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REPORT
102-850

ANTITRUST REFORM ACT OF 1992

AUGUST 12, 1992.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

REPORT

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 5096]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5096) to supersede the Modification of Final Judgment entered August 24, 1982, in the antitrust action styled U.S. v. Western Electric, Civil Action No. 82-0192, United States District Court for the District of Columbia; and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Antitrust Reform Act of 1992".

SEC. 2. AUTHORIZATION FOR BELL OPERATING COMPANY MONOPOLY 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 for authorization, notwithstanding the Modification of Final Judgment—

(A) to engage in research and development relating to telecommunications equipment or customer premises equipment,

(B) to provide information services,

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(C) to manufacture or provide telecommunications equipment, or manufacture customer premises equipment, or

(D) to provide interexchange telecommunications.

The application shall describe with particularity the nature and scope of each activity, and of each product market, service market, and 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 the date of the enactment of this Act.

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

(b) DETERMINATION BY THE ATTORNEY GENERAL.—

(1) COMMENT PERIOD.—Not later than 60 days after the application is published under subsection (a)(3), interested persons may submit comments to the Attorney General regarding the application.

(2) DETERMINATION.—(A) After the time for comment under paragraph (1) has expired, but not later than 120 days after the application is published under subsection (a)(3), the Attorney General shall issue a written determination with respect to granting the authorization for which the Bell operating company has applied.

(B)(i) The Attorney General shall grant such authorization only to the extent that the Attorney General believes that such company would satisfy the proof requirements described in subsection (c)(2)(A)(i).

(ii) The Attorney General shall deny the remainder of the requested authorization.

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

(3) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (2), the Attorney General shall publish the determination in the Federal Register, together with a description of the findings, studies, and analyses relied on for the determination.

(4) FINALITY.—The Attorney General's determination regarding an application made under this subsection shall be final unless a civil action with respect to such application is timely commenced under subsection (c)(1).

(c) DE NOVO JUDICIAL DETERMINATION.—

(1) CIVIL ACTION.—Not later than—

(A) 60 days after a determination by the Attorney General is published under subsection (b)(3), or

(B) 60 days after the expiration of the 130-day period beginning on the date the Attorney General receives an application made under subsection (a)(1),

whichever occurs earlier, the Bell operating company that applied to the Attorney General under subsection (a), or any person who might be injured in its business or property as a result of any determination regarding such company's engaging in the activity described in such company's application, may commence a civil action against the Attorney General, in any district court of the United States in the district in which such company resides or is found or has an agent, for a de novo determination regarding the application. Such company and any such person shall also have the right to intervene as a party in the civil action.

(2) JUDGMENT.—(A)(i) The court shall enter a judgment granting the authorization for which the Bell operating company applied to the Attorney General only to the extent that such company proves that there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in any relevant market for the activity to which the application relates.

(ii) The court shall enter a judgment denying the remainder of the requested authorization.

(B) A judgment granting any part of a requested authorization shall describe with particularity the nature and scope of each activity and of each product market, service market, and geographic market to which the authorization granted applies.

(3) STAY.—A judgment entered under paragraph (2) shall be stayed until the time for all appeals with respect to such judgment has expired.

(d) SPECIAL APPLICABLE DATE.—For purposes of subsection (a)(1), the applicable date for which a Bell operating company may apply for authorization with respect to providing interexchange telecommunications, or an information service relating to an alarm monitoring service, shall be 5 years after the date of the enactment of this Act.

SEC. 3. AUTHORIZATION AS PREREQUISITE.

(a) PREREQUISITE.—Until a Bell operating company is so authorized in accordance with section 2, it shall be unlawful for such company, directly or through an affiliated enterprise, to engage in an activity described in section 2(a)(1).

(b) EXCEPTION FOR PREVIOUSLY AUTHORIZED ACTIVITIES.—Subsection (a) shall not prohibit a Bell operating company from engaging—

(1) in any activity to the extent authorized by an order entered by the United States District Court for the District of Columbia pursuant to section 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 research and development in which any such company was lawfully engaged at any time in the period beginning on January 1, 1984, and ending on the date of the enactment of this Act, or

(3) in providing a specific information service (other than an information service relating to an alarm monitoring service) in a particular geographic market to the extent such company was lawfully engaged in providing such service to customers in such market at any time in the period beginning on October 7, 1991, and ending 60 days before the date of the enactment of this Act.

