguards."[289]

Casimir Skrzypczak, vice president for science and technology at NYNEX, another RBOC, agreed:

> The manufacturing prohibition has a very chilling effect on nearly one-half of the American communications industry's ability to perform research and development . . . with the spectacle of the Federal Government monitoring our research to make sure that we do not innovate in an unapproved way, by crossing over some fuzzy line in the process from creation of ideas to fabricating a product for use in the telecommunications system of this nation . . . .[290]

Alan C. Hasselwander, president and CEO of Rochester Telephone Corp., a non-Bell local telephone company, testified on behalf of the United States Telephone Association (USTA). The USTA includes among its members not only the Bell monopolies and other giants, but also the 1,000 smaller so-called "independent" telephone companies interconnected to the Bell System prior to divestiture and, in important respects, still interconnected to and dependent on the Bell operating companies today.[291]

Mr. Hasselwander advocated lifting the restrictions on information services and manufacturing, emphasizing the "benefits that could result from research and development if they were targeted toward local telephone customer needs."[292] He perceived the Bell operating companies as the ones "who have the incentives and resources" to conduct research and development for the benefit of other local telephone companies who are too small to engage in it themselves.[293]

Stephanie Biddle, executive vice president of the Computer and Communications Industry Association, whose members include three of the RBOCs, AT&T, and 55 other computer and telecommunications corporations, urged the Committee to consider each line-of-business restriction separately. Congress might opt, for example, to give the RBOC's "more freedom of action" in research

[288] *Id.* at 140–141. The two information services Mr. Ginn cited were electronic logs for fishermen's "catch of the day," which could be consulted, while they were "still at sea," by restaurants in planning their "menus for the evening"; and electronic inventories of home layouts, including "the location of children's rooms," that could be relayed to fire departments in "emergency situations."

[289] *Id.* at 137. Lee G. Camp, Vice President and General Manager of the Information Services Group at Pacific Bell, a Pacific Telesis subsidiary, said that lifting the information services and other MFJ restrictions would allow the telecommunications industry "to work together rather [than] to spend our time and money on litigation." *Id.* at 156.

[290] *Id.* at 186–187. Mr. Skrzypczak hotly denied the charges, reported in a December 22, 1988, *Boston Globe* article, of anticompetitive cross-subsidies and self-dealing on the part of NYNEX's two Bell operating company monopoly subsidiaries. He referred to the charges as "untrue and unfounded" reports from "dismissed employees who were disenchanted," with the exception of one "technical violation" that was "really an administrative oversight in executing the stated policy of the corporation." *Id.* at 203–204.

[291] Most of the so-called "independents" (as well as the "mutual" telephone companies) are utterly dependent on the RBOCs for interconnection not only to neighboring communities, but also—through a "point of presence"—to the long distance carriers. *See 1980 Justice Dep't Brief, supra* note 36, at 13; *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 1008–1010 (D.D.C. 1983).

[292] *1989 Hearings, supra* note 283, at 144–145.

[293] *Id.* at 146.

and development, "while continuing to bar them for some longer period of time from the actual fabrication of equipment."[294] Dealing with the restrictions on such a phased basis would provide an "orderly mechanism for the transition."[295] She also advocated confining the MFJ restrictions to antitrust considerations; in her view, Judge Greene's decision to maintain the information services restriction as to activities outside the geographic region of an RBOC's transmission facilities could not be justified on antitrust grounds.

Albert Halprin, chief of the FCC's Common Carrier Bureau during the Reagan Administration and now representing a number of RBOCs, advocated lifting the restrictions on research and development and on information services. He assured the Subcommittee that effective regulations could be developed to protect against cross-subsidization and discriminatory access, but also urged the Subcommittee to consider imposing criminal penalties against these practices. Like Ms. Biddle, he also advocated dealing with the restrictions on a "phased basis."[296]

In his prepared statement, Morton Bahr, president of the Communications Workers of America, complained that, in his view, the ordinary consumer had yet to benefit from the changes brought about by the MFJ. But he had reservations about lifting the line-of-business restrictions. First, he expressed extreme skepticism about the Bell monopolies' assertions regarding the competence and capabilities of regulators:

> For more than three years the Bell companies have had a steady drumbeat on eliminating the restrictions set as conditions for resolving the government's 1974 anti-trust suit. The arguments once again are directed to having the Congress establish the policy as one of commerce and business, not as an anti-trust matter. We believe the many anti-trust suits in common carrier matters were filed because the FCC's regulatory processes were unable to cope [with] the problems the agency itself caused by infusing "competition" in the industry. . . . [T]he transfer of policy from the District Court to the FCC—without the Congress' giving specific and long-overdue guidance to the FCC on these policies—invites a new generation of antitrust suits.[297]

His suspicions were equally strong regarding the RBOCs' intentions as to each of the restricted lines of business. He flatly opposed lifting either the manufacturing or long distance restriction under current circumstances. He described the RBOCs' evasiveness regarding manufacturing:

> CWA has been pressing the Bell companies to define the term "manufacture," in order to provide for a proper examination of the issues. CWA also has pressed for the Bell companies to commit publicly to engage in such "manufacture" within the United States. . . . [T]he Bell companies

[294] *Id.* at 377–378.
[295] *Id.* at 400.
[296] *Id.* at 329.
[297] *Id.* at 230–231.

> have continuously resisted defining the term and do not commit to domestic manufacture.
>
> Because CWA's questions about manufacture remain unanswered, the union is opposed to relaxing the MFJ manufacturing restrictions. We have seen many plants in the United States already closed down or severely cut back; we have seen much equipment production sent offshore and into "maquiladora" plants in Mexico adjacent to the U.S. border. We note a considerable slack in U.S. telecommunications goods manufacturing capacity.
>
> Thus, CWA and many others have asked for considerably more detail on the alleged "need" of the Bell companies to manufacture equipment. . . . First, can any Bell company cite any instance in which prospective suppliers are not eager to provide needed goods? Second, what goods do the Bell companies desire or need which are not already on the market? Third, are unrelated manufacturers refusing to meet Bell companies' needs? Fourth, what meaning do the Bell companies assign to the term "manufacture?" Fifth, will these companies commit to domestic manufacture, either on their own or by joint ventures?[298]

As to long distance service, he warned that chaos and strife would quickly follow if the restriction were lifted:

> The very core of the MFJ has been the separation of local and long-distance services, through the LATA plan devised by AT&T and approved by the Court. If the Bell companies were allowed to enter inter-LATA service, then the public and Congress could justifiably ask why the old Bell System was broken in the first place. The situation would become chaotic quite rapidly, and a new generation of anti-trust suits would be filed, with all of the usual old allegations refurbished and recycled. If the regional Bells built their own inter-LATA systems, they would be laying in massively redundant facilities on top of the present glut of toll facilities. Economically, this would be unwise. If the Bell regionals were to buy out established toll carriers, such as parts of MCI or U.S. Sprint, they would be accused of reducing the available competition in the industry.[299]

While he believed the RBOCs to be "uniquely situated to offer some [information] services through the network facilities, services others have not stepped forward to offer,"[300] he suggested the RBOCs do so by satisfying Judge Greene's requirements under the MFJ's competitive entry test:

> The Bell companies have not yet succeeded in getting the District Court's permission to offer information services. Judge Greene has denied several waiver requests because the [RBOCs] have not come forth with the specific plans by which the adequate competitive framework would be set in place. The [RBOCs] took strong criticism from the

[298] *Id.* at 235–236.
[299] *Id.* at 237.
[300] *Id.* at 232.

> Judge, who ruled that they did not supply enough detail as to how competition would be protected.
>
> It would appear to us that if the [RBOCs] seek to enter the information services business and do so without that endless chain of litigation, they ought to devise the appropriate accounting and structural rules to meet the Court's criteria.[301]

Testifying orally on behalf of Mr. Bahr, Barbara Easterling, executive vice president of CWA, dismissed as exaggerated the Bells' claims that the MFJ had caused any substantial loss of American telecommunications equipment manufacturing jobs. She pointed out that the RBOCs themselves, along with an inadequate U.S. trade policy, had been responsible for any movement of telecommunications equipment manufacturing jobs overseas:

> Very little of what had been manufactured in the United States has been moved offshore. I also would like to indicate to you that we have seen AT&T close five plants around the country, and this has created additional hardships on our members. The reason the plants have closed was due to the fact that the Bell operating companies began to purchase from foreign companies and this, along with the fact that AT&T is not permitted access to this same foreign market, have resulted in the shutting down of such plants.[302]

The other witnesses all opposed lifting the line-of-business restrictions. Some were adamantly opposed to any legislative tampering with the MFJ whatsoever; others were willing to contemplate legislation so long as it embodied the MFJ's principles, including the line-of-business restrictions.

John D. Zeglis, general counsel of the divested AT&T, endorsed the MFJ's antitrust rationale, heralding its procompetitive effects on the telecommunications industry:

> The problem . . . begins with local telephone exchanges, which nobody really can dispute are monopolies.
>
> . . . [T]hey're not just monopolies, they are essential facilities, bottlenecks, in the language of antitrust law, for anyone who wants to compete in long distance or manufacture telephone equipment.[303] They're bottlenecks for long distance because the long distance companies have to use those local lines to reach their customers, and they're bottlenecks for the manufacture of local switches because if a manufacturer doesn't sell to the local telephone company, it doesn't sell those local telephone switches at all. . . .
>
> . . . [Y]ou have a situation that epitomizes the central concern of the antitrust laws: monopolies that can be used to foreclose full and open competition.

---

[301] *Id.* at 233.
[302] *Id.* at 226.
[303] *See infra* text accompanying notes 357–358 regarding AT&T's continued tendency to focus on the manufacturing and long distance restrictions to the exclusion of the information services restriction.

> Now, in the old Bell System, AT&T owned both monopolies and competitive businesses, and we were constantly accused of abusing those monopolies to favor our own long distance and manufacturing.
>
> We fought and fought. The Justice Department sued us; we said the antitrust laws don't apply; the courts said they do. Seventy more plaintiffs sued us; we said we'd done no wrong; they kept suing us. The Congress, the commissions, the courts all went to work on creating rules for a level playing field—how we were going to be able to use our monopolies, or not use them, in connection with our other businesses.
>
> It was a chaotic period; people were spending time and money in courthouses and in this building that they should have been spending on research and development and innovation.
>
> * * * * * * *
>
> To get out of that insoluble problem, and to get the industry back on track, we agreed to the Justice Department's remedy for a permanent solution . . . that we divest those local monopolies and enjoin them from building back into competitive long distance and manufacturing. Otherwise, you would just re-create the problem that the Government set out to solve.
>
> We had the divestiture. We're sitting here 5½ years [later] looking back and, somewhat to our amazement, it is all working just like antitrust policy says it's supposed to. Without that incessant controversy, without the fear that the local monopolies are going to favor their sister companies, we've got more firms competing—over 500 alone in long distance; more research and development spending; more features and services reaching the market; lower prices—down 40 percent in long distance, more than that in a lot of equipment. . . .
>
> * * * * * * *
>
> . . . [T]he antitrust laws and this antitrust decree have set the stage for the Nation's continued telecommunications leadership in the 21st century through that most traditional and successful of American ways—namely, a lot of firms investing in innovation in the hope that their ideas will be better than their competitors', and that, solely on the merits of their products, they'll win in the marketplace.
>
> We have, we believe, a classic use of the antitrust laws on behalf of the American consumer, and, in our opinion, neither the Sherman Act nor the decree requires a change.[304]

William G. McGowan, chairman of MCI Communications Corp.—who, sixteen years earlier, had personally participated in the MCI meeting with the Justice Department which led to the Department's antitrust action against the Bell monopoly—also spoke with

[304] *1989 Hearings, supra* note 283, at 6–8.

absolute support for the goals and specific terms of the MFJ. He dismissed the RBOCs' campaign against the line-of-business restrictions as an attempt to rewrite history:

> In addition to solving their antitrust case and eliminating untold millions of dollars in damages that would have accrued from that litigation, the Bell operating companies leapt at the chance to own and operate seven of their own monopoly telephone companies.
>
> The judge was a hero to them at that time for structuring an arrangement very much to their future benefit, as I believe their subsequent great financial success has proven.
>
> But now where are we? We are facing a massive campaign by those same regional Bell operating companies that is embodied in the mantras we hear: "Free the RBOCs. Free the regional Bell operating companies." They would have us believe that the line-of-business restrictions and the consent decree are responsible for most of society's ills today, and that repealing them would be more beneficial to the body politic than oat bran would be to all of us.
>
> As Shakespeare wrote in *The Merchant of Venice,* "The brain may devise laws for the blood, but a hot temper leaps o'er a cold decree."
>
> The regional Bell operating companies would have this subcommittee believe that because of the consent decree, the American century is over, that this country can't compete any more, that we are behind the technological revolution, and that consumers were impoverished in this information age.
>
> That is, in the bard's words, "The seeming truth which cunning parties put to entrap the wisest." [305]

Mr. McGowan urged the Subcommittee not to disturb the competitive structure put in place by the MFJ, noting that huge investments had been made in reliance on that structure:

> MCI has invested over $6 billion in plant and equipment based on the ground rules put in place after the settlement of the antitrust case.
>
> We did it in reliance upon the Government's stated policy of enforcing structural controls over the industry. The experience of MCI is not unique. Thousands of companies have poured resources into the markets largely freed from monopoly abuse by the Bell System.[306]

Gene Kimmelman, legislative director of Consumer Federation of America, called the MFJ "a pretty good deal for the American people," and urged Congress to "just leave well enough alone for right now." He specifically cautioned the Subcommittee against relying on the FCC to effectively police competition in the absence of the MFJ's structural protections, characterizing the FCC's latest efforts to develop cost controls as "regulatory schizophrenia." He noted

[305] *Id.* at 63.
[306] *Id.* at 65.

that an October 1987 report by the U.S. General Accounting Office had determined that "[t]he level of oversight that [the FCC] is prepared to provide . . . will not provide telephone ratepayers or competitors positive assurance that FCC cost allocation rules and procedures are properly controlling cross-subsidy."[307]

Patricia M. Worthy, chairman of the District of Columbia Public Service Commission and vice chairman of the National Association of Regulatory Utility Commissioners (NARUC), also cautioned the Subcommittee against expecting regulatory controls to adequately fill the gap that would be left by lifting the MFJ restrictions. Too often State regulators had witnessed "regional holding companies [RBOCs] and their affiliates aggressively seeking through legislation, litigation, transfer of assets, and corporate reorganization, to avoid appropriate State regulation of their ventures into more competitive markets."[308] Nor did she have confidence in current Federal regulatory efforts:

> Congress should be wary in placing too much reliance on the current form of Federal regulatory safeguards to guard against the possibility of anti-competitive conduct, such as price discrimination and cross-subsidies. Such safeguards, called "non-structural safeguards," rely on cost-accounting principles to detect anti-competitive activity. . . .
>
> * * * * * * *
>
> . . . [R]eliance on the current accounting safeguards and monitoring efforts, such as through audits, is insufficient to protect the public interest should the MFJ restrictions be modified.[309]

Robert M. Johnson, publisher of Newsday, testified on behalf of the American Newspaper Publishers Association (now known as the Newspaper Association of America). He strongly endorsed the MFJ's line-of-business restrictions and said that any legislation the Subcommittee might consider should do precisely the same. Noting that newspaper publishers had supported lifting the electronic publishing ban from AT&T once it no longer possessed monopoly power in the long distance market, Mr. Johnson emphasized that the publishers "do not fear competition. We fear unfair competition."[310]

Mr. Johnson noted that Judge Greene's "gateways" decision permitting the RBOCs to engage fully in businesses relating to the transmission, storage, and retrieval of information content owned by others was barely a year old, and already there were reports of discriminatory access problems. In his view, permitting the RBOCs to own the content of information transmitted over their own mo-

[307] U.S. General Accounting Office, *Telephone Communications*, RCED–88–34 (Oct. 1987), at 3, *quoted in 1989 Hearings*, *supra* note 283, at 222.

[308] *1989 Hearings*, *supra* note 283, at 241. A 1986 report by the National Association of Regulatory Utility Commissioners, in discussing State regulators' experiences with cross-subsidies between Pacific Telesis and its regulated monopoly subsidiary Pacific Bell, found that "[t]he operations and methods of Pacific Telesis bring to life the worst nightmares of regulators. There appears to be no advantage to the holding company structure except to the unregulated businesses of Pacific Telesis, which are cross-subsidized at every turn by Pacific Bell." National Ass'n of Regulatory Util. Comm'rs., Summary Report On The Regional Holding Company Investigations 17 (Sept. 18, 1986), *quoted in 1989 Hearings*, *supra* note 283, at 277.

[309] *1989 Hearings*, *supra* note 283, at 249, 253.

[310] *Id.* at 327. *See United States* v. *Western Elec. Co.*, 1989–2 Trade Cas. (CCH) ¶68,673 (D.D.C. July 28, 1989).

nopoly transmission lines would raise the same core Sherman Act concerns that had led to the MFJ. "The [RBOCs] already control the medium. . . . Now they want to control the message."[311] He indicated newspaper publishers could support allowing the RBOCs to engage in electronic publishing outside their region, but only if there were "tough legislation to prevent . . . collusion and misconduct."[312]

Philip L. Verveer, a Washington attorney, testified on behalf of the National Cable Television Association. As a Justice Department lawyer in the 1970's, he had headed the investigation and litigation of the Department's antitrust action against the Bell System, later becoming chief of the FCC's Common Carrier Bureau. He recalled his early meetings with MCI and other frustrated would-be Bell competitors regarding their treatment by the Bell System: "[there was] difficulty arranging for local interconnection, intimations of discriminatory pricing for competing transmission services, and general lack of cooperation clothed in a genial inability to resolve critical coordination issues in timely fashion."[313] Mr. Verveer explained the antitrust theory borne out by the Department's case—permitting a regulated monopoly to enter related competitive markets is inherently anticompetitive:

> Regulation prevents the Bell Companies from fully exploiting the economic value of their monopolies by limiting the profits that these companies earn. The very nature of traditional public utility regulation prevents them from earning their monopoly profits in the market—local distribution—where they have power. As a result, their rational economic incentive to evade these constraints, to fully recognize the value of their monopolies, leads to efforts to exploit them in other markets. Regulatory evasion creates a constant and systematic bias toward diversification into adjacent markets and a constant danger of unfair competition in these markets. . . .
>
> . . . [C]ost-of-service regulation induces the regulated monopolist to maximize its profits in an unusual way. The monopoly local exchange provider has an increased incentive to integrate into unregulated markets through which it can launder otherwise impermissible profits. The monopolist can maximize its overall profits by misallocating joint costs to the regulated services and thus increasing the rate base, by manipulating intracorporate transfer prices, and by discriminating against its competitors, thereby raising their costs or foreclosing them altogether. . . .
>
> The line-of-business restrictions were imposed specifically to ensure that the Bell Companies would not once again act on their ineluctable incentives and abilities to exploit and extend their monopolies in competitive markets.[314]

[311] *1989 Hearings, supra* note 283, at 267.
[312] *Id.* at 280.
[313] *Id.* at 289.
[314] *Id.* at 291–292.

Mr. Verveer pointed out that Judge Greene's "gateways" decision already gave the RBOCs considerable freedom of activity in competition with cable companies, and cited First Amendment concerns which made it essential that the MFJ restriction on information *content* remain intact:

> [T]he Bell Companies are free to deploy fiber, or any other distribution technology. They are also free to provide video transport, construction, and maintenance services, such as Pacific Bell provides in Palo Alto and C&P provides here in the District of Columbia.
>
> What they are not allowed to do is to provide *content*. Whether that content happens to be television or the electronic word, this policy remains ultimately sound. The central importance of diversity to our society has always made enforcement of Sherman Act principles all the more critical when competition in First Amendment activities is threatened. In such cases, the Sherman Act protects not only economic efficiency, it preserves the broad availability of information from a multitude of speakers.[315]

Mr. Verveer concluded that the MFJ and its line-of-business restrictions "have well served U.S. consumers," spurring "significant investment, increased competition, and improved dynamism in all of the affected industries."[316] He added that if Congress were to attempt to codify antitrust principles in this area, it would be "very important to create something that looks very much like the present MFJ."[317]

In a memorandum submitted for the record, Mr. Verveer noted that the arguments put forward by the Bell monopolies today are the same as they were promoting at the time the Justice Department brought its antitrust action in 1974:

> Fifteen years ago, the Bell Companies . . . held out a utopian vision of new services available to all on demand, attained at no extraordinary cost to society . . . [They] asserted that these millenial goals could be achieved only if the Bell Companies served as society's chosen instrument. . . .
>
> Just as during the decades before divestiture, when they were opposing competition with every means at their disposal, the Bell Companies today are again advancing the proposition that they uniquely can produce efficiency and distributional equity and that the regulatory authorities will prevent any untoward developments flowing from the Bell Companies' market dominance. Just as before divestiture, there has been little effort to prove or justify any of these propositions. And, just as before divestiture, none of them withstands scrutiny.
>
> As you listen to the present debate on the desirability of permitting the Bell Companies to enter adjacent markets, consider whether there is any probative evidence that in fact [Bell] entry into these markets will result in any of

[315] *Id.* at 296.
[316] *Id.* at 286.
[317] *Id.* at 328.

the significant improvements in national security, international trade, domestic employment, or efficiencies that the [Bells] claim. Consider also what evidence there is that claims of competitive abuses are an artifact of a wholly irrelevant past, and that recent, preternatural improvements in regulatory effectiveness will bring any such abuses to light. The simple truth of the matter is that the traditional Bell Company arguments, unsupported by truly probative evidence, do not support removal of the line-of-business restrictions.[318]

Wayne Robins, president of ITT Communications, testified on behalf of the Competitive Telecommunications Association (CompTel) comprising 130 small long-distance carriers who together serve about 8 percent of the U.S. market. He urged the Subcommittee to include the MFJ's line-of-business restrictions and equal access provisions in any legislation it might consider, and to maintain supervision of telecommunications competition policy in the Justice Department and the courts, in light of the FCC's "historic failure to police monopoly abuses." The FCC already needed further congressional prodding to enforce the equal access provisions in relation to long-distance interconnection, he said.

Mr. Robins emphasized that any legislation should deal with the line-of-business restrictions on a phased basis. The long-distance restriction should remain intact for as long as the RBOCs retain their local exchange monopolies, and the information services restriction "should not be altered further for the time being."[319] As to the manufacturing restriction, he expressed concern about even permitting the RBOCs to engage in joint ventures with other firms. He characterized the RBOCs' assertion that the manufacturing restriction was somehow harming the U.S. balance of trade as a "dubious proposition."[320]

Allen R. Frischkorn, Jr., president of the Telecommunications Industry Association, composed of 500 manufacturers and suppliers of telecommunications equipment and related products, credited the MFJ with having had a "dramatic" impact on competition. He cited Census Bureau figures indicating there were now between 1,500 and 2,000 telecommunications equipment manufacturing firms in the United States. Lifting the manufacturing restriction, he said, would have an equally dramatic anticompetitive effect:

> The RBOCs and their supporters . . . argue that removal of the manufacturing prohibition is necessary in order to maximize our Nation's commitment of resources to the development of innovative new telecommunications technologies. However, in making this assertion, the RBOCs rely on a static view of the marketplace which ignores the substantial stimulus which open, competitive procurement by the RBOCs now provides to prospective suppliers' research and development efforts, as well as the chilling effect which a return to closed markets would have on the ability of efficient U.S. manufacturers to attract the

[318] *Id.* at 439–441.
[319] *Id.* at 381.
[320] *Id.* at 402.

capital necessary to maintain and expand their R&D programs.[321]

Referring to the RBOCs' argument that the manufacturing restriction was harming the U.S. trade balance as a "red herring,"[322] Mr. Frischkorn also refuted their contention that the restriction kept them from engaging in constructive technological dialogue with equipment suppliers:

> [O]ne of the major benefits of the MFJ has been to create an atmosphere in which the Bell Operating Companies have established a more open, cooperative relationship with the *entire* equipment manufacturing community, which has redounded to the benefit of the RBOCs, their suppliers, and the American economy. RBOC entry into the manufacturing business would seriously jeopardize this relationship and impede the free exchange of information between the RBOCs and the telecommunications manufacturing community at large, thereby reducing the level and pace of innovation in this critical sector of our economy.[323]

Mr. Frischkorn dismissed the RBOCs' contentions regarding research and development as "hogwash":

> [T]he consent decree has resulted in an explosion of R&D in this country in the telecommunications field. R&D now, on the average, is between 8 and 10 percent of sales for telecommunications manufacturers. I frankly think the RBOCs' arguments about R&D are hogwash. The RBOCs, in buying products from my member companies—and in fact, all the manufacturers in the United States—are funding that R&D. That is because when a manufacturer sells a product, he's recovering in his price the cost of his past, present, and future R&D.
>
> There may be some flexibility on [the] joint development issue. However, unlike Mrs. Biddle, we would like to see a "no royalty" provision in any agreement between the RBOCs and small companies.
>
> The reason for that is we don't want the RBOCs to turn to a few suppliers for their development needs, fund development and recover cost plus a profit in royalties. It would be just the same [as] if the RBOCs were manufacturing themselves—they would, in essence, have a captive manufacturer.[324]

Frischkorn concluded that any legislative shift from the MFJ should proceed on a phased basis and should preserve the MFJ's line-of-business restrictions and competitive entry test, as well as include strong additional competitive safeguards. Regulation would not be effective in countering Bell abuses.

Brian Moir, a Washington attorney, testified on behalf of the International Communications Association, composed of 700 cor-

[321] *Id.* at 395.
[322] *Id.* at 403.
[323] *Id.* at 396.
[324] *Id.* at 401.

porate, educational, and governmental users of telecommunications, who collectively spend $18 billion per year on telecommunications products and services. He told the Subcommittee that new telecommunications technologies had been brought to the marketplace largely in spite of, and not because of, the RBOC monopolies, and that business users have been well served by the MFJ.

> The monopoly providers of telecommunications services had very little incentive to provide the equipment, facilities, and services necessary to fulfill the new and expanding user needs. As a consequence, users were forced to go outside the traditional providers of telecommunications service, such as the Bell System, to obtain the technologies and services necessary to meet their requirements. . . . Despite the well-documented anti-competitive behavior of the Bell System to frustrate this emergent synergism, there is now a healthy competitive environment which is capable of providing state-of-the-art telecommunications equipment and information services to both business users and consumers.[325]

Mr. Moir urged that the Subcommittee, in any legislation it might consider, not rely on current FCC capability and commitment, which were woefully inadequate to the task. His position was that the line-of-business restrictions should be preserved until the RBOCs no longer possessed a monopoly bottleneck in the local exchange, or until truly effective regulation could be achieved. These steps would preserve a competitive marketplace to the benefit of the customer:

> The telecommunications and information needs of ICA's business and institutional members are best served by a competitive marketplace. Consequently, the business telecommunications user community has never advocated the continuation of barriers to entry against any telecommunications supplier in any market if such entry would provide users with more choice. ICA continues to support that policy today. Unfortunately, as history in the telecommunications industry has taught us, the entry or presence of monopoly suppliers in some markets may actually reduce or inhibit user choice and the potential for competition.[326]

In response to questioning, Mr. Moir restated this point succinctly:

> You, as a customer, would obviously like to have more choice and high-quality choice. That is what I bring to this table, 18 billion dollars' worth of corporate American purchasing power.
>
> We would love to have more suppliers. What we don't want to have is seven new entrants that reduce the total number of people in the field.[327]

Edwin B. Spievack, president of the North American Telecommunications Association, testified on behalf of the 750 tele-

[325] *Id.* at 419–420.
[326] *Id.* at 420.
[327] *Id.* at 484.

communications manufacturers and distributors composing its membership. He urged the Subcommittee to preserve the MFJ, which had "allowed genuine competition to begin to flourish in this all-important industry."[328]

He recounted the tactics employed by the Bell System prior to the MFJ—in addition to its own in-house purchasing bias—to sabotage the efforts of competing manufacturers. These tactics included withholding critical network design information, stalling sellers of new products until Western Electric could "complete a crash course" to develop comparable products, imposing unnecessary interconnection requirements, delaying the provision of equipment necessary to satisfy the interconnection requirements, and supplying defective interconnection equipment. He noted that the Justice Department's own 1986 study, as well as Judge Greene, had found that these same dangers would be present now if the Bells were permitted to manufacturer equipment.

Thomas F. Smith, chairman of Security, Inc., and also of the Alarm Industry Communications Committee, testified on behalf of America's 13,000 alarm service companies. He told the Subcommittee that his industry had had numerous difficulties with the Bell System over the years, before and after the MFJ. He noted that because most alarm companies were too small to have the resources to mount an effective legal challenge to the Bells, either at the FCC or in court, legislation to alter the MFJ restrictions would be "disastrous."[329]

Remarking on the divergence of opinion expressed regarding an appropriate congressional response, Chairman Brooks acknowledged that "our task is just beginning" and that formulating a policy in "the interest of all Americans" would require the Subcommittee to "screen out rhetoric in favor of informed opinion."[330] He also made clear his conviction that "the competitive environment fostered by the consent decree . . . has been greatly beneficial to our system." The Subcommittee, he resolved, would "not permit a return to the days of coercive 'bottleneck' practices, so harmful to the industry and consumers alike," that were "the basis of the Government's antitrust case in the first place."[331]

B. 102d Congress

1. Hearings

When the Subcommittee on Economic and Commercial Law held its next general oversight hearing on the MFJ, on August 1, 1991,[332] it took place against the backdrop of two major developments. First, the Senate had passed legislation two months earlier that would have removed the MFJ's manufacturing restriction and permitted the RBOCs to enter the manufacturing line of business without meeting the MFJ's competitive entry test. S. 173, the "Telecommunications Equipment Research and Manufacturing Act

[328] *Id.* at 456.
[329] *Id.* at 464.
[330] *Id.* at 488.
[331] House Comm. on the Judiciary, Press Release, Aug. 1, 1989.
[332] *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 1), Hearing Before the Subcomm. on Economic and Commercial Law of the House Committee on the Judiciary*, Serial No. 60, 102d Cong., 1st Session (Aug. 1, 1991) [hereinafter *1991 Hearings*].

of 1991," would have relied on FCC post-entry regulatory measures in lieu of the MFJ's antitrust principles to guard against anticompetitive practices by the RBOC monopolies.

Second, Judge Greene, pursuant to the D.C. Circuit's directive on remand of the triennial review decision regarding the information services restriction, had been constrained to discard the competitive entry test in favor of a standard requiring him to defer to the Justice Department and lift the restriction unless he found a "certainty" that competitive harm would result. In a July 25, 1991 decision—rendered just a week before the hearing took place—Judge Greene had reluctantly lifted the restriction despite his conviction that:

> the most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of the American people in just a few dominant, collaborative conglomerates, with the captive local telephone monopolies as their base.[333]

Judge Greene had stayed his decision, pending appeal.

As revealed at the hearing, these developments had had a marked effect on various segments of the telecommunications industry. The Bell monopolies, emboldened by their progress in court against the information services restriction and in Congress against the manufacturing restriction, had escalated their demands accordingly. Meanwhile, a fissure had erupted in the once-solid phalanx of support for the MFJ's line-of-business restrictions among important segments of the competitive market. Information service providers were resentful of the "neutral" stance AT&T had taken toward the information services restriction during the triennial review—an abandonment which had proven fatal in the court of appeals. AT&T and other telecommunications equipment manufacturers, for their part, had been stung by the decision of information service providers to stand on the sidelines as the Bell monopolies secured passage of S. 173 in the Senate. This fissure was now evidenced in divergent legislative responses urged upon the Subcommittee.

Edward E. Whitacre, Jr., chairman and CEO of Southwestern Bell, testified on behalf of the seven regional Bell operating companies. Repeating the Bells' now familiar themes, he pressed the Subcommittee to promptly follow the Senate's lead and assert congressional responsibility for removing the manufacturing restriction—but to defer to the established judicial processes regarding the information services restriction.

The manufacturing restriction, Mr. Whitacre told the Subcommittee, was "creating a moat between the identification of consumer needs and the ability to effectively answer them,"[334] producing an "absolute chilling effect . . . on advancement."[335] Removing the restriction, he said, would "help America regain its service leadership in the telecommunications marketplace and

[333] *United States* v. *Western Elec. Co.*, 767 F. Supp. 308, 326 (D.D.C. 1991) (footnote omitted).
[334] *1991 Hearings*, *supra* note 332, at 23.
[335] *Id.* at 40.

strengthen America's position in world trade."[336] "With relief from the MFJ," he promised, "the telecommunications balance of trade will once again shift in America's favor. . . . As a result, more jobs will be created . . . ."[337]

The information service restriction, he said, was preventing the Bells from solving the problems associated with "latchkey children and aging parents," and from alleviating shortages of medical care in rural America.[338] Supporters of the restriction, he maintained, are simply afraid to "compete with us to bring new services to the American people."[339]

Mr. Whitacre assured the Subcommittee that "existing and proposed" regulatory safeguards would adequately protect competition in the telecommunications industry.[340] He denounced the concerns voiced about Bell anticompetitive conduct in the absence of the MFJ's line-of-business restrictions as "an unjustified attack on the integrity of an industry that has served and continues to serve this country well by providing the best telephone service in the world."[341] In response to a question from Chairman Brooks, however, Mr. Whitacre told the Subcommittee that the RBOCs would "unquestionably" support legislation to codify the principles set forth in the MFJ, while suggesting that any such legislation apply generically to the industry.[342]

Kenneth B. Allen, senior vice president of the Information Industry Association, criticized the court of appeals decision which had forced Judge Greene to use a "certainty" standard in re-evaluating the information services restriction. Such a standard, he said,

> undermines an important purpose of the Tunney Act: to interpose the courts as independent checks on the negotiation and administration of consent decrees by the Justice Department. . . . The Department's abrupt about-face on nearly every significant issue in this mammoth case should . . . conjure for this Committee, as it did for Judge Greene, the historical abuses that led up to passage of the Tunney Act.[343]

In the wake of Judge Greene's decision to lift the information services restriction, Mr. Allen said, "Congress . . . will be the forum for designing a sensible course to promote competition and benefit the American consumer."[344] He told the Subcommittee that it was "critical to move quickly."[345] He urged the Subcommittee not to rely on regulatory processes to prevent anticompetitive RBOC conduct, noting that it was "recurrent regulatory failure over the past century [that] led to the MFJ."[346] Bell monopoly entry into information services would continue to be premature, he

[336] *Id.*
[337] *Id.* at 40–41.
[338] *Id.* at 34.
[339] *Id.* at 19.
[340] *Id.* at 36.
[341] *Id.* at 20.
[342] *Id.* at 87.
[343] *Id.* at 227.
[344] *Id.* at 225.
[345] *Id.* at 229.
[346] *Id.* at 225.

said, unless and until workable and effective safeguards could be developed and tested, including antitrust-type entry standards.[347]

Questioned by a member of the Subcommittee, Mr. Allen said the information services industry had "not taken a position or a look at" S. 173, the Senate-passed legislation to lift the MFJ's manufacturing restriction.[348] He did remark, however, that the safeguards proposed in S. 173 appeared inadequate.[349]

Cathleen Black, president and CEO of the American Newspapers Publishers Association, concurred with Mr. Allen, urging Congress to "enact legislation that would permit Regional Company entry into electronic publishing only when they do not have monopoly control over telephone exchange service."[350]

AT&T Vice Chairman Randall L. Tobias, in contrast, urged the Subcommittee to "leave things alone."[351] Focusing on the manufacturing restriction and S. 173, he said the "real solution at the moment . . . is to do nothing. I think the consent decree as it applies is working fine."[352]

The MFJ had benefitted the telecommunications equipment and long-distance markets enormously, Mr. Tobias said.[353] Because regulation could not adequately protect competition against monopoly abuse in these markets, he said, AT&T would oppose any attempt to alter the framework of the MFJ.[354] He expressed disdain for the "piecemeal approach advocated by some [that] would destroy the competitive equipment market by again combining the local exchange monopolies with in-house equipment suppliers."[355] If the Subcommittee were to consider any legislation, he said, it should be a "comprehensive approach" and "embody the fundamental procompetitive principles of the [MFJ] mandating separate ownership of monopoly telephone exchanges on the one hand and competitive businesses on the other. Those are the only safeguards that have worked."[356]

During questioning by Chairman Brooks, Mr. Tobias insisted that AT&T had not supported lifting the information services restriction during the triennial review before Judge Greene, but had merely made a "decision to be neutral."[357] But Chairman Brooks urged him to reconsider the implications of AT&T's narrow focus:

> Mr. TOBIAS. [T]he circumstances changed a bit in terms of the rules that were applied when the appellate court came down with its decision.
>
> Mr. BROOKS. Would you now oppose it, now that you know a little more about it, or the facts have changed?
>
> Mr. TOBIAS. I would like to stay exactly where I am. And I know that this is a very uncomfortable position for everybody, including me. But the fact is that our focus is on the impact on manufacturing and on interexchange services.

[347] *Id.* at 230–231.
[348] *Id.* at 278.
[349] *Id.*
[350] *Id.* at 123.
[351] *Id.* at 89.
[352] *Id.* at 96.
[353] *Id.* at 60.
[354] *Id.* at 62, 78.
[355] *Id.* at 61.
[356] *Id.*
[357] *Id.* at 106.

> But if it meant that the fundamental decree . . . was going to fall apart, we would have a very serious problem, because we are very concerned about the implications of the heart of the decree on manufacturing and on interexchange services.
>
> Mr. BROOKS. But you know when you jumped the newspapers, the media, and let information services go by, not opposing it, maintaining a neutrality, but gave the RBOCs a shot at that—when you did that, the newspapers and other information service providers don't seem to love you as much any more. As a result, they might not support you on manufacturing. Then you are right back in the soup.[358]

The views of the Communication Workers of America (CWA) had also undergone some modification during the intervening period. CWA was now ready to support complete removal of the MFJ's manufacturing and information services restrictions. Accordingly, CWA advocated swift House endorsement of S. 173[359] and congressional acceptance of Judge Greene's decision lifting the information services restriction.[360]

CWA was also ready to rely on regulation to counter the Bells' monopoly tendencies. As to manufacturing, CWA supported the regulatory scheme set out under current law, as modified by S. 173—provided the "domestic content" issue was acknowledged. As to information services, CWA suggested that opponents of RBOC entry instead work with the Bells to establish the appropriate regulatory safeguards.[361]

Other witnesses at the hearing maintained the views they had expressed at the 1989 hearings. Gene Kimmelman of Consumer Federation of America, Ronald J. Binz of the National Association of State Utility Consumer Advocates, and Edwin B. Spievak of the North American Telecommunications Association all expressed strong support for the MFJ's line-of-business restrictions.[362] Now, however, their calls for legislative action to preserve the competitive principles of the MFJ had grown more urgent.

Stephanie Biddle of the Computer and Communications Industry Association reiterated her association's earlier views, but with some refinements. She now expressed full support for lifting the information services restriction, within a Bell monopoly's region as

---

[358] *Id.*

[359] *1991 Hearings, supra* note 322, at 269.

[360] *Id.* at 264.

[361] *See 1991 Hearings, supra* note 332, at 268–269.

[362] Reminding Subcommittee members that the MFJ was a *settlement* of a Sherman Act enforcement action against the Bell System, Mr. Spievak accused the RBOC monopolies of seeking a "retroactive exemption from the antitrust laws." *Id.* at 199.

He also described for the Subcommittee how the RBOCs had already discovered a way—even under the MFJ restrictions—to leverage their monopoly power to unfairly discriminate in favor of certain telecommunications equipment manufacturers and cross-subsidize, all in one stroke.

> [T]he Bell companies have selected certain favored manufacturers to design the functionality of customer equipment into the central office and then deny independent manufacturers technical information on which that central office functions, so that manufacturers can design their equipment to function with the central office.
>
> It is an enormous, complex issue, but it essentially has the Bell operating companies in the market today, even before they can manufacture, insisting certain favored manufacturers lay off their R&D cost into the network to get lower prices for their premises equipment against which independent manufacturers cannot compete, because there are no R&D costs in the premises equipment. It is a new form of cross subsidy.

Id. at 196–197.

well as outside it.[363] And she expressed support for permitting the Bells to participate in research and development, but only through funding specific projects of unaffiliated manufacturers under contract, and only to receive royalties for sales of the resulting products to unaffiliated parties.[364]

Surveying the increasing disarray and uncertainty in the telecommunications industry being brought about by the RBOCs' escalating demands and the tilt toward factionalism in major segments of the competitive markets, Chairman Brooks advised all to anticipate legislation to restore coherence and stability to competition policy in the telecommunications industry: "it appears Congress will be drawn directly into establishing the competition policy to rule this unruly industry." [365] He counseled all interested parties to continue to "talk to us if not to each other." [366]

Before the next hearings took place before the Subcommittee, there were additional developments. On October 2, 1991, the D.C. Circuit Court of Appeals removed Judge Greene's stay of his July 25 decision, thus permitting immediate RBOC entry into information services before appellate review was completed. Six days later, Congressman Jim Cooper introduced legislation, H.R. 3515, which would have the effect of reinstating the information services restriction in a somewhat different fashion.[367] Meanwhile, the RBOC monopolies were increasing their lobbying efforts in the House regarding the Senate-passed legislation to lift the manufacturing restriction. Each bill contained its own set of unique standards governing the ability of an RBOC to engage in the line of business in question; yet none of the standards possessed the blend of strength and flexibility of the MFJ's competitive entry test in promoting and safeguarding competition.

As the Second Session of the 102d Congress got underway, the Subcommittee intensified its examination of these developments in telecommunications competition policy. On January 21, 1992, Chairman Brooks announced that hearings would be scheduled promptly, with the express purpose of assisting the Subcommittee in developing comprehensive legislation to ensure a competitive telecommunications marketplace.