SEC. 4. PROHIBITIONS.

(a) ANTICOMPETITIVE DISCRIMINATION.—A Bell operating company with monopoly power in any exchange service market that is engaged (directly or through an affiliated enterprise) in an activity described in section 2(a)(1) shall not discriminate, in any relevant market, between itself or an affiliated enterprise and any other person, or between any two such other persons, with respect to any product or service related to the provision or use of a telecommunications service if the effect of such discrimination may be to substantially lessen competition, or to tend to create a monopoly, in any line of commerce.

(b) ANTICOMPETITIVE CROSS-SUBSIDIES.—A Bell operating company with monopoly power in any exchange service market shall not use (directly or indirectly) proceeds obtained from providing exchange service in such market to subsidize, in any relevant market, an activity described in section 2(a)(1).

(c) ANTICOMPETITIVE CONCENTRATION AMONG BELL OPERATING COMPANIES.—(1) Except as provided in paragraph (2), a Bell operating company with monopoly power in any exchange service market shall not become an affiliated enterprise of, or acquire (directly or indirectly) any exchange service assets of, another Bell operating company if the effect of such affiliation or acquisition may be to substantially lessen competition, or to tend to create a monopoly, in any line of commerce.

(2) Paragraph (1) shall not prohibit any acquisition by a Bell operating company from another Bell operating company if the 2 companies are affiliates of each other on the date of such acquisition and were affiliates of each other on the date of the enactment of this Act.

(d) ANTICOMPETITIVE JOINT ACTIVITY AMONG BELL OPERATING COMPANIES.—(1) Except as provided in paragraph (2), it shall be unlawful for a Bell operating company with monopoly power in any exchange service market to engage jointly (directly or through an affiliated enterprise) with another Bell operating company, in any relevant market, in an activity described in section 2(a)(1) in restraint of trade.

(2) EXCEPTIONS.—Paragraph (1) shall not prohibit Bell operating companies from jointly engaging in an activity—

(A) at Bell Communications Research (commonly known as "Bellcore") if such companies were lawfully engaging in such activity at Bell Communications Research at any time in the period beginning on January 1, 1984, and ending on the date of the enactment of this Act,

(B) if such companies are affiliates of each other while jointly engaging in such activity and were affiliates of each other on the date of the enactment of this Act, or

(C) if such companies were lawfully engaging jointly in such activity on the date of the enactment of this Act.

SEC. 5. COMPLIANCE.

(a) DUTY TO ADVISE CERTAIN MANAGEMENT EMPLOYEES OF OBLIGATIONS UNDER ACT.—Each Bell operating company shall advise, in writing, each of its officers and other management personnel with significant responsibility for matters addressed in this Act, of the requirements of this Act, and that violations of this Act may result in criminal liability.

(b) CERTIFICATION OF COMPLIANCE.—Not later than 30 days after the end of each calendar year, the chief executive officer of (or another officer responsible for the operation of) each Bell operating company that is not (directly or indirectly) owned or controlled by another Bell operating company shall certify in writing to the Attorney General whether such company and its affiliates have complied throughout such year with sections 3 and 4 and with subsection (a).

SEC. 6. 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 3, 4, or 5 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) 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 a determination by the Attorney General under section 2(b)(2).

(2) 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.

(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.

SEC. 7. DEFINITIONS.

For purposes of this Act:

(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" means, with respect to a Bell operating company, a person—

(A) that such company or its affiliate (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with, to any extent whatsoever, or

(B) in whose gross revenues such company or its affiliate has any direct or indirect financial or proprietary interest, through a revenue sharing arrangement, royalty arrangement, or otherwise.

(3) 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 monopolies, attempts to monopolize, and unlawful restraints of trade.

(4) 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).

(5) CUSTOMER PREMISES EQUIPMENT.—The term "customer premises equipment" means equipment employed on the premises of a person (other than a person engaged in the business of providing a telecommunications service) to originate, route, or terminate telecommunications, and includes software relating to such equipment.

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

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

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

(7) 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 standard metropolitan statistical area, consolidated statistical area, or State, except as expressly permitted under the Modification of Final Judgment before the date of the enactment of this Act.

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

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

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

(11) INFORMATION ACCESS.—The term "information access" means specialized exchange services provided by a Bell operating company for the purpose of originating, terminating, transmitting, forwarding, or routing telecommunications to or from a provider of information services.