The first such hearing took place February 19, 1992,[368] at which the Subcommittee heard testimony from telecommunications industry executives and a representative of the International Brotherhood of Electrical Workers. During this hearing it was revealed that a broad consensus was developing behind Chairman Brooks' call for comprehensive legislation embodying the competitive principles of the MFJ. Comprising this consensus was a disparate coalition of long distance telecommunications companies, telecommunications equipment manufacturers, information service providers,

[363] *See id.* at 148–157.
[364] *See id.* at 158–171.
[365] House Comm. on the Judiciary, Press Release, Aug. 1, 1991.
[366] *1991 Hearings, supra* note 332, at 284.
[367] The bill would prohibit RBOCs from offering electronic publishing information services in States in which it offers local phone services, until an alternative local telephone service is available to, and actually used by, specified proportions of the population. H.R. 3515, 102d Congress, 1st Sess. § 227 (1991).
[368] *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 2), Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* Serial No. 60, 102d Cong., 2d Sess. (Feb. 19, 1992).

business users of telecommunications, and government and non-profit consumer advocacy groups.

The consensus was reflected in an unprecedented "Unity Statement" that, by the time H.R. 5096 was approved by the full Judiciary Committee on July 1, included more than 1,500 organizations as signatories.[369]

Chairman Brooks made clear at the outset of the hearing that his comprehensive legislation would not be a rigid bar against RBOC entry into the competitive lines of business, but would instead reflect a balanced and flexible approach taking into account the dynamic and innovative nature of the telecommunications industry.[370]

AT&T Chairman and CEO Robert E. Allen, the first witness to testify at the February 19 hearing, explained the compelling forces that had brought together such disparate elements of the telecommunications industry into the Unity Coalition: "piecemeal attacks [on the Consent Decree]—and especially the erratic and unpredictable behavior of the Department of Justice—have eroded, and are threatening to nullify altogether, the competitive and consumer benefits that the Decree created."[371]

Echoing this concern was MCI President and CEO Bert C. Roberts, Jr:

> If monopoly forces are allowed once again to dominate our country's telecommunications markets, the progress of the last 10 years—America's competitive head start on the rest of the world—will quickly be lost. This is not mere rhetoric. Competition has allowed thousands of American entrepreneurs to bring innovative services and products to the marketplace. And we've all benefitted from this newfound freedom of choice.[372]

Dwight D. Opperman, president and CEO of West Publishing Co., described how the dependence of electronic publishers on the telephone for connection to their customers made them vulnerable to anticompetitive abuse by the RBOC monopolies:

---

[369] The statement reads as follows:

> The undersigned organizations representing consumers, business telecommunications users, competitive local telecommunications service providers, information service providers, telecommunications equipment manufacturers and long distance companies, believe the principles of the AT&T consent decree are essential to promote universal service, maximum competition, an efficient infrastructure, and growth in domestic telecommunications employment. The competitive marketplace serves the needs of telecommunications customers for fair prices, customer choice and product innovation. We should continue the progress America has made in bringing the benefits of competition to telephone consumers.
>
> Congress should enact a national telecommunications policy founded on the purposes of the consent decree. A national policy should build on the success of introducing competition into the telecommunications industry. A national policy should not allow local telephone monopolies to undermine competitive market forces and abuse captive ratepayers by returning to the days when consumers and businesses suffered under monopoly bottleneck telephone control over price, products, and services. By maintaining pro-competitive and pro-consumer policies, America will preserve affordable telephone service, increase telecommunications competition and employment and promote investment in an efficient infrastructure necessary to maintain American superiority in global markets.

Id. at 167.

[370] *Id.* at 2–3.

[371] *Id.* at 25. Referring to the utter reversal that had taken place in the Justice Department with respect to the MFJ's line-of-business restrictions, Mr. Allen told the Subcommittee that the Department had "lost its memory and I think its compass." *Id.* at 22.

[372] *Id.* at 110.

> The lifting of the stay creates the need for Congressional action with particular force and urgency. Because distribution is so critical to our business, we are extremely exposed to the twin dangers of service discrimination and outright appropriation of business opportunities if the distributor with whom we must deal is at the same time our competitor.
>
> * * * * * * *
>
> . . . The line-of-business restrictions in the MFJ, while sometimes misconceived by their detractors as restraints of progress, actually promote progress and diversity by imposing a modest protection against the possibility of unfair practices by seven companies who enjoy a stranglehold on our distribution system. All other companies—large and small, traditional and upstart, foreign and domestic—are free to enter the market in full force.[373]

David E. Easterly, president of Cox Newspapers, expressed the same concern using a familiar, nontechnical analogy: "I hope that as lawmakers you have an instinctive understanding that there will be foul play galore if you leave us in a situation where Domino's must contract with Pizza Hut for delivery of their pizzas with no protection from abuse and dirty tricks."[374]

Presenting a markedly different view was Ivan Seidenberg, vice president of NYNEX Corporation, testifying on behalf of the seven RBOCs. Mr. Seidenberg asserted that immediate removal of all remaining line-of-business restrictions would be good not only for innovation and competition, but for job creation as well. "Although the line-of-business restrictions may have seemed appropriate ten years ago when the American market was dominated solely by AT&T," Mr. Seidenberg stated, "they have out-lived their usefulness, and have had a chilling effect upon the telecommunications industry and the economy."[375]

Mr. Seidenberg left no doubt that the RBOCs were now insistent not only that Congress remain passive while Judge Greene's decision removing the information services restriction works its way through the appeals process, and that the House of Representatives enact S. 173 to remove the manufacturing restriction, but that "the long distance restriction also must be removed."[376] He reiterated the familiar RBOC criticisms against the MFJ restrictions and RBOC reassurances regarding the efficacy of regulation:

> As with the manufacturing and information services restrictions, the long distance prohibition has outlived its usefulness. It is a vestige of the break-up of AT&T which today serves only to promote inefficiency and higher costs for consumers. Its repeal will allow the Bell Companies to better serve their customers, and will provide consumers with cheaper long distance and information services. Of course, as with manufacturing and information services, consumers will be protected by the numerous federal and

[373] *Id.* at 414, 417.
[374] *Id.* at 45.
[375] *Id.* at 78.
[376] *Id.* at 74.

state safeguards and powerful regulatory tools currently in place.[377]

Mr. Dan Bruns, chairman and CEO of General Videotex Corporation, joined NYNEX in asserting that permitting the Bells "unencumbered" entry into information services would increase competition:

> Those who would reimpose information services restrictions are wrong when they claim that Bell company entry into information services will reduce competition. We believe the opposite is true. It is the existing information services market that has limited competition. Entry by regional Bell companies is likely to increase the responsiveness of this market.[378]

Stephen T. Lynn, representing the EM–3 Council of the International Brotherhood of Electrical Workers, disputed the contention of Mr. Seidenberg and Mr. Bruns that removing the line-of-business restrictions would lead to a net increase in either competition or American jobs. Stating his opposition to the RBOC-backed legislation to remove the MFJ's manufacturing restriction, Mr. Lynn said:

> I am deeply concerned about the impact of the legislation presently under consideration in the U.S. House of Representatives which would allow the regional Bell Operating Companies (RBOCs) to enter into manufacturing. They have argued that such legislation would be good for the country, because it would create jobs for American workers and stem our declining balance of trade. Mr. Chairman and Members of the Subcommittee, I can tell you that those are nothing but hollow promises. The RBOCs have conceded the fact before this committee that they are not interested in constructing any new manufacturing plants, that they will joint venture with foreign firms. They will create jobs only for the companies they joint venture with—companies such as Siemens, Alcatel, Ericcson, Northern Telecom and NEC—companies which employ only a few—if any—American workers.
>
> * * * * * * *
>
> In addition to the potential loss of thousands of high-paying union jobs, this legislation also poses a serious threat to consumers. By lifting the restrictions on the Regional Bell Operating Companies, Congress would, in effect, be re-creating seven smaller versions of the old Bell monopoly which would actually suppress, rather than enhance, competition within the telecommunications industry.[379]

Mr. Lynn further elaborated on this concern in additional testimony submitted for the record:

---

[377] *Id.* at 100.
[378] *Id.* at 434.
[379] *Id.* at 423, 426.

> Our first and foremost concern . . . is the loss of thousands of union jobs in America, many of which are I.B.E.W. jobs. If the RBOCs are free to manufacture for themselves, why whould they purchase equipment from any other supplier? We know from past history, that when the telephone companies are able to manufacture for themselves, little or nothing is purchased from anyone else. Cross subsidization will likely come about, which will mean increased cost for all rate payers and will stifle competition.[380]

Mr. Lynn directly refuted the RBOCs' claim that the MFJ's manufacturing restriction limited their ability to consult with equipment manufacturers regarding technological needs:

> I would like to address this issue we have heard about when the RBOCs complain they have no voice with their suppliers when equipment is manufactured. Brother Frank Possinger who is the president of I.B.E.W. local #1974 at the Omaha Works, tells me that Bellcore has offices in their plant and are on the shop floor every day. There is no question that they have the authority to examine every step of the manufacturing process and have the power to change any design specifications. As a matter of fact, the RBOC people even have the authority to halt production if they don't like what they see. That is a great deal of authority. Just because they are restricted from the actual manufacturing itself does not mean that they give up their rights as buyers to specify what they want and to take bids from the thousands of suppliers who could and would make exactly what they want.[381]

At the conclusion of the hearing, Chairman Brooks announced that the Subcommittee would "move forward in considering a comprehensive approach to the dilemma facing competition in the telecommunications industry," grounded in "the competitive principles that have safeguarded the workings of our distinctive American free enterprise system."[382]

On March 18, 1992, the Subcommittee held another hearing to receive testimony from Federal and State enforcement and regulatory officials.[383] There was a marked contrast in view between the Federal officials and the State officials.

James F. Rill, Assistant Attorney General for the Antitrust Division, defended the Justice Department's reversal of position on the MFJ's core manufacturing and information service restrictions. He repeated the explanation given by the Department at the time of the reversal: that it was based on a thorough analysis of the telecommunications industry study that the Department had commissioned outside consultant Peter Huber to conduct:

[380] *Id.* at 467.
[381] *Id.* at 425–426.
[382] House Comm. on the Judiciary, press release, Feb. 19, 1992.
[383] *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 3), Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* Serial No. 60, 102d Cong., 2d Sess. (March 18, 1992).

> The Department conducted its review of the restrictions in 1986 and early 1987. It retained an independent consultant, Dr. Peter Huber, to conduct a study of the telecommunications industry and to prepare a report to assist the Department in making recommendations for changes in the decree. The Department reported to the court in 1987, after evaluating the extensive information Dr. Huber had compiled.[384]

While expressing the Department's continued support for the interexchange restriction, Mr. Rill cautioned the Subcommittee against enacting a permanent restriction into statute, since "future developments in technology, market conditions, or regulation could alter the risk of anticompetitive harm, and flexibility to adapt is necessary."[385]

Alfred C. Sikes, Chairman of the Federal Communications Commission (FCC), also testified in favor of removing the restrictions on information services and equipment manufacturing. He sought to assure the Subcommittee that the FCC could now be depended upon to protect the marketplace against anticompetitive abuse:

> Whatever might have been possible prior to the breakup of the unified Bell System, or before we instituted a comprehensive package of regulatory safeguards, the reality today is that the FCC does have effective tools, and has clearly demonstrated both the willingness and ability to use them.[386]

During questioning by Mr. Synar, however, Chairman Sikes admitted that the FCC: (1) had only 18 auditors to cover 256 audit areas; (2) relied heavily on independent private auditors; and (3) had unsuccessfully sought Administration support to more than double the number of auditors.[387]

The State government witnesses presented a markedly different view. They urged that the line-of-business restrictions and the competitive entry test be preserved and revitalized, and that enforcement efforts be strengthened.

Hubert H. Humphrey III, Attorney General of Minnesota, made clear that he did not agree with the Justice Department's "willingness to depart from the Consent Degree terms which the RBOCs agreed to just a few years ago."[388] He called for comprehensive legislation to codify the line-of-business restrictions:

> When we're talking about regional Bell operating companies and competition policy, the right standards are no mystery. They are the ones embodied in the Modified Final Judgment in the AT&T case and expressed in the Unity Statement. You all know more than I do about the theoretical dangers of cross-subsidization and bottleneck mo-

[384] *Id.* at 39. *See* discussion *supra*, notes 248–256 and accompanying text, of the decision-making that had already taken place in the Justice Department *prior* to its decision to hire Dr. Huber as its "independent consultant."
[385] *Id.* at 28.
[386] *Id.* at 68.
[387] *Id.* at 157–160.
[388] *Id.* at 95.

nopolies. A theory is great, but the practical lesson is this: big businesses with monopoly power always use it. . . .

* * * * * * *

. . . I believe that a clear and comprehensive legislative solution codifying the principles of the Modified Final Judgment and Unity Statement is critical to the orderly strategic development of our national telecommunications policy. To permit the RBOCs, with their monopolies over local phone services, to project their monopoly power into adjacent markets is to turn back the clock to the days before the AT&T settlement.[389]

William J. Cowan, general counsel of the New York State Public Service Commission, recounted his agency's difficulties in effectively regulating the regional Bell NYNEX since divestiture. Joining the call for comprehensive legislation based on the competitive principles of the MFJ, he warned the Subcommittee not to place its trust in the FCC as the guardian of competition:

> [I]n this rapidly changing world of telecommunications, it would be either naive or incredibly egotistical to believe that regulators can do the job through rigorous oversight alone. Congress, as it goes forward, has no choice but to create a framework that takes into account [the] monopoly position the [RBOC] Holding Companies still possess. At the same time any framework should be flexible enough to respond to a changing marketplace. Thus, in preventing a too-soon reversal of the MFJ restrictions by the judicial process, it seems important to provide for flexibility to respond to what promises to be a changing competitive marketplace. . . .
>
> . . . I am concerned that the view at the FCC over the last few years has been that it alone should determine the proper oversight of telephone companies as they engage in new businesses. I seriously question whether it has either the resources or the commitment to alone protect local ratepayers.[390]

Charlie Donaldson, New York Assistant Attorney General in charge of the Energy and Utilities Unit in the Bureau of Consumer Frauds and Protection, also expressed doubts as to whether regulatory oversight could prevent anticompetitive abuse. He discussed his State's enforcement efforts against overcharges by MECO, an unregulated NYNEX subsidiary, to New York Telephone, a regulated NYNEX telephone monopoly, which enabled NYNEX to reap millions of dollar in excess profits:

> NYNEX was able to extract excess charges from a regulated subsidiary even within the constraints imposed by the Modified Final Judgment and in the face of current levels of regulatory oversight. Moreover, NYNEX was able

[389] *Id.* at 87, 88.
[390] *Id.* at 147, 148.

to do this with subsidiaries that were structurally separate from its regulated telephone companies.

* * * * * * *

. . . [Y]ears after the existence of substantial overcharges by MECO and other unregulated NYNEX subsidiaries became widely known, only a small fraction of those overcharges have been identified and quantified. Since identifying the nature and quantity of the overcharges must be done before consumers can be protected from them, we may be years away from completing this task.

Given the delay in identifying the NYNEX unregulated subsidiary overcharges and the voluminous records involved, we are uncertain just how much of the overcharges will ultimately be identified, much less quantified. The trail is rather cold.[391]

An exchange between Chairman Brooks and Mr. Cowan following the testimony summed up the low regard in which the Bells appeared to hold regulation as a deterrent to monopoly abuse:

Mr. BROOKS. In describing how they dealt with you New York folks, the chief executive of NYNEX, Mr. Ferguson, is quoted as saying that, "For us, learning to deal with competition has been a lot like children meeting with the new babysitter. You're not quite sure how strict she's going to be. So you test her a little." Well, they apparently tested you all pretty good.

Mr. COWAN. They sure did.[392]

At the conclusion of the March 18 hearing, Chairman Brooks announced that he would soon introduce comprehensive legislation establishing a unified standard, based on the principles of the MFJ, for authorizing entry of the RBOCs into the competitive lines of business.

2. Legislative action: H.R. 5096

Based on the extensive record developed in the hearings, Chairman Brooks introduced H.R. 5096, the "Antitrust Reform Act of 1992," on May 7, 1992. The bill would have superseded the MFJ's core line-of-business restrictions, establishing a unified procedure and standard for the Bell operating companies to use in applying for authorization to engage in information services, manufacturing, or interexchange telecommunications.

The cornerstone of the bill was the competitive entry test, based closely on the test in the MFJ, requiring the Bell operating company applying for entry to prove that "there is no substantial possibility that [it] could use monopoly power to impede competition in any relevant market for the activity to which the application relates." This entry requirement would not have applied, however, to any activity into which the Bell operating company had already been granted entry by Judge Greene under the MFJ's competitive entry test.

[391] *Id.* at 124, 126.
[392] *Id.* at 151.

The procedure established in the bill followed the procedure for a Bell operating company to lift or waive a line-of-business restriction under the MFJ's competitive entry test. The Bell would first apply to the Attorney General for approval; if there were objection to the Attorney General's decision by the RBOC or an independent party, the application could be considered *de novo* by a Federal district court.

The Attorney General's decision was required to be rendered within 130 days, and would become final if no one filed a timely request for *de novo* court determination.

As introduced, the bill established an orderly transition out of the MFJ restrictions into the statutory framework. The Bell operating companies would become eligible to apply for entry immediately upon date of enactment for research and development regarding telecommunications equipment or customer premises equipment, or for any product or service for which there were a compelling competitive need and no alternative supplier at hand. They would become eligible to apply after 3 years for information services other than electronic publishing; after 5 years for manufacture or provision of telecommunications equipment; and after 7 years for interexchange telecommunications or electronic publishing. This phased-in transition was designed to minimize the dislocation and disruption in telecommunications markets from the transition of this trillion-dollar industry out of the laboratory conditions of the MFJ.

During its consideration of H.R. 5096, the Judiciary Committee evaluated and rejected RBOC claims, advanced by Harvard Law School Professor Laurence H. Tribe, that legislation codifying the MFJ's line-of-business restrictions would be an unconstitutional bill of attainder and violate separation-of-powers principles, because it would apply only to the Bells, rather than to all local telephone companies generically.[393] The Committee concluded that Supreme Court precedent clearly indicates there is no constitutional impediment to passing legislation to supplant a judicial decision—even legislation directed to a particular subset of a group—provided there is a rational, non-punitive governmental basis for doing so.[394] As Professor Tribe has emphasized in his own treatise:

> It is only laws that inflict punishment on legislatively specified individuals that the bill of attainder ban con-

[393] *See* memorandum of Laurence H. Tribe, *Comments on the Brooks Bill (H.R. 5096): A Constitutional Perspective* (May 21, 1992). Professor Tribe was retained by the RBOCs to write the memorandum.

Professor Tribe also argued that imposing the competitive entry test on the RBOCs for entry into information services would violate the RBOCs' First Amendment right to free speech. The American Civil Liberties Union made similar bill-of-attainder, separation-of-powers, and First Amendment arguments. The Committee carefully evaluated, and ultimately rejected, all such constitutional arguments. In addition to conducting its own analysis of the relevant constitutional precedents, the Committee received analyses from Professor Bert Neuborne of New York University Law School (retained by the Newspaper Association of America), Professor Henry P. Monaghan of Columbia University Law School (retained by AT&T) and, perhaps most importantly, the American Law Division of the Library of Congress. *See Antitrust Reform Act of 1992:* H.R. Rep. No. 850, 102d Congress, 2d Sess. (star print), at 15-16, 88-94 (1992).

[394] *E.g., Nixon* v. *Administrator of General Services,* 433 U.S. 425, 468–484 (1977). Mr. Johnny H. Killian, senior specialist and attorney in the American Law Division of the Library of Congress, noted that instances of Congress altering a judicial determination through a statutory revision "are legion." Johnny H. Killian, *Discussion of Bill of Attainder Arguments Made Against Bill to Restore Restrictions of Consent Decree in AT&T Case,* American Law Division of the Library of Congress (1992).

> demns, and [it is] plain that not all burdens may be deemed punishment for this purpose even when legislative "specification" is shown.[395]

Congress's constitutional authority to make competition policy is well known.[396] And the rational governmental basis for directing H.R. 5096 (and H.R. 3626) at the Bell companies alone is two-fold. First, the Bells alone exercise immense local exchange monopoly power concentrated throughout a vast geographical region; the local exchange operations of even the Bells' closest runners-up are widely dispersed. Second, the very purpose of the legislation is to supersede the MFJ's existing line-of-business restrictions, to which the Bells alone are subject.

The RBOCs themselves presented the Committee with a refutation of the bill-of-attainder and separation-of-powers arguments in 1989, when they were seeking to *build* support for other legislation. The RBOCs provided a memorandum from Professor Robert Pitofsky of Georgetown University Law School, in which he stated:

> In this paper, we consider whether Congress has the power to establish policy with respect to the line-of-business restrictions imposed on the Bell Operating Companies (BOCs) by the antitrust consent decree now applicable to those companies. A review of the relevant case law demonstrates that there is no legal bar to such legislation. . . .
>
> * * * * * * *
>
> . . . As a matter of law, it is appropriate for Congress to remove or modify these restrictions.[397]

On May 28, 1992, the Subcommittee on Economic and Commercial Law met to mark up H.R. 5096. The Subcommittee ordered the bill reported favorably to the full Committee on the Judiciary, without amendment, by a rollcall vote of 10 to 6.

On July 1, 1992, the Committee on the Judiciary met to mark up H.R. 5096. During the markup, the Committee considered amendments regarding the phased-in transition period, the legal standard for the competitive entry test, the deference to be shown by the Judicial Branch to determinations by the Attorney General, and the legal standard for the post-entry safeguards. The Committee also considered how the bill should treat information service activities in which the Bells may already be engaged pursuant to the lifting of Judge Greene's stay of his July 26, 1991, decision.

Much of the discussion focused on the terms of years in the phased-in transition period for triggering Bell operating company eligibility to apply for entry into the various lines of business. While many Members supported the concept of a transition period term-of-years, some questioned whether the specific terms of years

---

[395] Laurence H. Tribe, American Constitutional Law 650–651 (2d ed. 1988).

[396] *See, e.g., Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911); *Addyston Pipe & Steel Co.* v. *United States,* 175 U.S. 211 (1899); *United States* v. *Joint-Traffic Ass'n,* 171 U.S. 505 (1898).

[397] Memorandum of Robert Pitofsky & Robert S. Thorpe, *Legislating With Respect to Line-of-Business Restrictions on Bell Operating Companies: An Appropriate Role for Congress* 1, 4 (August 1, 1989). The accompanying cover letter from Mr. Casimir Skrzypczak of NYNEX emphasized that the memorandum "concludes that no constitutional impediment exists which prevents legislative action with respect to the Consent Decree . . . ."

were necessary or reflective of market viability. Others questioned why any transition period was needed at all. Still others believed some allowance should be made for the Bells to remain in information services in which they were already engaged pursuant to the latest court developments.

In an effort to address these concerns, Chairman Brooks offered two amendments. The first amendment reduced the term of years for most information services from 3 years to 2 years; for equipment manufacturing, from 5 years to 2 years; and for long distance and electronic publishing, from 7 years to 5 years. This amendment was adopted by voice vote.

Chairman Brooks' second amendment permitted a Bell operating company to continue providing any information service in a particular geographic market to the extent the company was lawfully engaged in providing that service to customers in that geographic market during the period from October 7, 1991 (the date Judge Greene's stay was lifted) to the date 60 days before the date of enactment of the bill. This amendment was intended to respond to assertions by the Bells that they would have acquired a "detrimental reliance" interest in these business activities, although—as Chairman Brooks noted—the Bells were proceeding at their own risk, given that Judge Greene's decision was still on appeal, and the Judiciary Committee had been signalling its interest in codifying the principles of the MFJ for three years. Mr. Bryant offered a perfecting amendment to exempt alarm services from this "grandfather" provision. Chairman Brooks accepted the perfecting amendment, and his amendment, as perfected, passed by voice vote.

Next, Mr. Fish offered an amendment to eliminate the transition period terms of years altogether; this amendment also extended the time period for all grandfather provisions in the bill as introduced to the date of enactment. Mr. Fish's amendment was adopted by a rollcall vote of 18 to 15.

Later, Mr. Bryant offered an amendment to reinstate a five-year phase-in period for long distance services and for alarm services. Eliminating the transition period entirely for the long distance restriction risked reinstituting the worst of the original bottleneck, Mr. Bryant stated, and could result in an absolute avalanche of litigation immediately upon enactment of the bill. In addition, due to the small size of virtually all alarm service businesses and their utter reliance on the immediate responsiveness of the local telephone exchange, they were virtually helpless against anticompetitive abuses by the Bell monopolies. Mr. Bryant's amendment was adopted by voice vote.

The Committee also adopted, by voice vote, an amendment by Mr. Campbell which further tailored the post-entry antitrust prohibitions to conform more precisely to certain other antitrust statutes. Under Mr. Campbell's amendment, discrimination or recombination by a Bell with monopoly power would be prohibited under the bill only if "the effect . . . may be to substantially lessen competition, or to tend to create a monopoly, in any line of commerce"; joint activity among Bells with monopoly power would be prohibited under the bill only if "in restraint of trade."

The Committee also considered—but rejected—amendments to eliminate *de novo* court determination of contested Bell applications for entry, to change the standing requirement, and to alter the bill's test for Bell entry into competitive markets. The amendment offered by Mr. Fish to eliminate *de novo* court determination was rejected by a rollcall vote of 20 to 13. The amendment he offered to tighten standing requirements for challenging an application in court was rejected by voice vote. Mr. Fish, Mr. McCollum, and Mr. Glickman each offered amendments to alter the competitive entry test. Mr. Fish's amendment was rejected by voice vote; Mr. McCollum's amendment was rejected by a rollcall vote of 23 to 9; and Mr. Glickman's amendment was rejected by voice vote.

On August 12, 1992, the Judiciary Committee filed its report on H.R 5096. Because the legislation took a pure antitrust approach to superseding the MFJ's line-of-business restrictions, it was not subject to sequential referral to any other committee. On October 1, 1992, the House Committee on Rules held a hearing on H.R. 5096, but time constraints prevented the measure's consideration by the full House prior to adjournment.

C. 103d Congress

1. Introduction of H.R. 3626

During the first session of the 103d Congress, Chairman Brooks worked with Energy and Commerce Committee Chairman John Dingell to develop comprehensive telecommunications legislation. After several months of discussions, Chairman Brooks and Chairman Dingell jointly introduced H.R. 3626, the "Antitrust and Communications Reform Act of 1993," on November 22, 1993, the last day of the first session of the 103d Congress. H.R. 3626 builds upon the Judiciary Committee's effort last Congress in moving H.R. 5096 forward, but expands the effort to encompass legitimate and vital communications regulatory policy concerns as well. H.R. 3626 was jointly referred to the Committee on the Judiciary and the Committee on Energy and Commerce.

On the same day that H.R. 3626 was introduced, Representatives Edward J. Markey and Jack Fields introduced H.R. 3636, the "National Communications Competition and Information Infrastructure Act of 1993." This legislation, which is designed to remove regulatory impediments to competition in the local telephone exchange and has been viewed by many as a complement to H.R. 3626, was referred solely to the Energy and Commerce Committee. When H.R. 3626 and H.R. 3636 were introduced, the Clinton Administration committed itself to support broad-ranging telecommunications reform legislation in the context of their National Information Infrastructure initiative.[398]

H.R. 3626 would supersede the MFJ's line-of-business restrictions, establishing a procedure for Bell operating companies to apply for authority to engage in interexchange (long distance) telecommunications services, alarm monitoring services, and equipment manufacturing. Because the Supreme Court had denied certiorari to review the district court's decision permitting the Bells

[398] *See, e.g.*, Paul Farhi, *Gore Backs Opening Up Data Highway*, Wash. Post, Dec. 22, 1993, at D1; Sandra Sugawara and Paul Farhi, *Consensus Builds on Rewriting Telecommunications Laws*, Wash. Post, Jan. 11, 1994, at D1.

into information services,[399] the legislation did not seek to establish prerequisites to entry into information services generally.

Title I of H.R. 3626, entitled the "Antitrust Reform Act of 1993" in the bill as introduced, provides for application by the Bell operating companies to the Justice Department and the FCC for approval to enter the fields of interexchange telecommunications and alarm monitoring services. Approval by both the Department and the FCC is required, and the agencies' determinations are subject to judicial review. The Department is to apply the MFJ's competitive entry test, while the FCC is to determine whether granting entry would be consistent with the public interest, convenience, and necessity.

As introduced, H.R. 3626 provided for several phase-in periods before the Bells could apply for entry. A Bell could apply on the date of enactment to provide interstate long distance services within its own region, or to engage in any long distance activity in markets in which there is no actual or were potential competition. But a Bell would have to wait 18 months to apply to "resell" long distance services provided by others; 60 months to apply to provide interstate long distance outside its region; and 66 months to apply to provide alarm monitoring services.

Three exceptions to the general restriction on interexchange telecommunication service were set forth in the bill as introduced. The first exception was for waivers approved by the U.S. District Court for the District of Columbia under the MFJ's competitive entry test, if the waivers were approved or pending by the date of enactment. The second exception was for interexchange services within a State if authorized by that State following the date of enactment. The third exception was for resale of interexchange services originating in a State that authorizes competitors of the Bell companies to provide *intra*exchange toll calls without access codes, unless the Justice Department files an action to enjoin Bell entry into the long distance resale market.

Title I of the bill sets forth a somewhat different procedure for the Bells to gain entry into equipment manufacturing, but this procedure is also based on the competitive entry test. There is a one-year phase-in period before a Bell operating company could manufacture or provide telecommunications equipment, or manufacture customer premises equipment. Prior to entry, the Bell would be required to provide notice to the Attorney General for a determination as to whether the MFJ's competitive entry test is satisfied. As with long distance, manufacturing waivers approved by the United States District Court for the District of Columbia, if approved or pending by the date of enactment, would not be subject to the bill's restrictions.

Title I of the bill also includes a prohibition against anticompetitive tying by the Bells, for as long as they retain monopoly power.

Title II of the bill, entitled the "Communications Reform Act of 1993" in the bill as introduced, sets forth a number of post-entry regulatory safeguards applicable to telecommunications equipment manufacturing, alarm monitoring services, and electronic publish-

[399] *Consumer Fed'n of Am.* v. *United States,* 114 S. Ct. 487 (1993).

ing. The electronic publishing safeguards are scheduled to sunset on June 30, 2000.

Both title I and II of the legislation include antitrust savings clauses.

2. Hearings

The Subcommittee on Economic and Commercial Law conducted three legislative hearings on H.R. 3626. At the first hearing, on January 26, 1994,[400] the Clinton Administration made its first congressional appearance concerning telecommunications legislation. Anne K. Bingaman, Assistant Attorney General for the Justice Department's Antitrust Division, urged the Subcommittee to keep competitive considerations its touchstone for telecommunications reform, noting that "it is competition, not regulation, that will provide the best guarantee of promoting new products, lower prices, employment, expanded export opportunities, and innovation in the telecommunications industry."[401] Ms. Bingaman described the fostering of competition in telecommunications as still a work in progress:

> While the MFJ has unleashed powerful competitive changes that have benefitted American consumers and business, its job—and our job—is not yet complete. There is still room and need for even more competition in all three markets affected by the MFJ: local telephone service, long distance telephone service, and equipment research and development and manufacturing.
>
> * * * * * * *
>
> . . . [U]ntil local telephone markets are competitive, entry tests and/or structural safeguards that allow for objective analyses by regulators of pricing, cross-subsidization, and discrimination are important means available to ensure that local telephone customers are not charged with the costs of long-distance service and manufacturing and that markets are not distorted by unfair and cross-subsidized pricing.[402]

Larry Irving, Assistant Secretary for Communications and Information at the U.S. Department of Commerce, echoed Ms. Bingaman's call for broad-scale competition-based telecommunications policy reform. Noting that the MFJ "helped unleash an era of competition in innovation that brought low prices and new service choices to consumers,"[403] Mr. Irving expressed support for a legislative mechanism, such as the one in H.R. 3626, to loosen or remove the MFJ's line-of-business restrictions as competitive conditions permit:

> Reform of the MFJ goes hand-in-glove with opening up local competition . . . . The development of full-fledged competition in the local provision of telecommunications

[400] *H.R. 3626, the "Antitrust and Communications Reform Act of 1993," Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* 103d Cong., 2d Sess. (Jan. 26, 1994) (forthcoming 1994) [hereinafter *January 1994 Hearings*].

[401] Statement of Anne K. Bingaman, *January 1994 Hearings, supra* note 400, at 11.

[402] *Id.* at 5, 9.

[403] Statement of Larry Irving, *January 1994 Hearings, supra* note 400, at 10.

> services will alleviate the competitive concerns that prompted the strictures placed by the MFJ on the activities of the Regional Bell Telephone Companies (RBOCs). Thus, comprehensive legislative procedures for loosening the MFJ restrictions as competition develops are appropriate. Implementation of these procedures in the wake of enhanced local competition will allow the RBOCs to compete in markets for goods and services now closed to them.[404]

The hearing also included a panel of two private telecommunications experts, Philip Verveer, the former lead Justice Department attorney in the AT&T case, and Peter W. Huber, the Washington attorney who authored the report commissioned by the Justice Department in connection with the 1987 triennial review.

Mr. Verveer, who in 1989 had testified before the Subcommittee in support of the MFJ's line-of-business restrictions, now endorsed the approach taken in H.R. 3626, of dual agency review:

> The model advanced by H.R. 3626—of requiring the two most expert government agencies to make qualitative judgments subject to judicial review—is by far the best approach that has been proposed over the several decades that these restrictions have been in place. It provides the relevant industries and the public-at-large with an assurance that the local exchange companies will be foreclosed from entering new businesses under improper circumstances, but they will not be precluded from doing so any longer than necessary. The absence of that assurance has caused the principal objection to the transfer of this question from judicial to regulatory authorities.[405]

But Mr. Verveer expressed concern about the lack of an adequate Federal role for reviewing Bell company entry into long distance under the bill's intrastate and "dialing parity"/resale exceptions:

> Title I affords the Bell Companies opportunities to enter certain aspects of the interLATA business without using the parallel Antitrust Division-FCC application and approval process. These alternatives threaten to sabotage the basic arrangement. In the extreme case, the procedure authorized by Section 102(b)(2) and (3) could result in Bell Company entry into the long distance business through a combination of intrastate facilities and interstate resale without any significant change in relevant circumstance. It could permit the Bell Companies, through the offering of least cost routing service, effectively to commoditize the long distance business.[406]

Mr. Huber, while also supporting H.R. 3626, took a different view from Mr. Verveer's regarding the competitive challenges facing the industry. He asserted that the local exchange monopoly was facing rising competition from a number of sources, while long distance services were not as competitive as they should be:

[404] *Id.*
[405] Statement of Philip L. Verveer, *January 1994 Hearings, supra* note 400, at 5.
[406] *Id.* at 17.

> AT&T has maintained a 60–65 percent share of the long-distance market since 1990, and this share may now in fact be rising slightly. AT&T's market share today remains over three times that of its nearest competitor. Most analysts agree that the long distance market today is a stable oligopoly characterized by pricing cooperation rather than competition. . . . Despite steadily decreasing access charges, the long-distance carriers have raised prices no fewer than four times in the past three years. On each occasion, AT&T led the way, and MCI and Sprint followed.[407]

The Subcommittee's next hearing took place on February 2, 1994.[408] In addition to new FCC Chairman Reed E. Hundt, the witnesses included a panel of three representatives of the competitive long distance companies and three representatives of the Bell companies. The long distance company representatives were John Zeglis of AT&T; William Esrey, now chairman and CEO of Sprint; and Bernard J. Ebbers, chairman of CompTel and president and CEO of LDDS Communications. The Bell company representatives were Edward Whitacre of Southwestern Bell Corporation; Richard W. Odgers, executive vice president and general counsel of Pacific Telesis Group; and James G. Cullen, president of Bell Atlantic Corporation.

Chairman Hundt expressed his view that H.R. 3626, in combination with H.R. 3636, would help pave the way for a transition away from Bell monopoly dominance, but he warned against ignoring the current control of local networks by the Bell operating companies:

> Of course, you all are well aware, as everyone at the FCC is aware, that there are bottleneck issues here. There are concerns about whether the local telephone companies in the Beaumont, Port Arthur area, or any other area in the country, will be willing to allow competition to come in and at the same time will be willing to use their facilities in a way that doesn't prejudice those people against whom they intend to compete.[409]

The three representatives of the long distance industry all expressed support for the bill's focus on the competitive entry test, but voiced concerns over the intrastate and "dialing parity"/resale exceptions to the interexchange restriction. Mr. Zeglis of AT&T urged that the competitive entry test apply across the board:

> "[E]xceptions to this basic framework give rise to our principal concerns with H.R. 3626. Namely, that there is no competitive entry test for statewide long-distance or for the resale of long-distance from an RBOC's home State to the rest of the world.
>
> We urge you . . . to restore the competitive entry test for these market segments. We would ask you to please

[407] Statement of Peter W. Huber, *January 1994 Hearings, supra* note 400, at 10.
[408] *H.R. 3626, the "Antitrust and Communications Reform Act of 1993," Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (Feb. 2, 1994) (forthcoming 1994) [hereinafter *February 2, 1994 Hearings*].
[409] *Id.* (tr. at 20).

> consider that these unprotected markets are huge. Almost a quarter of our industry, 13, 14, 15 billion dollars, and resale can be the entire industry. . . .
>
> Now, the fact that the RBOCs could only resell interstate long-distance is cold comfort. They could still use those monopolies to displace us in favor of their preferred wholesaler. And giving us 1+ intraexchange toll as the trigger for the RBOCs to do interstate resale is hardly a fair trade. We still couldn't offer local service. Only the RBOCs can do that. And even our toll service would still have to use the RBOCs' bottleneck monopolies
>
> The whole scheme, Mr. Chairman, would create some unusual anomalies. The Department of Justice would apply the competitive entry test for, say, Southwestern Bell to build facilities from St. Louis to Memphis, but not of equal distance from St. Louis to Kansas City. The Department would apply the competitive entry test for Southwestern Bell to resell long-distance service from Chicago to Minneapolis where Southwestern Bell doesn't have a monopoly, but not from St. Louis to Detroit where the call starts and ends on Southwestern Bell's monopoly.
>
> So, in short, Mr. Chairman, our concern is that the bill eliminates the competitive entry test where the RBOCs' monopolies are the most threatening. The fix is pretty quick and easy: Have the Department of Justice apply the entry test to all RBOC requests for long-distance.[410]

Mr. Esrey of Sprint seconded Mr. Zeglis' concerns, emphasizing that the Bells control access to over 99% of long distance calls. He went even further than Mr. Zeglis, urging that true competition in the local exchange market be an absolute prerequisite to Bell entry into long distance:

> Local competition is the best and possibly the only way to dissipate the RBOCs' monopoly power and eliminate their ability to harm long distance competitors. If the RBOCs are allowed to compete in the long distance market before local competition is a reality, we will surely face the same antitrust abuses that led to the AT&T/RBOC divestiture, and creat[e] a situation where another divestiture is (or seven of them are) required, which would undisputedly not be in the public interest.[411]

Mr. Esrey also contradicted Bell assertions that long distance rates have been increasing in an anticompetitive manner:

> The RBOCs' argument is misleading in a number of respects. First, it is a natural occurrence in a competitive market for competitors to react to pricing actions taken by others; indeed, such reaction is the essence of competition,

[410] *February 2, 1994 Hearings, supra* note 408 (tr. at 27–28).

[411] Statement of William T. Esrey, *February 2, 1994 Hearings, supra* note 408, at 10. Peter Huber had disputed the 99% figure during the January 26 hearings, saying that it took into account only the access charges paid by the long distance companies. Some business customers now pay the access charges directly to the alternative access provider, he said. He said it was impossible to precisely determine the true figure, but estimated it to be somewhere "in the 90's." *January 1994 Hearings, supra* note 400 (tr. at 114).

not the opposite. Second, the RBOCs don't include in their observations on long distance prices the myriad of long distance products and promotions available in the market today. These discount promotions are the basis for price competition in the long distance market.[412]

Mr. Ebbers of LDDS testified on behalf of the approximately 400 so-called "third tier" long distance carriers, who compete with AT&T, MCI, and Sprint and collectively account for about 14% of the Nation's long distance telecommunications traffic.[413] He described the competitive dynamics in the long distance market that have led to a 50% reduction in price in the decade since divestiture:

> [T]hese extraordinary price reductions and technological and service innovations in the competitive long-distance industry have occurred even as local Bell Company rates have increased by 13%; they have occurred *despite* the fact that we must pay 45 cents of every revenue dollar directly to local exchange monopolies for access to our customers, and that we continue to pay 99% of these access charges to those monopolies—not by choice but by necessity; and our competitive industry has seen job growth of 18% in the last five years, while the Bell Companies decreased their domestic work forces by 11% even as they invested over $12 billion in overseas ventures.[414]

Mr. Ebbers echoed the other long distance witnesses in urging the Subcommittee to ensure that there was adequate Federal antitrust review prior to Bell entry into *any* segment of the long distance marketplace.