(12) INFORMATION SERVICE.—The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include the use of any such capability to engage in the business of providing an exchange service.

(13) INTEREXCHANGE TELECOMMUNICATIONS.—The term "interexchange telecommunications" means telecommunications between a point located in an exchange area and a point located outside such exchange area.

(14) MODIFICATION OF FINAL JUDGMENT.—The term "Modification of Final Judgment" means the order entered August 24, 1982, in the antitrust action styled U.S. 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.

(15) 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)).

(16) RESEARCH AND DEVELOPMENT.—The term "research and development" means—

(A) theoretical analysis, experimentation, or systematic study of phenomena or observable facts,

(B) development or testing of basic engineering techniques,

(C) extension of investigative findings or theory of a scientific or technical nature into practical application for experimental or demonstration purposes, but does not include production or testing of models or prototypes,

(D) collection or analysis of research information,

(E) establishment or operation of facilities for conducting any activity included under subparagraph (A), (B), (C), or (D), or

(F) prosecution of applications for patents, or the granting of licenses, for the results of any such activity.

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

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

(19) TELECOMMUNICATIONS SERVICE.—The term "telecommunications service" means the offering for hire of transmission facilities or of telecommunications by means of such facilities.

(20) 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. 8. 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 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",

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

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

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

(7) 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,

(8) 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.—Nothing in this Act shall be construed to modify, impair, or supersede the applicability of any other antitrust law.

(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 other than law expressly referred to 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 Act 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 Act.

SEC. 9. AMENDMENT TO DEFINITION OF ANTITRUST LAWS APPEARING IN THE CLAYTON ACT.

Subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)) is amended by inserting "the Antitrust Reform Act of 1992;" after "thirteen;".

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 5096 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

A. INTRODUCTION

H.R. 5096, the "Antitrust Reform Act of 1992," would simply codify the antitrust entry test of the Consent Decree which settled the Justice Department's 1974 antitrust suit by divesting the competitive lines of telecommunications business from the old consolidated Bell System.[1] The 1982 AT&T Consent Decree, also known as the Modification of Final Judgment ("MFJ"), thus created the framework for a competitive environment in which the divested lines of business could finally flourish free of the coercive and market-distorting effects of the underlying local exchange monopoly.

In preserving the vitality of the antitrust principles underlying the MFJ, the legislation merely transfers from the courtroom to the statute books the antitrust test under which the regional Bell telephone monopolies may engage in manufacturing telecommunications equipment, providing information services, and providing long distance (interexchange) services. However, it is carefully drafted not to interfere with or in any way alter the existing regulatory framework in place to oversee non-antitrust aspects of the telecommunications industry.

It is now abundantly clear that, under the MFJ, these lines of business have flourished since their separation from the Bell System. Nevertheless, the antitrust laws have never functioned as a shield to be used to protect any particular competitors; they are in place only to ensure that competition is safeguarded in the distinctive American free-enterprise system.[2] For that reason, H.R. 5096 would codify a mechanism to encourage entry by the Bell operating companies into these restricted markets as soon as antitrust considerations permit.

For over 80 years, the antitrust laws have co-existed with the telecommunications regulatory apparatus as an independent and essential element of congressional policy. Certainly, the regulatory apparatus plays the central role in overseeing the day-to-day technical complexities of the telecommunications industry. But overarching these telecommunications industry specifics is the larger picture of competitive vigor at the market level. It is at this level where antitrust has functioned as the ultimate guarantor of product and service diversity and price competition to the benefit of the

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

American consumer.[3] In this sense H.R. 5096 functions precisely in the same manner as the antitrust merger statutes, which are complementary to—but independent of—other regulatory procedures found in such diverse agencies as the Securities and Exchange Commission and the Federal Reserve.

The 1974 antitrust enforcement action was not the first time the Justice Department found it necessary to invoke the Sherman Act in order to strike out against monopolistic practices of the Bell System. Twice before in this century, the Sherman Act was also enlisted to root out anticompetitive evils in an industry that was neither open nor free-moving.[4] Both in 1913 and 1949, as in 1974, the Justice Department commenced Sherman Act litigation after a crisis developed in the regulatory process in the face of clearly anticompetitive activities of a completely entrenched monopoly entity.[5]

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, the responsibility for reining in the Bell System's monopolistic tendencies was surrendered to the regulatory apparatus, accompanied by solemn professions of faith in a new-found regulatory capability and resolve.[6]

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 monopoly ownership of 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 monopoly 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."[7] Before the MFJ took effect in 1984, the presiding judge, Harold Greene, permitted the 22 local Bell monopolies to recombine into seven regional Bell holding companies (RBOCs), creating seven

[3] The benefits of free-market competition for consumers, and the detrimental effect of monopolism, was observed by no less an authority on the free market than Adam Smith:

> The price of monoply 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).