The three Bell operating company representatives expressed general support for the legislation, while urging that various amendments be adopted to give the Bells greater latitude in certain respects. Mr. Whitacre of Southwestern Bell expressed some concern that the bill "unnecessarily delays" permitting new products and services to reach the marketplace, but said the bill represented an important compromise that his company was prepared to support:

> The bill doesn't contain everything that Southwestern Bell Corporation believes is appropriate. But it does represent a workable compromise on difficult issues. We're committed to working to achieve the necessary revisions in the bill after debate and consideration.[415]

Mr. Whitacre also responded to the contention that Bell access charges are unreasonably high:

> Access charges are set higher than they should be to subsidize lower local telephone service charges. These charges are kept low to preserve universal service. This legislation does not address universal service issues, but passing the

[412] *Id.* at 17.
[413] Statement of Bernard J. Ebbers, *February 2, 1994 Hearings, supra* note 408, at 1.
[414] *Id.* at 3.
[415] Statement of Mr. Edward E. Whitacre, Jr., *February 2, 1994 Hearings, supra* note 408, at 12.

bill will create additional competition that is good for all consumers.[416]

Mr. Odgers of Pacific Telesis directed his testimony to the bill's exceptions for intrastate and resale long distance. He characterized the intrastate exception as merely returning the industry to the pre-MFJ regulatory status quo:

> This provision giving the States authority over intrastate long distance service restores the jurisdictional balance that existed prior to the 1984 breakup of the old Bell System. Section 2(b) of the Communications Act of 1934 gives to the States general authority with respect to intrastate communication service [47 U.S.C. 152(b)]. Communication services *between* States are subject to FCC jurisdiction.[417]

With regard to the resale exception, Mr. Odgers asserted that permitting the Bells to resell long distance services provided by others would be fair compensation for a State's granting "dialing parity" for toll calls within an exchange area:

> H.R. 3626 attempts to at least partially restore a competitive balance by allowing the Bell company in such a situation to enter the interLATA services market by reselling the services of the long distance companies. In that way the Bell company should have a chance of retaining more than a minuscule number of its intraLATA service customers.[418]

Mr. Cullen of Bell Atlantic testified regarding so-called "incidental" long distance services. He urged that the bill be amended to authorize immediate Bell entry into interexchange services related to wireless, cable, and information services, which he asserted would enable an RBOC to facilitate competition *outside its region:*

> Bell Atlantic's out-of-region business will be built upon the existing cable facilities of TCI and Liberty Media. As soon as our merger with TCI and Liberty closes, we will begin upgrading the out-of-region TCI and Liberty cable systems to provide telephone services in direct competition with the incumbent telephone companies. Within approximately two and a half years after we close the merger, we plan to be providing local telephone services in approximately 30 cities outside our region. By the end of the 1990's, we expect to be providing competing local telephone services in geographical areas totalling more than 40 million people outside Bell Atlantic's current telephone service area.[419]

The Subcommittee's February 10, 1994 hearing on H.R. 3626 focused on electronic publishing, alarm monitoring, and manufactur-

[416] Id. at 15.
[417] Statement of Richard Odgers, *February 2, 1994 Hearings, supra* note 408, at 9-10.
[418] *Id.* at 13.
[419] Statement of James G. Cullen, *February 2, 1994 Hearings, supra* note 408, at 2. On February 23, Bell Atlantic and TCI announced that they had abandoned plans for the merger.

ing issues.[420] Frank A. Bennack, Jr., president and chief executive officer of the Hearst Corporation, testified on behalf of the Newspaper Association of America (NAA). Mr. Bennack expressed strong support for the electronic publishing post-entry safeguards in title II of the bill. The separate subsidiary requirements and other related safeguards, he said, would help temper what would otherwise be an unfair advantage for the Bell operating companies in electronic publishing:

> The BOCs have the ability and the incentive to discriminate against competing electronic publishers and to cross-subsidize their own electronic publishing operations with telephone monopoly revenues. NAA believes that the record before Congress already clearly demonstrates that the Department of Justice, the FCC, and the State PUCs [public utility commissions] do not now have the necessary policy guidance to effectively safeguard electronic publishing markets from BOC entry. . . . Most State PUCs have not even been able to address the electronic publishing issue. A few that have, such as the commissions of New Jersey and Pennsylvania, have endorsed separate [subsidiary] requirements similar to those in H.R. 3626.[421]

Allen Frishkorn again testified on behalf of the Telecommunications Industry Association (TIA), a trade association of telecommunications equipment manufacturers and suppliers. As other witnesses had, Mr. Frishkorn insisted that meaningful competition in the local market should be a prerequisite for Bell entry. He warned that "[u]ntil . . . a competitive market for local services emerges, the BOCs retain both the ability and the incentive, if the manufacturing restriction is lifted, to engage in self-dealing and other forms of anticompetitive behavior."[422] He urged that the bill be amended in a number of respects: to require a Bell to give public notice of proposed entry, in addition to notice to the Justice Department; to provide for comment by competing manufacturers, and possibly the public, regarding any such proposed entry; to require judicial review of any such proposed entry; and to impose more stringent post-entry safeguards.

AFL-CIO Legislative Director Robert M. McGlotten, appearing on behalf of the Communications Workers of America and the International Brotherhood of Electrical Workers, expressed concern over the large communications job losses among AFL-CIO members in recent years. He declared that "the time has come to let open competition enter the market, with sufficient rules to protect the process of competition and safeguard the interest of consumers."[423]

Vance K. Opperman, testifying on behalf of West Publishing and the Electronic Publishing Group, said that the members of his group were worried about "the potentially devastating anti-com-

---

[420] *H.R. 3626, the "Antitrust and Communications Reform Act of 1993", Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* 103d Cong., 2nd session (Feb. 10, 1994) (forthcoming 1994) [hereinafter *February 10, 1994 Hearings*].

[421] Statement of Frank A. Bennack, Jr., *February 10, 1994 Hearings, supra* note 420, at 5–6.

[422] Statement of Allen R. Frishkorn, Jr., *February 10, 1994 Hearings, supra* note 420, at 2–3.

[423] Statement of Robert M. McGlotten, *February 10, 1994 Hearings, supra* note 420, at 5.

petitive effects that could—and, we believe, would likely—evolve if the local exchange telephone companies were permitted into information services without appropriate protections."[424] Therefore, he stated, the group welcomed the Brooks-Dingell and Markey-Fields legislation:

> We are encouraged that, after years of careful study, Congress appears poised to legislate to address the central policy issue of the next decade involving telecommunications. Intelligent legislative policy in 1994 will have benefits lasting well into the 21st century for every American from schoolchild to retiree, from Maine to Honolulu, from Nome to Miami. Both H.R. 3626 . . . and H.R. 3636 . . . are signal achievements along the road toward achieving that intelligent communications policy.[425]

While Mr. Opperman testified that the electronic publishing post-entry safeguards included in title II of the legislation were "appropriate,"[426] he urged the Subcommittee to clarify the definition of electronic publishing to more explicitly cover non-newspaper forms of electronic publishing.

Emil J. Wengel, owner and operator of a small Virginia alarm monitoring company and chairman of the Legislative Committee of the National Burglar and Fire Alarm Association, noted the convergence of forces now supporting competition-based telecommunications policy reform:

> Congress is currently facing an historic crossroads. For the first time, key actors in Congress, the Administration and a large cross-section of the telecommunications industry recognize the need for legislation to resolve long standing conflicts and establish ground rules for the future. With those rules in hand, we believe America will expand and maintain its international telecommunications dominance.[427]

In concluding the hearings, Chairman Brooks declared that "it is crucial that this Committee—as well as the Energy and Commerce Committee—act with all deliberate speed on their joint referral if the Congress is to avoid the traditional pattern of gridlock that has in the past set back this industry from moving with competitive vigor into the 21st century."[428]

3. Mark-up of H.R. 3626

On March 2, 1994, the Subcommittee on Economic and Commercial Law met to mark up H.R. 3626. No amendments were offered or adopted at that time. The Subcommittee ordered the bill favorably reported to the full Committee on the Judiciary by voice vote.

On March 16, 1994, the Committee on the Judiciary met to mark up H.R. 3626 and considered a number of amendments. First, Mr.

---

[424] Statement of Vance K. Opperman, *February 10, 1994 Hearings, supra* note 420, at 1.
[425] *Id.* at 3.
[426] In response to questioning, Mr. Opperman made clear that he viewed the regulatory safeguards as "less protective" of competition than the original MFJ restriction and entry test. *February 10, 1994 Hearings, supra* note 420 (tr. at 35).
[427] Statement of Emil J. Wengel, *February 10, 1994 Hearings, supra* note 420, at 1.
[428] Closing statement of Representative Brooks, *February 10, 1994 Hearings, supra* note 420.

Synar offered an amendment to add definitions for the terms "manufacture" and "affiliated enterprise" as used in title I of the bill, to conform their meaning to that under the MFJ. The amendment was adopted by voice vote.

Next, Mr. Fish offered an amendment relating to the electronic publishing provisions in title II of the legislation. His amendment clarified that non-newspaper electronic publishers offering content-based information (such as legal text, consumer information, and scientific and technical material) were intended to be included within the definition of "electronic publishing." Mr. Fish's amendment was approved by voice vote.

Next, Chairman Brooks and Mr. Fish jointly offered an en bloc package of technical amendments. Among other things, the amendments added a short title for the bill, clarified the definition of the term "alarm monitoring service" for title I of the bill, added definitions for the terms "carrier" and "State" for title I, deleted the provision designating title I as one of the "antitrust laws" under the Clayton Act, and clarified the operation of the section governing the manufacturing restriction (including the operation of the 1-year waiting period before the Bells would be eligible to seek entry). This package of technical amendments was approved by voice vote.

Chairman Brooks next offered an amendment to title I's long distance provisions. He indicated that the Subcommittee hearings had revealed a number of concerns about the provisions, some expressed by the Bells and others expressed by the long distance companies. The amendment was crafted to respond to some of those concerns, while remaining sensitive to the need to maintain balance in the legislation.

First, the amendment eliminated the phased-in waiting periods before the Bells could apply for entry into the various components of long distance, responding to Bell arguments that the waiting periods did not fully promote the potential for new competitors and technologies. Second, the amendment revised the evidentiary standard the RBOCs are required to meet to gain approval from the Attorney General and the FCC for entry, from "clear and convincing" to a less stringent "preponderance of the evidence" standard.

Third, the amendment clarified the intrastate long distance exception in several respects. It specified that a State considering authorizing Bell entry into the intrastate market take into account the potential effects on competition and the public interest. It specified that the Attorney General would have 120 days to decide whether to file suit to enjoin entry,[429] and that such a suit must be based on a determination that the competitive entry test was not satisfied. And it specified that the Attorney General's competitive determination be published in the Federal Register.

Fourth, the amendment clarified the dialing parity/resale exception in a similar fashion, giving the Attorney General 120 days to decide whether to file suit to enjoin entry, specifying that the com-

[429] In response to questions submitted for the record, Assistant Attorney General Bingaman had advised the Committee that a 45-day period for Justice Department review, such as provided under the "dialing parity"/resale provision of the bill as introduced, was far too short for the Department to conduct a responsible review. Ms. Bingaman had urged the Committee to consider increasing any review period to 180 days. *January 1994 Hearings, supra* note 400.

petitive entry test be the basis for the decision, and requiring publication of the competitive determination in the Federal Register.

Mr. Fish called for a division of Chairman Brooks' amendment, to permit a separate vote on the portion of the amendment relating to the evidentiary standard. Both portions of the amendment were separately approved by voice vote. Subsequent to this approval, Mr. Hughes expressed concern that the 120-day review period might not always permit the Justice Department adequate time for a proper review. He asked that as the legislation moves forward, additional thought be given to whether additional time for review is necessary.

Mr. Glickman next offered an amendment to title II of the legislation designed to ensure that community newspapers who enter the electronic publishing market have direct access to local telecommunications networks. His amendment was approved by voice vote.

Chairman Brooks then offered an amendment permitting the Bells to offer certain interexchange services relating to cable and wireless telecommunications activities immediately, without regard to the competitive entry test, on the grounds that these services are truly "incidental" to other services lawful for the Bells to provide. Mr. Brooks' amendment would permit the RBOCs to utilize receive-only antennas and satellite uplinks in connection with cable services, and to provide interexchange handoffs and automatic call forwarding services in connection with cellular and other types of wireless telephone systems. The amendment was approved by voice vote.

Finally, Mr. Goodlatte offered an amendment to strike the so-called "domestic content" provision in title II of the legislation. Some discussion ensued relating to the best means of promoting high-wage telecommunications manufacturing jobs in the United States. Chairman Brooks indicated that, based on discussions that had already taken place with the General Counsel to the U.S. Trade Representative, it was his hope that any possible inconsistency between H.R. 3626 and the Nation's international treaty obligations could be resolved as the bill advanced beyond the Judiciary Committee. Mr. Goodlate's amendment was rejected by a 19-16 roll call vote. H.R. 3626, as amended, was then ordered reported favorably as a single amendment in the nature of a substitute.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

Section 1 states the short title of the bill: the "Antitrust and Communications Reform Act of 1994." Section 1 also states the short title of titles I and II of the bill: the "Antitrust Reform Act of 1994" and the "Communications Reform Act of 1994," respectively.

A. TITLE I—SUPERSESSION OF THE MODIFICATION OF FINAL JUDGMENT

The provisions of title I of the bill supersede the line-of-business restrictions in the 1982 AT&T antitrust consent decree, also known as the Modification of Final Judgment, or MFJ.

SECTION 101. AUTHORIZATION

Section 101 of the bill establishes the procedure for a Bell operating company (BOC) to apply for and receive authorization to enter a competitive market to provide interexchange (long distance) telecommunications services or alarm monitoring services, notwithstanding the line-of-business restrictions in section II(D) of the MFJ. The definition of "Bell operating company" in the bill is based on the one in the MFJ, and includes not only each of the 20 local Bell operating companies, but also any successor or affiliate—including its parent regional Bell holding company (RBOC).

Under the procedure, a BOC seeking to lift, or obtain a waiver from, the interexchange or alarm monitoring restriction must apply to both the Attorney General and the Federal Communications Commission (FCC), each of whom is to make a separate, independent determination regarding the application. The Attorney General would evaluate the application under the MFJ competitive entry test: the BOC must prove that there is no substantial possibility that it or its affiliates could use monopoly power to impede competition in the market it seeks to enter. The FCC would evaluate the application under a "public interest" test, considering a number of competitive, consumer, and regulatory factors. The BOC has the burden to prove both tests are satisfied by a preponderance of the evidence.

In addition, the Attorney General and the FCC are to prescribe regulations for expedited consideration of applications by a BOC to provide interexchange telecommunications services that are "incidental" to other services the BOC may lawfully provide. The Committee intends that in prescribing these regulations, the Attorney General and the FCC follow the rulemaking procedures set forth in the Administrative Procedures Act (5 U.S.C. 553).

Subsection (a) sets forth the application requirements. A BOC is eligible to apply for entry into any market to provide interexchange telecommunications services immediately on the date of enactment, but must wait until 66 months after the date of enactment to apply for entry to provide alarm monitoring services. The Attorney General and the FCC are to notify each other upon receipt of an application, and jointly publish the application in the Federal Register within 10 days after they have both received it.

The application procedure is expressly designed to focus on the particular market the BOC seeks to enter. This market-specific approach, traditional in antitrust analysis, recognizes that a BOC may be able to satisfy the tests set forth in the bill for some product, service, and geographical markets before others. Thus, under H.R. 3626, the BOC decides how broad or narrow to make its application—which specific activity (or activities) and which product, service, and geographic markets to include. The Attorney General and the FCC are to approve the granting of an application as to any activities and markets included in the application for which the pertinent test is satisfied. This approach thus provides maximum flexibility to the Bells to achieve entry as quickly and as completely as antitrust and public interest considerations will permit. At the same time, this market-specific focus recognizes that a single proposed Bell activity may constitute simultaneous entry into a number of product and service markets and submarkets, to each of which the tests must be applied.

Subsection (b) governs the separate determinations by the Attorney General and the FCC regarding a BOC application. Interested persons have 45 days after an application is published in the Federal Register to submit written comments to the Attorney General or the FCC. These comments are also to be made available to the public. After the time for comment has expired, but not later than 180 days after receiving the application, the Attorney General and the FCC are to issue their separate respective determinations on the record, after consulting with each other and after an opportunity for a hearing. The determinations are to be based on a preponderance of the evidence.

The Committee included the consultation requirement because the Committee believes that the expertise of the Commission in the communications industry and communications law can assist the Attorney General in making a determination about the effect of granting the application on competition, and that the expertise of the Justice Department on telecommunications antitrust matters can inform the Commission's public interest determination.

Any person who would be threatened with loss or damage as a result of the approval of the requested authorization has the right to participate as a party in both the Attorney General and FCC proceedings; this is the same showing traditionally required for a private party to seek an injunction under the antitrust laws. The use of this standing requirement is not intended to preclude any other interested person—including an organization—from appearing as amicus in the proceeding, whether or not the person submitted written comments during the 45-day comment period.

The BOC's requested authorization is granted only to the extent approved by both the Attorney General and the FCC, either initially or as a result of judicial review. The Attorney General is to approve granting the requested authorization only to the extent that the Attorney General finds there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market it seeks to enter. This is the prophylactic test formulated by Judge Greene for the MFJ; it focuses not on whether the BOC's market entry would itself constitute an antitrust violation, but on whether the BOC possesses, by virtue of its monopoly power in the local telephone exchange, the incentive and ability to impede competition in a related market that depends on local telephone service.

The FCC is to approve granting the requested authorization only to the extent that the FCC finds granting it to be "consistent with the public interest, convenience, and necessity."

This standard comes directly from the Communications Act of 1934, and grants the Commission considerable leeway in taking into account various interests. In assessing the impact on the public interest, subsection (b)(3)(E) directs the Commission to consider, at a minimum, a number of factors. Clauses (i) and (ii), for instance, direct the Commission to consider the probability that granting the requested authorization will secure reduced rates, or will increase rates, for consumers in the near future and over the long term. Clauses (iv), (v), and (vi) direct the Commission's attention to the potential for anticompetitive behavior if the application is granted. Clause (iii) will focus the Commission on the potentital for expedited delivery of new services if the application is granted.

Not later than 10 days after issuing a determination, the Attorney General or the FCC, as the case may be, is to publish a brief description of the determination in the Federal Register.

Not later than 45 days after the description of a determination is published, either the BOC who applied, or any person threatened with loss or damage, may commence an action for judicial review in the United States Court of Appeals for the District of Columbia Circuit. If no such action is commenced, the determination of the Attorney General or the FCC, as the case may be, becomes final. If such an action *is* commenced, then, with respect to an application for which both the Attorney General and the FCC have approved granting authorization, the authorization is granted only if and to the extent neither approval is vacated or reversed as a result of the judicial review.

The standard for judicial review is the one traditionally applicable to appeals of agency decisions under the Administrative Procedures Act. The Attorney General or the FCC, as the case may be, is to file a certified copy of the record on which its determination was based. All actions with respect to a particular BOC application are to be consolidated for judicial review. Interested persons may submit amicus briefs.

SECTION 102. AUTHORIZATION AS PREREQUISITE

Section 102 establishes the general rule that a BOC is prohibited from providing interexchange telecommunications services or alarm monitoring services except to the extent authorized in accordance with section 101 of the bill. The prohibition against unauthorized BOC entry applies not only to activities engaged in directly by the BOC itself, but also to activities engaged in by the BOC through any "affiliated enterprise." The phrase "directly or through an affiliated enterprise" is taken from the MFJ provision establishing the line-of-business restrictions.

The term "affiliated enterprise" is not defined in the text of the MFJ itself; rather, the definition is found in court opinions rendered under the MFJ.[430] As the court opinions make clear, the term "affiliated enterprise" includes not only ownership and corporate control relationships, but also other economic relationships under which the BOC has a stake in the revenues of another company. These relationships may be purely contractual in nature, for example a royalty arrangement. The use of the term "affiliated enterprise" reflects a recognition that these other relationships can also create an incentive to abuse monopoly power to the detriment of an open and free-moving marketplace.

Several exceptions to the general prohibition are set forth for various interexchange telecommunications services. First, there is an exception for any waiver or authorization granted under the MFJ pursuant to either of two tests: the competitive entry test found in section VIII(C) of the MFJ, or the public interest test for

[430] *United States* v. *Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Jan. 21, 1992), *aff'd*, 12 F.3d 225 (D.C. Cir. 1993).

unopposed motions found in section VII of the MFJ. This exception also applies to any request for such a waiver or authorization which is pending on the date of enactment, if it is ultimately granted under section VIII(C) or section VII.

Second, there is an exception to permit a BOC to provide interexchange telecommunications services within a particular State, if the State approves or authorizes it. Such State approval or authorization must occur after the date of enactment, and must take into account the potential effects on competition and the public interest. The BOC must notify the public and the Attorney General of having received such approval or authorization—and that such approval or authorization is final and that all time for any State review or appeal has expired—and then wait at least 120 days thereafter before offering to provide the approved or authorized services. After the 120-day period, the BOC may provide those services unless the Attorney General has commenced a civil action to enjoin the BOC from doing so, based on its independent determination that the competitive entry test is not satisfied. Within 10 days of bringing such an action, or within 10 days after the 120-day period expires, the Attorney General is to publish in the Federal Register the determination reached.

Third, there is an exception to permit a BOC to provide interexchange telecommunications services through resale of telecommunications services purchased from a person who is not an affiliated enterprise of the BOC.[431] This exception applies only in States that have granted "dialing parity" for *intra*exchange toll telecommunications.

Intraexchange toll telecommunications are calls that do not cross an exchange area boundary, yet travel far enough that an additional fee, or "toll," is charged for them in addition to the basic monthly phone fee. While the MFJ restricted the divested BOC monopolies from providing *inter*exchange telecommunications services until the competitive entry test was satisfied, it deliberately left *intra*exchange toll calls in BOC hands. In most States, the local BOC held a monopoly in the intraexchange market at the time the MFJ took effect, although only a few States had explicit statutory prohibitions against intraexchange competition at that time.[432]

In recent years, a number of States have permitted other long distance carriers to compete with the local BOC in the intraexchange toll market, but customers in those States can opt for a non-BOC carrier only by dialing an "access code" in addition to the phone number. To date, no State has permitted other long distance carriers to compete with the local BOC in the intraexchange toll market *on the same terms*—e.g., without the customer having to dial the additional access code.[433] Intra-exchange toll competition on the same terms has come to be referred to as "dialing parity." Although "dialing parity" is not yet available in

[431] The term "resale" refers to the practice, common in the telecommunications industry, of obtaining a telecommunications service and reselling it to "end users." Thus, for example, a company could provide an end user with long distance service without having any of the equipment or facilities necessary to physically perform the service. *See, e.g.*, Provision of Resale Capacity and Cellular Service to Subscribers 47 C.F.R. §22.914 (1992).

[432] *See* National Ass'n of Regulatory Util. Comm'rs, Intrastate Telecommunications Competition (1985), at v–viii.

[433] *See* National Ass'n of Regulatory Util. Comm'rs, Compilation of Utility Regulatory Policy 1992–1993, at table 164, 167.

any State, some States have considered allowing competing long distance carriers to offer intraexchange toll service without the need for access codes; Michigan has recently approved such "1-plus" competition, but it is not required to be implemented until January 1, 1996.[434]

As with the exception for intrastate interexchange telecommunications services, the "dialing parity"/resale exception is subject to a 120-day waiting period after the BOC gives notice to the public and the Attorney General that State approval or authorization for "dialing parity" is final, during which time the Attorney General can commence a civil action to enjoin BOC entry if the Attorney General determines that the competitive entry test is not met. As with the intrastate exception, the Attorney General must publish the determination in the Federal Register.

Finally, there are several exceptions to permit the BOCs to provide designated interexchange telecommunications services deemed "incidental" to activities in which various BOCs are already lawfully engaged: namely, cable television services and commercial mobile radio transmission services, such as cellular telephone.

In connection with the provision of cable services, the BOCs would be permitted to provide interexchange telecommunications services (i) to receive cable transmission signals, (ii) to offer local cable distribution services across exchange area boundaries within the same cable system, and (iii) to deliver transmission signals from a satellite uplink. The first two categories of incidental relief are based on a waiver Judge Greene granted in connection with a particular RBOC cable television system acquisition;[435] but the provision would extend this waiver on a more general basis.

With regard to cellular telephone and other commercial mobile radio transmission services, the BOCs would be permitted to provide interexchange telecommunications services (i) to provide intersystem handoff, enabling a customer to move from one mobile telephone system to another across exchange area boundaries without dropping a call in progress, (ii) to provide automatic call delivery, enabling a call to be forwarded to a mobile telephone customer travelling in a foreign system, and (iii) to provide origination and voice storage and retrieval in connection with paging services. The first two categories of incidental relief correspond to a waiver previously granted by Judge Greene;[436] but the provision would extend the waiver on a more general basis, and broaden its application to include other commercial mobile radio in addition to cellular, including potential new services such as personal communications systems.

SECTION 103. LIMITATIONS ON MANUFACTURING AND PROVIDING EQUIPMENT

Section 103 of the bill establishes the procedure for a BOC to receive authorization to manufacture or provide telecommunications

---

[434] *MCI* v. *Michigan Bell Tel. Co.* (Michigan Public Service Comm'n, Feb. 24, 1994).

[435] *See United States* v. *Western Elec. Co.*, No. 82-0192, slip op. (D.D.C. Sept. 21, 1993) (issued in connection with Southwestern Bell's acquisition of cable television systems in Arlington County, Virginia, and Montgomery County, Maryland).

[436] *See United States* v. *Western Elec. Co.*, 1990-2 Trade Cas. (CCH) ¶69,177 (D.D.C. Sept. 12, 1990) (granting (i) a temporary waiver for intersystem handoff (extended on Sept. 6, 1991, and Sept. 8, 1992), and (ii) relief for automatic call delivery limited to certain technology).

equipment, or to manufacture customer premises equipment. (Under the MFJ, a BOC is already permitted to provide customer premises equipment, such as telephones and PBX's, if manufactured by others.)

This procedure differs from the one set forth in section 102 for BOC entry into the interexchange and alarm services markets, in that there is no formal "application" or "approval." Instead, under this section, the BOC submits a written notification to the Attorney General of the manufacturing or supply activity in which it intends to engage; after a one-year waiting period, the BOC is free to engage in the activity unless the Attorney General has commenced a civil action to enjoin BOC entry. Like the procedure in section 102, however, the Attorney General's review is based on the MFJ competitive entry test.

Subsection (a) sets forth a one-year prohibition, beginning on the date of enactment, against BOC manufacture or provision of telecommunications equipment or BOC manufacture of customer premises equipment, whether directly or through an affiliated enterprise.

Subsection (b) sets forth the notification and review procedure under which a BOC may receive authorization effective after the one-year prohibition has expired. At any time after the date of enactment, a BOC may submit a notification to the Attorney General describing the manufacturing (or telecommunications equipment providing) activity in which it intends to engage and including such additional relevant documentary material and information as will assist the Attorney General in determining whether the competitive entry test is satisfied. The BOC must also supply any additional relevant information requested during the course of the Attorney General's review.

The BOC must wait for a year after submitting the written notification to the Attorney General before engaging in the activity described in the notification—regardless of when the notification is submitted. After this one-year waiting period has expired, the BOC is free to engage in the activity unless the Attorney General has commenced a civil action to enjoin BOC entry based on a determination that the competitive entry test is not satisfied. The Attorney General may shorten this waiting period by providing early notice to the BOC that the Antitrust Division does not intend to commence such a civil action.

Subsection (c) provides an exception to the one-year prohibition and the notification and review procedure, for any waiver or authorization granted under the MFJ pursuant to either the section VIII(C) competitive entry test or the section VII public interest test, or for any request for such a waiver or authorization which is pending on the date of enactment, if it is ultimately granted under section VIII(C) or section VII.

SECTION 104. ANTICOMPETITIVE TYING ARRANGEMENTS

Section 104 of the bill establishes an additional antitrust-based safeguard that will continue to apply to a BOC for as long as the BOC possesses monopoly power in any market for exchange service. This safeguard is grounded in core antitrust principles and reflects concerns that were at the heart of the Sherman Act case that led to the MFJ. It prohibits a BOC from tying, directly or indirectly, the sale of any product or service to the provision of any telecommunications service, in any relevant market, if the effect of such tying may be to substantially lessen competition, or tend to create a monopoly, in any line of commerce. The phrase "substantially lessen competition, or tend to create a monopoly, in any line of commerce" is taken from section 7 of the Clayton Act. The Committee intends that the same types of competitive considerations used in section 7 also be used to evaluate the effects of tying, in order to distinguish anticompetitive tying from packaging that may have a benign or even procompetitive effect.

SECTION 105. ENFORCEMENT

Section 105 of the bill contains the bill's enforcement provisions, taken from existing provisions in the antitrust laws.

Subsection (a) establishes the duties and powers of the United States Attorneys to seek to enjoin violations, either to prevent or to restrain them. This provision is modeled on section 15 of the Clayton Act (15 U.S.C. 25) and section 4 of the Sherman Act (15 U.S.C. 4).

Subsection (b) provides criminal penalties for knowing violations of the Act. These penalties are to be the same as for knowing violations of section 1 of the Sherman Act.

Subsection (c) provides a private right of action for treble damages, plus interest and costs, for persons who are injured in their business or property by reason of a violation. This provision is modeled on section 4 of the Clayton Act.

Subsection (d) provides a private right to seek injunctive relief, for persons who are threatened with loss or damage by a violation. This provision is modeled on section 16 of the Clayton Act.

Subsection (e) vests the courts of the United States with exclusive jurisdiction to make determinations under the Act, other than the determinations made by the Attorney General and the FCC regarding Bell entry into a restricted line of business, as specified in section 101(b)(3). These Attorney General and FCC determinations are to be reviewed by the United States Court of Appeals for the District of Columbia Circuit.

This subsection further provides that actions commenced to enforce a duty, claim, or right under the Act shall not be stayed pending a determination to be made by the Attorney General or FCC regarding an application for entry by a BOC. This provision does not, of course, refer to an action commenced in the D.C. Circuit regarding the same application for entry; such action must await the determination of the Attorney General or the FCC, as the case may be.

Subsection (f) provides that a subpoena requiring the attendance of a witness at a hearing or trial in connection with an action under the Act may be served at any place within the United States.

Subsection (g) explicitly incorporates two generally applicable antitrust enforcement statutes into this Act. It makes clear that the Antitrust Civil Process Act applies to this Act, and that the Antitrust Procedures and Penalties Act applies to Justice Department enforcement actions brought under this Act.

SECTION 106. DEFINITIONS

Section 106 of the bill contains the definitions to terms used in title I of the Act.

The definition of "affiliate," "carrier," "customer premises equipment," "electronic publishing," "exchange area," "exchange service," "information," "interexchange telecommunications," "telecommunications," "telecommunications equipment," "telecommunications service," and "transmission facilities" are drawn from definitions in the MFJ. The Committee intends that these terms have the same meaning as under the MFJ. The definitions of "customer premises equipment" and "telecommunications equipment" are clarified to reflect the D.C. District Court's opinion of December 3, 1987 and the D.C. Circuit's opinion of February 2, 1990.[437]

The definition of "Bell operating company" is also modeled on the definition in the MFJ. The definition is designed to subject to title I's requirements the same entities that are subject to the MFJ's line-of-business restrictions, in keeping with the bill's purpose of superseding those restrictions with a procedure for BOC entry into those lines of business in accordance with antitrust and public interest considerations.

The Committee rejected suggestions that the bill's entry requirements be written to cover all local exchange service providers—including companies who are not parties to the MFJ and are not subject to its line-of-business restrictions. The Committee has carefully considered, and rejected, the notion that this focus on the Bell companies might somehow constitute an unconstitutional bill of attainder.[438] Title I of the bill naturally focuses on the BOCs and their affiliates, because they uniquely are seeking release from restrictions imposed under the MFJ. And as Judge Greene has stated, the line-of-business restrictions themselves are not punitive in nature, but are "prophylactic measures"[439] designed "to avoid a recurrence of the type of discrimination and cross-subsidization that were the basis of the AT&T lawsuit."[440]

The definition of "exchange access" is likewise modeled on the MFJ definition, except that the definition in title I does not include the various requirements pertaining to exchange access which are included within the text of the MFJ's definition. Instead, the MFJ's exchange access requirements are included in the savings clause provisions in section 107(a) of the bill, and thereby left unaffected.

The definitions of "affiliated enterprise" and "manufacture" clarify that these terms will continue to have the meaning given to them under the MFJ. Although these terms are used in the text of the MFJ, they are not defined there. Instead, their definitions are found in the case history, reflected in judicial opinions interpreting the MFJ. The term "affiliated enterprise" is interpreted in *United States* v. *Western Elec. Co.,* Civil Action No. 82-0192 (D.D.C. Jan. 21, 1992), *aff'd,* 12 F.3d 225 (D.C. Cir. 1993). The term "manufacture" is interpreted in *United States* v. *Western Elec. Co.,* 894

[437] *United States* v. *Western Elec. Co.,* 675 F. Supp. 655, 667 n.54 (D.D.C. 1987), *aff'd,* 894 F.2d 1387 (D.C. Cir. 1990).

[438] *See supra* notes 393–397 and accompanying text.

[439] *United States* v. *Western Elec. Co.,* 592 F. Supp. 846, 869 (D.D.C. 1984).

[440] *MFJ Opinion, supra* note 1, 552 F. Supp. at 142.

F.2d 1387 (D.C. Cir. 1990). The Committee intends that these two terms incorporate all relevant case law interpreting them.

As the court opinions make clear, the term "affiliated enterprise" includes not only ownership and corporate control relationships, but also other economic relationships under which the BOC has a stake in the revenues of another company. These relationships may be purely contractual in nature, for example a royalty arrangement. The court opinions make clear that the term "manufacture" includes not only a product's actual fabrication, but also its design and development.

The definition of "alarm monitoring service" is derived from various descriptions of the industry, including the one found in the 1987 Justice Department report,[441] as well as on the general definition of "information service" found in section IV (J) of the Modification of Final Judgment. It is precisely written in order to distinguish alarm monitoring services from other similar services. The hallmark of an alarm monitoring service is a device at a fixed premises that receives signals from other devices in its immediate vicinity regarding a possible threat at such premises, and then transmits its own signal regarding that threat to a remote monitoring center. Thus, the definition does not include devices designed to detect threats to mobile objects such as motor vehicles. In addition, the definition specifically excludes devices attached to individuals for monitoring an ongoing medical condition. Finally, the definition only includes services in which the signal from the device at the fixed premises travels to the remote location via the transmission facilities of a Bell operating company or Bell affiliate.

The definition of "antitrust laws" includes the acts listed in the Clayton Act definition, as well as the part of the Federal Trade Commission Act that confers antitrust enforcement authority.

The definitions of "cable service" and "commercial mobile service" are taken from the Communications Act of 1934.

The definition of "Modification of Final Judgment" includes the order entered by Judge Greene on August 24, 1982, as well as any judgment or order entered in the case on or after that date.

The definition of "person" is taken from that found in section 1 of the Clayton Act (15 U.S.C. 12).

The definition of "State" includes not only the 50 States and the District of Columbia, but also all commonwealths, republics, territories, and possessions subject to United States sovereignty.

SECTION 107. RELATIONSHIP TO OTHER LAWS

Section 107 of the bill contains savings provisions for other applicable laws.

Subsection (a) provides that, although title I of the bill supersedes the MFJ's line-of-business restrictions, the other parts of the MFJ are not affected. For clarity those other parts are explicitly enumerated.

Subsection (b) provides that, except for the explicit amendment to the Antitrust Civil Process Act, nothing in this Act shall be construed to modify, impair, or supersede any of the antitrust laws.

[441] *Huber Report, supra* note 217, at 13.1.

Subsection (c) provides that nothing in this Act shall be construed to modify, impair, or supersede any other Federal law other than law expressly referred to in this Act. This subsection also contains a savings clause for State and local law, except "to the extent such law would impair or prevent the operation of this Act."

Subsection (d) provides that any penalty imposed, or relief granted, under title I shall be in addition to, and not in lieu of, any penalty or relief authorized by any other law. Thus, other substantive laws are preserved not only in their requirements, but also in their penalties and relief.

B. TITLE II—REGULATION OF MANUFACTURING, ALARM SERVICES, AND ELECTRONIC PUBLISHING BY BELL OPERATING COMPANIES

Title II amends the Communication Act of 1934 to establish new regulations governing manufacturing, alarm services, and electronic publishing by BOCs.

SECTION 201. REGULATION OF MANUFACTURING BY BELL OPERATING COMPANIES

Section 201 of the bill adds a new section 229 to the Communications Act of 1934. This new section establishes the regulations governing entry by BOCs into the business of manufacturing and providing telecommunications equipment.

Subsection (a) of this new section grants the authority for the BOCs to engage in manufacturing telecommunications equipment and customer premises equipment. Subsection (b) requires a BOC to set up a separate affiliate to engage in manufacturing. Subsection (c) specifies in more detail the requirements for the separate affiliate.

Subsection (c)(1) requires the Federal Communications Commission (the Commission) to prescribe regulations to ensure compliance with this Act.

Subsection (c)(2) requires the affiliate to maintain separate books, records, and accounts from its affiliated BOC.

Subsection (c)(3) prohibits a BOC or any of its non-manufacturing affiliates from performing advertising, sales, installation or maintenance for the manufacturing affiliate, except after acquiring such equipment from their manufacturing affiliate. The BOC is permitted to engage in institutional advertising not related to specific telecommunications equipment.

Subsection (c)(4)(A) contains a general rule that a BOC must conduct all of its manufacturing in, and acquire all component parts from, the United States. Subparagraph (B) provides that an affiliate may use components from outside the United States if such components are not available in the United States. The cost of components obtained from foreign sources must not exceed 40%. The affiliate is required to certify to the Commission that it has made a good faith effort to obtain components from the United States, and, on an annual basis, that the affiliate complied with the requirements of this section. If the Commission determines after reviewing such certification that there has been a violation, it may impose penalties or forfeitures. Any supplier that suffered because of a violation of this section is permitted to bring a complaint to the Commission. The Commission, in consultation with the Department of Commerce, must conduct an annual report determining the cost of components manufactured outside the United States, and shall annually adjust the 40% figure based on specified criteria. Any intellectual property from outside the United States used by the affiliate will not count towards the 40% figure.

Subsection (c)(5) provides that any debt incurred by any manufacturing affiliate may not be issued by its affiliate BOC, nor may the affiliate incur debt in a manner that would permit a creditor, upon default, to have recourse to the assets of the BOC.

Subsection (c)(6) clarifies that a manufacturing affiliate is not required to remain separate from any other affiliate of the BOC; however, if a non-manufacturing affiliate becomes affiliated with the manufacturing affiliate, then it will be required to comply with the requirements of this section.

Subsection (c)(7) requires the manufacturing affiliate to offer to any common carrier its equipment at a price and on terms and conditions that reflect no discrimination or preference in light of the price, terms, and conditions under which it offers such equipment to its affiliated BOC. This requirement is subject to a reciprocal requirement for common carrier purchasers who themselves are involved in manufacturing.

Subsection (c)(8) imposes certain requirements on the sales practices of manufacturing affiliates. This paragraph prohibits an affiliate from discontinuing equipment for which there is reasonable demand, unless the affiliate can demonstrate to the Commission that it is not making a profit. The Commission is required to prescribe regulations defining reasonable demand by considering: (i) whether continuing manufacturing is profitable; (ii) whether the equipment is obsolete; (iii) whether the necessary components are available; (iv) whether alternatives are available in the market; and (v) any other factors the Commission deems appropriate.

Subsection (c)(9) permits joint network planning and design agreements with other contiguous common carriers; however, such agreements must not be a prerequisite for the introduction or deployment of new services or equipment.

Subsection (d) addresses information requirements of the manufacturing affiliate. Under this subsection, each BOC must file with the Commission full and complete information regarding the protocols and technical requirements for connection with and use of its telephone exchange service facilities. Each BOC must promptly report to the Commission any changes or planned changes.

Subsection (d) also prohibits a BOC from disclosing to its manufacturing affiliate any information required to be filed pursuant to the subsection, unless that information is first filed with the Commission. The Commission may prescribe additional regulations to ensure that competing equipment providers will have access to the technical information of a BOC. Each BOC is required to provide common carriers providing telephone exchange service with information on the planned deployment of telecommunications equipment.

Subsection (e) requires the Commission to prescribe regulations requiring that any BOC with a manufacturing affiliate provide to other non-affiliated providers of functionally equivalent equipment comparable opportunities to sell such equipment to it. This subsection also states that a BOC is not allowed to subsidize its manufacturing affiliate with revenues from telephone exchange service or telephone toll service.

Subsection (f) permits a BOC and its affiliates to engage in close collaboration with any manufacturer of customer premises or telecommunications equipment during design and development.

Subsection (g) requires the Commission to prescribe regulations within 1 year after the date of enactment that will ensure that telecommunications equipment is designed, developed, and fabricated to be accessible and usable by individuals with disabilities, unless the cost of making the equipment accessible and usable would result in an undue burden or adverse competitive impact. The regulations must take effect within 18 months after the date of enactment. The Commission also is required to prescribe regulations to ensure that advances in network services will be accessible to individuals whose access might otherwise be impeded by a disability of functional limitation, unless the result would be an undue burden or adverse competitive impact. The regulations must require that, in the event an undue burden or adverse competitive impact would result from full compliance with the accessibility requirements, the network service or equipment in question will be made compatible with existing periphery devices commonly used by persons with disabilities.

Subsection (g)(4) defines "undue burden" to mean significant difficulty or expense. In making a determination whether an activity would result in an undue burden, the Commission is required to consider: (i) the nature and cost; (ii) the impact on the operation of the facility involved; (iii) the financial resources of the affiliate; (iv) the financial resources of the BOC; and (v) the type of operation or operations of the affiliate or BOC.

In determining adverse competitive impact, the Commission is required to consider: (i) whether such activity would raise the cost of the equipment or network service in question beyond consumer demand; and (ii) whether such activity would put the affiliate at a competitive disadvantage. "Activity" includes the research, design, development, deployment, and fabrication activities necessary to comply with the requirements of subsection (g), and the acquisition of the related materials and equipment components.

Subsection (h) requires that a BOC affiliate establish a permanent program for manufacturing research and development of products and applications for the enhancement of the public switched telephone network and to promote public access to advanced communications services. Such access must include access by public institutions and people with disabilities and functional limitations. The Commission is authorized to prescribe additional regulations to carry out this subsection.

Subsection (i) authorizes the Commission to prescribe regulations to implement this section.

Subsection (j) authorizes the Commission to carry out this section and the regulations prescribed thereunder. Any common carrier that is injured by an act or omission of a BOC that violates subsection (c)(7) or (8) is permitted to initiate an action in an appropriate district court to recover damages sustained as a consequence of the act or omission.

Subsection (k) requires the Commission to prescribe regulations to implement this section within 180 days after the date of enactment.

Subsection (l) clarifies that this section does not prohibit any manufacturing affiliate from engaging directly or through an affiliate in any manufacturing activity in which it is authorized to engage on the date of enactment.

Subsection (m) ensures that nothing in this section will alter or affect any antitrust law, including title I of the bill, H.R. 3626.

Subsection (n) contains definitions of the terms "affiliate," "owns," "owned," "ownership," "Bell operating company," "customer premises equipment," "manufacturing," "manufacturing affiliate," "Modification of Final Judgment," "telecommunications," "telecommunications equipment," and "telecommunications service" as used in this section.

SECTION 202. REGULATION OF ENTRY INTO ALARM MONITORING SERVICES

Section 202 of the bill adds a new section 230 to the Communications Act of 1934. This new section requires the Commission to prescribe regulations, not later than 6 years after the date of enactment, to protect the public interest when a BOC is permitted to provide alarm monitoring services.

Subsection (a) of this new section directs the Commission to prohibit BOCs and their affiliates from recording or using the occurrence or the contents of calls received by providers of alarm monitoring services for the purposes of marketing such services. The Commission is also required to establish procedures for the receipt and review of complaints concerning violations by such companies.

Subsection (b) establishes procedures for expedited consideration of complaints, requiring the Commission to make a final determination within 120 days after receipt of a complaint. If a violation is found, the Commission is required to issue a cease and desist order within 60 days.

Subsection (c) authorizes the Commission to punish violations of this section pursuant to its authority under title V of the Communications Act of 1934, explicitly including the full authority to order an offending BOC to cease offering alarm monitoring services.

Subsection (d) contains definitions of the terms "Bell operating company," "affiliate," and "alarm monitoring services" as used in this section.

SECTION 203. REGULATION OF ELECTRONIC PUBLISHING

Section 203 of the bill adds a new section 231 to the Communications Act of 1934. This new section sets forth new regulatory requirements for BOC participation in electronic publishing.

Subsection (a) of this new section states generally that a BOC may only engage in electronic publishing through a separated affiliate or an electronic publishing joint venture, or when such publishing is not disseminated by means of the BOC's (or an affiliate's) basic wireline telephone exchange services or exchange facilities.

Subsection (b) requires the separated affiliate or electronic publishing joint venture to maintain books, records, and accounts separate from those of the BOC. The affiliate is prohibited from incurring debt in a manner that would permit a creditor upon default to have recourse on the BOC.

After 1 year from the effective date of this section, an affiliate is prohibited from hiring: (i) as corporate officers, sales and marketing management personnel whose work will include the local telephone service territory of the BOC; (ii) any network operations personnel whose work will require dealing directly with the BOC; or (iii) any person who worked at the BOC the year before. There is an exception for persons covered by a collective bargaining agreement.

The affiliate is prohibited from providing telephone exchange service in any exchange area of the BOC, and from using the name or trademarks of the BOC except where they are already used in common with the entity that owns or controls the BOC.

Subsection (b)(8) requires the separated affiliate to have an annual review performed, showing compliance with this section and its regulations. The reviews are to be provided to the Commission and made public.

Subsection (c) requires a BOC to provide its separated affiliate or electronic publishing joint venture with facilities, services, and information only on the same terms and conditions as provided to non-affiliates. The BOC is required to carry out transactions with a separated affiliate on terms and conditions similar to those with its non-affiliates, and in a manner that 1) is auditable, 2) is pursuant to written contracts, 3) is nondiscriminatory, and 4) values assets in a way beneficial to telephone subscribers. The BOC must comply fully with all applicable Commission and State cost allocation and other accounting rules.

Paragraphs (11), (12), and (15) of subsection (c) reflect an amendment offered by Representative Glickman and adopted by the Committee by voice vote, that requires a BOC to provide to all electronic publishers the same type of facilities and services as offered to any other electronic publisher, on the same terms and conditions and at a charge that is no higher on a per unit basis. This amendment was adopted to ensure that small publishers are charged the same rates as large publishers.

Subsection (d) prohibits the BOC from providing to any electronic publisher, including its own separated affiliate or electronic publishing joint venture, any customer proprietary network information (CPNI) not available to electronic publishers generally.

Subsection (e) requires full compliance with these safeguards and prohibits BOCs or affiliates from acting in concert with each other or with any other entity to evade the law.

Subsection (f) clarifies that this section does not preclude an affiliate from investing dividends derived from a BOC in its separated affiliate.

Subsection (g) prohibits a BOC from engaging in any promotion, marketing, sales or advertising for, or jointly with, its affiliate.

Subsection (h) explicitly permits three types of joint activities between a BOC and its electronic publishing affiliate, under specified conditions. Subsection (h)(1) permits a BOC to provide inbound telemarketing or referral services related to the provision of electronic publishing if it provides the same service on the same terms and conditions and prices to non-affiliates as to its affiliates and electronic publishing joint ventures. The term "inbound telemarketing or referral services" is defined in subsection (p)(9) to mean "the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call." Thus, a BOC may refer a customer who seeks information on an electronic publishing service to the various providers of the service. No outbound telemarketing or similar activity, under which the call is initiated by the BOC or affiliate or someone on its behalf, is permitted.

Subsection (h)(2) permits a BOC to engage in nondiscriminatory teaming or business arrangements. Subsection (h)(3) permits a BOC to participate in electronic publishing joint ventures, provided that the BOC or affiliate has not more than a 50% (or for small publishers, 80%) direct or indirect equity interest in the joint venture. The Committee intends that the term "small, local electronic publishers" cover publishers serving communities of fewer than 50,000 persons. Officers and employees of a BOC are prohibited from collectively having more than 50% of the voting control of the venture. The BOC is permitted to provide promotion, marketing, sales, or advertising personnel services for the joint venture.

Subsection (i) requires that any transactions between a BOC and any affiliate relating to electronic publishing be recorded in the books of each entity, be auditable, and be pursuant to written contracts or tariffs filed with the Commission or a State and made publicly available. Any transfer of assets related to electronic publishing from a BOC to an affiliate are to be valued at the greater of net book cost or fair market value, and any transfer of assets from an affiliate to the BOC are to be valued at the lesser of net book cost or fair market value. A BOC must provide to non-affiliates any information related to the provision of electronic publishing on the same terms and condition it offers to its affiliate.

Subsection (j) requires that any transactions between any affiliate of a BOC and an electronic publishing affiliate shall be recorded in the books and records of each entity, be auditable, and be pursuant to written contracts or tariffs filed at the Commission and State and made publicly available. Any transfer of assets directly related to electronic publishing from a BOC to any affiliate and then to a separated affiliate must be valued at the greater of net book cost or fair market value. Any transfer of assets from a separated affiliate to any affiliate and then to a BOC must be valued at the lesser of net book cost or fair market value. An affiliate is required to offer any information that it received directly or indirectly from its affiliated BOC, and that is related to the provision of electronic publishing, to non-affiliates on the same terms and conditions as the information is provided to a separated affiliate.

Subsection (k) prohibits a BOC from having any officer, employees, property, or facilities in common with any electronic publishing entity. This subsection also prohibits a BOC employee from serving as director of any electronic publishing entity, and prohibits a BOC from carrying out any marketing or sales, or any hiring of personnel, purchasing, or production, for any electronic publishing entity.

A BOC must provide to any non-affiliated electronic publisher any facilities, services, or information on the same terms and conditions under which it provides them to its affiliate.

Subsection (l) gives a BOC one year from the date of enactment to comply with the requirements of this section.

Subsection (m) provides that the provisions of this section cease to apply on June 30, 2000.

Subsection (n) entitles a person claiming a violation of this section to file a complaint with the Commission or bring a suit as provided in section 207 of the Communications Act of 1934. The BOC, affiliate, or separated affiliate is liable for damages for any violation found, unless it is discovered first through the internal compliance review process and corrected within 90 days of such discovery. A person may apply to the Commission for an order requiring the BOC to cease and desist, or apply to the district court of the United States to order the BOC to comply.

Subsection (o) states that this section will not alter or affect the operation of any antitrust law, including title I of the bill, H.R. 3626.

Subsection (p) establishes several definitions applicable to this section. A number of points about these definitions merit attention. Paragraph (1) defines "affiliate" in terms of "owns or controls," and paragraph (4) defines "control" with reference to the regulations of the Securities and Exchange Commission. Together, these definitions provide a useful definition of the nature of the relationship between Bell operating companies and other entities for regulatory purposes. Paragraph (2) defines the term "basic telephone service" to mean any wireline telephone service or wireline telephone exchange facility provided by a Bell operating company in a telephone exchange area.

Paragraph (5) defines the term "customer proprietary network information" (CPNI) to mean (i) information relating to the quantity, technical configuration, type, destination, and amount of volume of service subscribed by a customer, that is available to the BOC by virtue of the company-customer relationship, and (ii) information contained in the bills received by a customer. The Communications Act generally refers to such persons as "subscribers" and not "customers." In using CPNI as a term of art, the Committee does not intend to abandon the general distinction between customers and subscribers.

Paragraph (6) defines "electronic publishing" to mean the dissemination, provision, publication, or sale to an unaffiliated entity or person, using a BOC's basic telephone service, of any news or entertainment; business, financial, legal, consumer, or credit material; editorials; columns; sports reporting; features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information. This language reflects an amendment offered by Congressman Fish to expand the definition of "electronic publishing" so that it applies to all content-based information services generally thought of as electronic publishing, provided by a Bell company using any part of its local exchange network, including advanced wireline digital services. The Committee is aware that it is acting at the dawn of the Information Age, when new technologies, services, and practices are announced almost every day. In recognition of the rich and varied possibilities that lie ahead, the Committee included clause (xii) to cover information that is "like or similar" to the kinds of information enumerated here. This provision is intended to cover circumstances which might not have been foreseen but which involve information similar to, or analogous to, the kinds of information described here. Paragraph (6) explicitly excludes from the definition of "electronic publishing," however, various specified network services, as well as full motion video entertainment on demand, and video programming as defined in section 602 of the Communications Act of 1934.

Paragraph (9) defines "inbound telemarketing" as the marketing of property, goods, or services by telephone to a customer or potential customer who initiated the call. "Customer" refers to a person who purchases or would purchase property, goods, or services—other than basic telephone service, because a person who purchases basic telephone service is a subscriber.

Paragraphs (7), (8), (10), (11), and (12) define the terms "electronic publishing joint venture," "entity," "own," "separated affiliate," and "Bell operating company," respectively.

COMMITTEE OVERSIGHT FINDINGS

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

COMMITTEE ON GOVERNMENT OPERATIONS OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Operations were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill H.R. 3626, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 24, 1994.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3626, the Antitrust and Communications Reform Act of 1994.

Enactment of H.R. 3626 would affect direct spending and receipts. Therefore, pay-as-you-go procedures would apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 3626.
2. Bill title: Antitrust and Communications Reform Act of 1994.
3. Bill status: As ordered reported by the House Committee on the Judiciary on March 16, 1994.
4. Bill purpose: Title I of H.R. 3626 would permit a Bell operating company to apply to the Department of Justice (DOJ) and the Federal Communications Commission (FCC) for authority to provide certain communications services and would establish criteria for an application's approval. The bill would permit the Bell companies, after notifying the DOJ and waiting one year, to manufacture and sell telecommunications equipment. It would permit both the DOJ and private individuals to bring civil actions against Bell companies violating provisions of the bill, and would make violators of certain provisions criminally liable.

Title II would permit a Bell company, through an affiliate, to manufacture and provide telecommunications equipment, and would place certain requirements on these companies. The bill would require the FCC to promulgate regulations governing Bell companies that manufacture such equipment and to establish procedures for reviewing complaints regarding violations of regulations or laws by the Bell companies. Title II also would require the FCC to prepare an annual report on the cost of communications components manufactured outside the United States.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998	1999
Authorizations of Appropriations					
Estimated authorizations of appropriations:					
Federal Communications Commission	26	16	17	18	18
Department of Justice	6	7	7	3	3
The Judiciary	4	4	4	2	2
Total estimated authorizations	36	27	28	23	23
Estimated outlays	32	27	28	24	24

[By fiscal year, in millions of dollars]

	1995	1996	1997	1998	1999
Revenues:					
Estimated receipts from fines	(1)	(1)	(1)	(1)	(1)
Direct spending:					
Estimated budget authority	0	(1)	(1)	(1)	(1)
Estimated outlays	0	(1)	(1)	(1)	(1)

[1] Less than $500,000.

The costs of this bill fall within budget function 370.

Basis of Estimate

CBO assumes that estimated amounts authorized would be appropriated for each fiscal year. Outlay estimates are based on historical outlay rates for the FCC, the DOJ, and the Judiciary.

FCC

H.R. 3626 would require the FCC to promulgate a variety of regulations, establish new procedures, and develop and maintain processes to respond to complaints about the Bell companies' business practices. Based on information from the FCC, CBO estimates that implementing the provisions of the bill would cost the commission approximately $26 million the first year, and from $16 million to $18 million each year over the next four years. Costs in the first year would be divided roughly equally between personnel costs associated with rulemakings and overhead costs associated with acquiring space, furnishings, hardware, and software necessary to carry out the required tasks. Costs in later years are primarily for personnel costs associated with continued enforcement and handling of complaints.

DOJ

H.R. 3626 would require the DOJ to promulgate regulations and procedures, process applications, hold hearings, and litigate appeals. Based on information from the DOJ, CBO estimates that implementing the provisions of the bill would cost the department $6 million to $7 million in each of the first three years, and about $3 million in later years, primarily for personnel costs. We expect the initial costs to be higher because most rulemakings would occur in the first year, because the Bell companies would probably file most of their applications during that period, and finally because most complaints and challenges would be filed in the first several years before precedents exist.

The Judiciary.

Based on information from the DOJ and the Administrative Office of the United States Courts, CBO estimates that costs to the federal judiciary would be about $4 million annually in the first three years, with costs declining to approximately $2 million annually in later years as the number of appeals decreased.

6. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. H.R. 3626 would make criminally liable anyone who knowingly violates certain provisions of the bill. Fine col-

lections would count as governmental receipts and would be deposited in the Crime Victims Fund. Deposits in the Crime Victims Fund would be available for spending, usually in the following fiscal year. CBO expects that any additional fine collections would be negligible.

[By fiscal year, in millions of dollars]

	1994	1995	1996	1997	1998
Change in outlays	0	0	0	0	0
Change in receipts	0	0	0	0	0

7. Estimated cost to State and local governments: Implementing the provisions of H.R. 3626 could result in increased costs to some states. While the bill would impose no requirements on states, they would have more developments to monitor and coordinate with the FCC, and would have the authority to permit Bell companies to provide certain types of long-distance services. CBO expects that any additional costs would not be significant.

8. Estimate comparison: None.

9. Previous CBO estimate: On June 24, 1994, CBO transmitted a cost estimate for H.R. 3626, the Antitrust and Communications Reform Act of 1994, as ordered reported by the House Committee on Energy and Commerce on March 16, 1994. In that cost estimate, CBO projected that the FCC would spend approximately $27 million in the first year, and $18 million to $20 million in later years. Those costs are $1 million to $2 million a year more than we estimate for this version of the bill. We expect that the costs to the FCC of implementing the Energy and Commerce Committee's bill would be slightly higher because that bill would permit the Bell companies to enter more telecommunications fields, and thus would result in higher spending by the FCC for rulemaking and enforcement. The Energy and Commerce Committee's bill, however, would authorize the FCC to increase its fees to offset the costs of implementing the bill.

10. Estimate prepared by: John Webb and Susanne Mehlman, and Melissa Sampson.

11. Estimate approved by: Paul Van de Water for C.G. Nuckols, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 3626 will have no significant inflationary impact on prices and costs in the national economy.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * * * * *

TITLE II—COMMON CARRIERS

* * * * * * *

SEC. 229. REGULATION OF MANUFACTURING BY BELL OPERATING COMPANIES.

(a) GENERAL AUTHORITY.—Subject to the requirements of this section and the regulations prescribed thereunder, but notwithstanding any restriction or obligation imposed before the date of enactment of this section pursuant to the Modification of Final Judgment on the lines of business in which a Bell operating company may engage, a Bell operating company, through an affiliate of that company, may manufacture and provide telecommunications equipment and manufacture customer premises equipment.

(b) SEPARATE MANUFACTURING AFFILIATE.—Any manufacturing or provision authorized under subsection (a) shall be conducted only through an affiliate that is separate from any Bell operating company.

(c) COMMISSION REGULATION OF MANUFACTURING AFFILIATE.—

(1) REGULATIONS REQUIRED.—The Commission shall prescribe regulations to ensure that Bell operating companies and their affiliates comply with the requirements of this section.

(2) BOOKS, RECORDS, ACCOUNTS.—A manufacturing affiliate required by subsection (b) shall maintain books, records, and accounts separate from its affiliated Bell operating company which identify all financial transactions between the manufacturing affiliate and its affiliated Bell operating company and, even if such manufacturing affiliate is not a publicly held corporation, prepare financial statements which are in compliance with financial reporting requirements under the Federal securities laws for publicly held corporations, file such statements with the Commission, and make such statements available for public inspection.

(3) IN-KIND BENEFITS TO AFFILIATE.—Consistent with the provisions of this section, neither a Bell operating company nor any of its nonmanufacturing affiliates shall perform sales, advertising, installation, production, or maintenance operations for a manufacturing affiliate, except that—

(A) a Bell operating company and its nonmanufacturing affiliates may sell, advertise, install, and maintain telecommunications equipment and customer premises equipment after acquiring such equipment from their manufacturing affiliate; and

(B) institutional advertising, of a type not related to specific telecommunications equipment, carried out by the Bell operating company or its affiliates, shall be permitted.

(4) DOMESTIC MANUFACTURING REQUIRED.—

(A) GENERAL RULE.—A manufacturing affiliate required by subsection (b) shall conduct all of its manufacturing within the United States and, except as otherwise provided in this paragraph, all component parts of customer premises equipment manufactured by such affiliate, and all

component parts of telecommunications equipment manufactured by such affiliate, shall have been manufactured within the United States.

(B) EXCEPTION.—Such affiliate may use component parts manufactured outside the United States if—

(i) such affiliate first makes a good faith effort to obtain equivalent component parts manufactured within the United States at reasonable prices, terms, and conditions; and

(ii) for the aggregate of telecommunications equipment and customer premises equipment manufactured and sold in the United States by such affiliate, the cost of the components manufactured outside the United States contained in all such equipment does not exceed 40 percent of the sales revenue derived in any calendar year from such equipment.

(C) CERTIFICATION REQUIRED.—Any such affiliate that uses component parts manufactured outside the United States in the manufacture of telecommunications equipment and customer premises equipment within the United States shall—

(i) certify to the Commission that a good faith effort was made to obtain equivalent parts manufactured within the United States at reasonable prices, terms, and conditions, which certification shall be filed on a quarterly basis with the Commission and list component parts, by type, manufactured outside the United States; and

(ii) certify to the Commission on an annual basis that such affiliate complied with the requirements of subparagraph (B)(ii), as adjusted in accordance with subparagraph (G).

(D) REMEDIES FOR FAILURES.—(i) If the Commission determines, after reviewing the certification required in subparagraph (C)(i), that such affiliate failed to make the good faith effort required in subparagraph (B)(i) or, after reviewing the certification required in subparagraph (C)(ii), that such affiliate has exceeded the percentage specified in subparagraph (B)(ii), the Commission may impose penalties or forfeitures as provided for in title V of this Act.

(ii) Any supplier claiming to be damaged because a manufacturing affiliate failed to make the good faith effort required in subparagraph (B)(i) may make complaint to the Commission as provided for in section 208 of this Act, or may bring suit for the recovery of actual damages for which such supplier claims such affiliate may be liable under the provisions of this Act in any district court of the United States of competent jurisdiction.

(E) ANNUAL REPORT.—The Commission, in consultation with the Secretary of Commerce, shall, on an annual basis, determine the cost of component parts manufactured outside the United States contained in all telecommunications equipment and customer premises equipment sold in the

United States as a percentage of the revenues from sales of such equipment in the previous calendar year.

(F) USE OF INTELLECTUAL PROPERTY IN MANUFACTURE.—Notwithstanding subparagraph (A), a manufacturing affiliate may use intellectual property created outside the United States in the manufacture of telecommunications equipment and customer premises equipment in the United States. A component manufactured using such intellectual property shall not be treated for purposes of subparagraph (B)(ii) as a component manufactured outside the United States solely on the basis of the use of such intellectual property.

(G) RESTRICTIONS ON COMMISSION AUTHORITY.—The Commission may not waive or alter the requirements of this paragraph, except that the Commission, on an annual basis, shall adjust the percentage specified in subparagraph (B)(ii) to the percentage determined by the Commission, in consultation with the Secretary of Commerce, pursuant to subparagraph (E).

(5) INSULATION OF RATE PAYERS FROM MANUFACTURING AFFILIATE DEBT.—Any debt incurred by any such manufacturing affiliate may not be issued by its affiliated Bell operating company and such manufacturing affiliate shall be prohibited from incurring debt in a manner that would permit a creditor, on default, to have recourse to the assets of its affiliated Bell operating company.

(6) RELATION TO OTHER AFFILIATES.—A manufacturing affiliate required by subsection (b) shall not be required to operate separately from the other affiliates of its affiliated Bell operating company, but if an affiliate of a Bell operating company becomes affiliated with a manufacturing entity, such affiliate shall be treated as a manufacturing affiliate of that Bell operating company and shall comply with the requirements of this section.

(7) AVAILABILITY OF EQUIPMENT TO OTHER CARRIERS.—A manufacturing affiliate required by subsection (b) shall make available, without discrimination or self-preference as to price, delivery, terms, or conditions, to any common carrier any telecommunications equipment that is used in the provision of telephone exchange service and that is manufactured by such affiliate so long as each such purchasing carrier—

(A) does not either manufacture telecommunications equipment, or have an affiliated telecommunications equipment manufacturing entity; or

(B) agrees to make available, to the Bell operating company affiliated with such manufacturing affiliate or any common carrier affiliate of such Bell operating company, any telecommunications equipment that is used in the provision of telephone exchange service and that is manufactured by such purchasing carrier or by any entity or organization with which such purchasing carrier is affiliated.

(8) SALES PRACTICES OF MANUFACTURING AFFILIATES.—

(A) PROHIBITION OF DISCONTINUATION OF EQUIPMENT FOR WHICH THERE IS REASONABLE DEMAND.—A manufac-

turing affiliate required by subsection (b) shall not discontinue or restrict sales to a common carrier of any telecommunications equipment that is used in the provision of telephone exchange service and that such affiliate manufactures for sale as long as there is reasonable demand for the equipment by such carriers; except that such sales may be discontinued or restricted if such manufacturing affiliate demonstrates to the Commission that it is not making a profit, under a marginal cost standard implemented by the Commission by regulation, on the sale of such equipment.

(B) DETERMINATIONS OF REASONABLE DEMAND.—Within 60 days after receipt of an application under subparagraph (A), the Commission shall reach a determination as to the existence of reasonable demand for purposes of such subparagraph. In making such determination the Commission shall consider—

(i) whether the continued manufacture of the equipment will be profitable;

(ii) whether the equipment is functionally or technologically obsolete;

(iii) whether the components necessary to manufacture the equipment continue to be available;

(iv) whether alternatives to the equipment are available in the market; and

(v) such other factors as the Commission deems necessary and proper.

(9) JOINT PLANNING OBLIGATIONS.—Each Bell operating company shall, consistent with the antitrust laws (including title I of the Antitrust and Communications Reform Act of 1994), engage in joint network planning and design with other contiguous common carriers providing telephone exchange service, but agreement with such other carriers shall not be required as a prerequisite for such introduction or deployment.

(d) INFORMATION REQUIREMENTS.—

(1) FILING OF INFORMATION ON PROTOCOLS AND TECHNICAL REQUIREMENTS.—Each Bell operating company shall, in accordance with regulations prescribed by the Commission, maintain and file with the Commission full and complete information with respect to the protocols and technical requirements for connection with and use of its telephone exchange service facilities. Each such company shall report promptly to the Commission any material changes or planned changes to such protocols and requirements, and the schedule for implementation of such changes or planned changes.

(2) FILING AS PREREQUISITE TO DISCLOSURE TO AFFILIATE.—A Bell operating company shall not disclose to any of its affiliates any information required to be filed under paragraph (1) unless that information is filed promptly, as required by regulation by the Commission.

(3) ACCESS BY COMPETITORS TO INFORMATION.—The Commission may prescribe such additional regulations under this subsection as may be necessary to ensure that manufacturers in competition with a Bell operating company's manufacturing affiliate have access to the information with respect to the proto-

cols and technical requirements for connection with and use of its telephone exchange service facilities required for such competition that such company makes available to its manufacturing affiliate.

(4) PLANNING INFORMATION.—Each Bell operating company shall provide, to contiguous common carriers providing telephone exchange service, timely information on the planned deployment of telecommunications equipment.

(e) ADDITIONAL COMPETITION REQUIREMENTS.—The Commission shall prescribe regulations requiring that any Bell operating company which has an affiliate that engages in any manufacturing authorized by subsection (a) shall—

(1) provide, to other manufacturers of telecommunications equipment and customer premises equipment that is functionally equivalent to equipment manufactured by the Bell operating company manufacturing affiliate, opportunities to sell such equipment to such Bell operating company which are comparable to the opportunities which such Company provides to its affiliates; and

(2) not subsidize its manufacturing affiliate with revenues from telephone exchange service or telephone toll service.

(f) COLLABORATION PERMITTED.—Nothing in this section (other than subsection (m)) shall be construed to limit or restrict the ability of a Bell operating company and its affiliates to engage in close collaboration with any manufacturer of customer premises equipment or telecommunications equipment during the design and development of hardware, software, or combinations thereof related to such equipment.

(g) ACCESSIBILITY REQUIREMENTS.—

(1) MANUFACTURING.—The Commission shall, within 1 year after the date of enactment of this section, prescribe such regulations as are necessary to ensure that telecommunications equipment and customer premises equipment designed, developed, and fabricated pursuant to the authority granted in this section shall be accessible and usable by individuals with disabilities, including individuals with functional limitations of hearing, vision, movement, manipulation, speech, and interpretation of information, unless the costs of making the equipment accessible and usable would result in an undue burden or an adverse competitive impact.

(2) NETWORK SERVICES.—The Commission shall, within 1 year after the date of enactment of this section, prescribe such regulations as are necessary to ensure that advances in network services deployed by a Bell operating company shall be accessible and usable by individuals whose access might otherwise be impeded by a disability or functional limitation, unless the costs of making the services accessible and usable would result in an undue burden or adverse competitive impact. Such regulations shall seek to permit the use of both standard and special equipment and seek to minimize the need of individuals to acquire additional devices beyond those used by the general public to obtain such access.

(3) COMPATIBILITY.—The regulations prescribed under paragraphs (1) and (2) shall require that whenever an undue bur-

den or adverse competitive impact would result from the manufacturing or network services requirements in such paragraphs, the manufacturing affiliate that designs, develops, or fabricates the equipment or the Bell operating company that deploys the network service shall ensure that the equipment or network service in question is compatible with existing peripheral devices or specialized customer premises equipment commonly used by persons with disabilities to achieve access, unless doing so would result in an undue burden or adverse competitive impact.

(4) DEFINITIONS.—As used in this subsection:

(A) UNDUE BURDEN.—The term "undue burden" means significant difficulty or expense. In determining whether an activity would result in an undue burden, factors to be considered include—

(i) the nature and cost of the activity;

(ii) the impact on the operation of the facility involved in the manufacturing of the equipment or deployment of the network service;

(iii) the financial resources of the manufacturing affiliate in the case of manufacturing of equipment, for as long as applicable regulatory rules prohibit cross-subsidization of equipment manufacturing with revenues from regulated telecommunications service or when the manufacturing activities are conducted in a separate subsidiary;

(iv) the financial resources of the Bell operating company in the case of network services, or in the case of manufacturing of equipment if applicable regulatory rules permit cross-subsidization of equipment manufacturing with revenues from regulated telecommunications services and the manufacturing activities are not conducted in a separate subsidiary; and

(v) the type of operation or operations of the manufacturing affiliate or Bell operating company as applicable.

(B) ADVERSE COMPETITIVE IMPACT.—In determining whether the activity would result in an adverse competitive impact, the following factors will be considered:

(i) whether such activity would raise the cost of the equipment or network service in question beyond the level at which there would be sufficient consumer demand by the general population to make the equipment or network service profitable; and

(ii) whether such activity would, with respect to the equipment or network service in question, put the manufacturing affiliate or Bell operating company, as applicable, at a competitive disadvantage in comparison with one or more providers of one or more competing products and services. This factor may only be considered so long as competing manufacturers and network service providers are not held to the same obligation with respect to access by persons with disabilities.

(C) ACTIVITY.—For the purposes of this paragraph, the term "activity" includes—

(i) the research, design, development, deployment, and fabrication activities necessary to comply with the requirements of this section; and

(ii) the acquisition of the related materials and equipment components.

(5) EFFECTIVE DATE.—The regulations required by this subsection shall become effective 18 months after the date of enactment of this section.

(6) IMPACT OF ADA.—Nothing in this section shall be interpreted to limit or otherwise affect the application of the Americans with Disabilities Act or its implementing regulations.

(h) PUBLIC NETWORK ENHANCEMENT.—A Bell operating company manufacturing affiliate shall, as a part of its overall research and development effort, establish a permanent program for the manufacturing research and development of products and applications for the enhancement of the public switched telephone network and to promote public access to advanced telecommunications services. Such program shall focus its work substantially on developing technological advancements in public telephone network applications, telecommunication equipment and products, and access solutions to new services and technology, including access by (1) public institutions, including educational and health care institutions; and (2) people with disabilities and functional limitations. Notwithstanding the limitations in subsection (a), a Bell operating company and its affiliates may engage in such a program in conjunction with a Bell operating company not so affiliated or any of its affiliates. The existence or establishment of such a program that is jointly provided by manufacturing affiliates of Bell operating companies shall satisfy the requirements of this section as it pertains to all such affiliates of a Bell operating company.

(i) ADDITIONAL RULES AUTHORIZED.—The Commission may prescribe such additional rules and regulations as the Commission determines necessary to carry out the provisions of this section.

(j) ADMINISTRATION AND ENFORCEMENT AUTHORITY.—

(1) COMMISSION REGULATORY AUTHORITY.—For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to any Bell operating company as the Commission has in administering and enforcing the provisions of this title with respect to any common carrier subject to this Act.

(2) PRIVATE ACTIONS.—Any common carrier that provides telephone exchange service and that is injured by an act or omission of a Bell operating company or its manufacturing affiliate which violates the requirements of paragraph (7) or (8) of subsection (c), or the Commission's regulations implementing such paragraphs, may initiate an action in a district court of the United States to recover the full amount of damages sustained in consequence of any such violation and obtain such orders from the court as are necessary to terminate existing violations and to prevent future violations; or such regulated local

telephone exchange carrier may seek relief from the Commission pursuant to sections 206 through 209.

(k) RULEMAKING REQUIRED.—The Commission shall prescribe regulations to implement this section within 180 days after the date of enactment of this section.

(l) EXISTING MANUFACTURING AUTHORITY.—Nothing in this section shall prohibit any Bell operating company from engaging, directly or through any affiliate, in any manufacturing activity in which any Bell operating company or affiliate was authorized to engage on the date of enactment of this section.

(m) ANTITRUST LAWS.—Nothing in this section shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws (including title I of the Antitrust and Communications Reform Act of 1994).

(n) DEFINITIONS.—As used in this section:

(1) The term "affiliate" means any organization or entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under common ownership with a Bell operating company. The terms "owns", "owned", and "ownership" mean an equity interest of more than 10 percent.

(2) The term "Bell operating company" means those companies listed in appendix A of the Modification of Final Judgment, and includes any successor or assign of any such company, but does not include any affiliate of any such company.

(3) The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(4) The term "manufacturing" has the same meaning as such term has under the Modification of Final Judgment.

(5) The term "manufacturing affiliate" means an affiliate of a Bell operating company established in accordance with subsection (b) of this section.

(6) The term "Modification of Final Judgment" means the decree entered August 24, 1982, in United States v. Western Electric Civil Action No. 82–0192 (United States District Court, District of Columbia), and includes any judgment or order with respect to such action entered on or after August 24, 1982, and before the date of enactment of this section.

(7) The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of an electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

(8) The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

(9) The term "telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

SEC. 230. REGULATION OF ENTRY INTO ALARM MONITORING SERVICES.

(a) REGULATIONS REQUIRED.—Not later than 6 years after the date of enactment of this section, the Commission shall prescribe regulations—

(1) to establish such requirements, limitations, or conditions as are (A) necessary and appropriate in the public interest with respect to the provision of alarm monitoring services by Bell operating companies and their affiliates, and (B) effective at such time as a Bell operating company or any of its affiliates is authorized to provide alarm monitoring services;

(2) to prohibit Bell operating companies and their affiliates, at that or any earlier time after the date of enactment of this section, from recording or using in any fashion the occurrence or the contents of calls received by providers of alarm monitoring services for the purposes of marketing such services on behalf of the Bell operating company, any of its affiliates, or any other entity; and

(3) to establish procedures for the receipt and review of complaints concerning violations by such companies of such regulations, or of any other provision of this Act or the regulations thereunder, that result in material financial harm to a provider of alarm monitoring services.

(b) EXPEDITED CONSIDERATION OF COMPLAINTS.—The procedures established under subsection (a)(3) shall ensure that the Commission will make a final determination with respect to any complaint described in such subsection within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, as determined by the Commission in accordance with such regulations, the Commission shall, within 60 days after receipt of the complaint, issue a cease and desist order to prevent the Bell operating company and its affiliates from continuing to engage in such violation pending such final determination.

(c) REMEDIES.—The Commission may use any remedy available under title V of this Act to terminate and punish violations described in subsection (a)(2). Such remedies may include, if the Commission determines that such violation was willful or repeated, ordering the Bell operating company to cease offering alarm monitoring services.

(d) DEFINITIONS.—As used in this section, the terms "Bell operating company", "affiliate", and "alarm monitoring services" have the meanings provided in section 106 of the Antitrust Reform Act of 1994, except that, for purposes of the term "affiliate", to own shall refer to owning an equity interest of more than 10 percent.

SEC. 231. REGULATION OF ELECTRONIC PUBLISHING.

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

(2) Nothing in this section shall prohibit a separated affiliate or electronic publishing joint venture from engaging in the provision of electronic publishing or any other lawful service in any area.

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

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

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

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

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

(4) file with the Commission annual reports in a form substantially equivalent to the Form 10–K referenced at 17 C.F.R. 249.310 as that section and form are in effect on the date of enactment;

(5) after 1 year from the effective date of this section, not hire as corporate officers sales and marketing management personnel whose responsibilities at the separated affiliate or electronic publishing joint venture will include the geographic area where the Bell operating company provides basic telephone service, or network operations personnel whose responsibilities at the separated affiliate or electronic publishing joint venture would require dealing directly with the Bell operating company, any person who was employed by the Bell operating company during the year preceding their date of hire, provided that this requirement shall not apply to persons subject to a collective bargaining agreement that gives such persons rights to be employed by a separated affiliate or electronic publishing joint venture of the Bell operating company;

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

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

(8) have performed annually by March 31, or any other date prescribed by the Commission, a compliance review which—

(A) must be conducted by an independent entity which is subject to professional, legal, and ethical obligations for the purpose of determining compliance during the preceding calendar year with any provision of this section that imposes a requirement on such separated affiliate or electronic publishing joint venture; and

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

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

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

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

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

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

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

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

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

(7) except for—

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

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

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

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

(9) have performed annually by March 31, or any other date prescribed by the Commission, a compliance review which—

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

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

(10) within 90 days of receiving a review described in paragraph (9), file a report of such exceptions and any corrective action with the Commission and allow any person to inspect and

copy such report subject to reasonable safeguards to protect any proprietary information contained in such report from being used for purposes other than to enforce or pursue remedies under this section;

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

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

(13) if prices for network access and interconnection for basic telephone service are no longer subject to regulation, provide electronic publishers such services on the same terms and conditions as a separated affiliate receives such services;

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) COMPLIANCE WITH SAFEGUARDS.—A Bell operating company, affiliate or its separated affiliate is prohibited from acting in concert with another Bell operating company or any entity in order to knowingly and willfully violate or evade the requirements of this section.

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

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

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

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

(h) PERMISSIBLE JOINT ACTIVITIES.—

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

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

(3) ELECTRONIC PUBLISHING JOINT VENTURES.—A Bell operating company or affiliate may participate on a nonexclusive basis in electronic publishing joint ventures with entities that are not any Bell operating company, affiliate, or separated affiliate to provide electronic publishing services, provided that the Bell operating company or affiliate has not more than a 50 percent direct or indirect equity interest (or the equivalent thereof) or the right to more than 50 percent of the gross revenues under a revenue sharing or royalty agreement in any electronic publishing joint venture. Officers and employees of a Bell operating company or affiliate participating in an electronic publishing joint venture may not have more than 50 percent of the voting control over the electronic publishing joint venture. In the case of joint ventures with small, local electronic publishers, the Commission for good cause shown may authorize the Bell operating company or affiliate to have a larger equity interest, revenue share, or voting control but not to exceed 80 percent. A Bell operating company participating in an electronic publishing joint venture may provide promotion, marketing, sales, or advertising personnel and services to such joint venture.

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

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

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

(B) auditable in accordance with generally accepted accounting principles; and

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

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

(3) A Bell operating company shall not provide an affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing, which such affiliate then directly or indirectly provides to a separated affiliate, and which is not made available to unaffiliated companies on the same terms and conditions.

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

(1) Any facilities, services, or basic telephone service information provided or any assets, personnel, or anything of commercial or competitive value transferred, from a Bell operating company to any affiliate as described in subsection (i) and then provided or transferred to a separated affiliate shall be—

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

(B) auditable in accordance with generally accepted accounting principles; and

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

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

(3) An affiliate shall not provide a separated affiliate any facilities, services, or basic telephone service information related to the provision of electronic publishing, which were provided to such affiliate directly or indirectly by a Bell operating company, and which is not made available to unaffiliated companies on the same terms and conditions.

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

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

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

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

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

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

(B) any hiring of personnel, purchasing, or production, for any entity that engages in electronic publishing.

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

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

(m) SUNSET.—The provisions of this section shall cease to apply to a Bell operating company or its affiliate or separated affiliate in any telephone exchange area on June 30, 2000.

(n) PRIVATE RIGHT OF ACTION.—

(1) Any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may file a complaint with the Commission or bring suit as provided in section 207 of the Communications Act of 1934 (47 U.S.C. 207), and such Bell operating company, affiliate, or separated affiliate shall be liable as provided in section 206 of the Communications Act of 1934, (47 U.S.C. 207): Provided, however, That damages may not be awarded for a violation that is discovered by a compliance review as required by subsection (b)(8) or (c)(9) of this section and corrected within 90 days.

(2) In addition to the provisions of paragraph (1), any person claiming that any act or practice of any Bell operating company, affiliate, or separated affiliate constitutes a violation of this section may make application to the Commission for an order to cease and desist such violation or may make application in any district court of the United States of competent jurisdiction for an order enjoining such acts or practices or for an order compelling compliance with such requirement.

(o) ANTITRUST LAWS.—Nothing in this section shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws (including title I of the Antitrust and Communications Reform Act of 1994).

(p) DEFINITIONS.—As used in this section—

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

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

(A) a competitive wireline telephone exchange service provided in a telephone exchange area where another entity provides a wireline telephone exchange service that was provided on January 1, 1984, and

(B) wireless telephone exchange service provided by an affiliate that is required by the Commission to be a corporate entity separate from the Bell operating company.

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

(4) The term "control" has the meaning that it has in 17 C.F.R. 240.12b–2, the regulations promulgated by the Securities

and Exchange Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) or any successor provision to such section.

(5) The term "customer proprietary network information" means—

(A) information which—

(i) relates to the quantity, technical configuration, type, destination, and amount of use of telephone exchange service or interexchange telephone service subscribed to by any customer of a Bell operating company, and

(ii) is available to the Bell operating company by virtue of the telephone company-customer relationship; and

(B) information contained in the bills for telephone exchange service or interexchange telephone service received by a customer of a Bell operating company.

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

(i) news or entertainment;

(ii) business, financial, legal, consumer, or credit material;

(iii) editorials;

(iv) columns;

(v) sports reporting;

(vi) features;

(vii) advertising;

(viii) photos or images;

(ix) archival or research material;

(x) legal notices or public records;

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

(xii) other like or similar information.

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

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

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

(iii) The transmission of information as part of a gateway to an information service that does not involve the generation or alteration of the content of information, including data transmission, address translation, protocol conversion, billing management, introductory information content, and navigational systems that enable users to access electronic publishing services, which do not affect the presentation of such electronic publishing services to users.

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

(v) Level 2 gateway services as those services are defined by the Commission's Second Report and Order, Recommendation to Congress and Second Further Notice of

Proposed Rulemaking in CC Docket No. 87–266 dated August 14, 1992.

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

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

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

(ix) Language translation.

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

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

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

(xiii) Caller identification services.

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

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

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

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

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

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

(i) full motion video entertainment on demand; and

(ii) video programming as defined in section 602 of the Communications Act of 1934.

(7) The term "electronic publishing joint venture" means a joint venture owned by a Bell operating company or affiliate that engages in the provision of electronic publishing which is disseminated by means of such Bell operating company's or any of its affiliates basic telephone service.

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

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

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

(11) The term "separated affiliate" means a corporation under common ownership or control with a Bell operating company that does not own or control a Bell operating company and is not owned or controlled by a Bell operating company and that engages in the provision of electronic publishing which is dis-

seminated by means of such Bell operating company's or any of its affiliates' basic telephone service.

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

* * * * * * *

O

Document No. 168