[4] *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. January 24, 1956).

[5] *See infra* text accompanying notes 96–111, 134–43, 193–228.

[6] *See infra* text accompanying notes 112–17, 144–77.

[7] *MFJ Opinion, supra* note 1, 552 F. Supp. at 225. *See infra* text accompanying notes 252–253.

dominant regional monopolies where a monolithic nationwide monopoly had existed before.[8]

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 at a time when the overall economy has been generally stagnant.[9] 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. In this sense, the consequences of the AT&T Antitrust Consent Decree are precisely the procompetitive effects that would be predicted in a free market system safeguarded by the antitrust laws.

Eight years of relentless and pervasive political and public relations pressure by the Bell monopolies, however, has begun to take its toll on the integrity of the MFJ's competitive market structure. Judge Greene has now been compelled by an appellate panel—premised on a procedural quirk,[10] but reflecting a fundamental disregard for the respective roles of the Justice Department and the courts under the antitrust laws and the Constitution [11]—to cast aside the MFJ's restriction against Bell monopoly entry into the information services market, 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.[12]

The judge's decision is now on appeal. Meanwhile, the Bell monopolies are working to build congressional support for removing the manufacturing and long distance restrictions as well, promising that the regulatory apparatus will fill any gap left by removal of the MFJ's structural protection.

The unraveling of the MFJ's competitive structure is causing extreme uncertainty and instability in this trillion-dollar industry.

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[8] *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983). *See infra* text accompanying note 255.

[9] *See infra* text accompanying notes 262–77, 371, 383.

[10] *See infra* text accompanying notes 331–332.

[11] H.R. 5096 serves an important purpose in congressional intent regarding the Antitrust Procedures and Enforcement Act (the "Tunney Act"). This law, which was enacted in 1974, was designed to ensure that the Federal judiciary performed an independent role in reviewing and scrutinizing antitrust consent decrees. The Tunney Act was enacted as a result of Judiciary Committee and Congressional concerns that undue political influence was improperly affecting the disposition of large antitrust cases. (For example, the Committee was particularly concerned about the unusual and suspicious circumstances surrounding the final negotiations surrounding the 1956 AT&T consent decree.)

In the Department's 1974 Sherman Act action, the Federal trial court held extensive Tunney Act proceedings. Consistent with its Tunney Act mandate, the court retained jurisdiction to review decree alterations and motions to remove the line-of-business restrictions. Unfortunately, but perhaps not surprisingly, political influence has been exercised in a manner aimed at having the Department reverse its position on the MFJ—and by so doing, renounce the very basis of the antitrust case. At the urging of the Department, the D.C. Circuit issued an opinion which had the effect of removing the Federal courts from many MFJ line-of-business deliberations. This opinion is at odds with separation-of-powers principles and the 100-year history of the antitrust laws, as expressed through the Tunney Act. The D.C. Circuit decision strikes at the very heart of the Nation's antitrust laws, and it is imperative that the proper roles of the Department and the Judiciary be clarified yet again by the Congress. *See infra* text accompanying notes 178–92, 333–34.

[12] *United States* v. *Western Elec. Co.*, 767 F. Supp. 308, 326 (D.D.C. 1991).

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 the self-interested designs of a monopoly with "bottleneck" control over the local telephone exchange on which they all depend.[13] This is precisely the problem the 1974 Justice Department action and the MFJ sought to prevent.

H.R. 5096 embodies a firm resolve by the Judiciary Committee 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 structure of the MFJ. Nothing less than a continuation of the strong antitrust foundation will 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. Only in this environment will the best competitors have a fair chance to prosper. The Committee specifically intends that these competitors will eventually include the Bells—as soon as, but no sooner than, their entry is possible without unacceptably endangering the free market environment.

H.R. 5096 preserves the principles of the Sherman Act and the competitive structure established under the MFJ, while responding to the Bells' desire for a fresh consideration of the MFJ's specific line-of-business restrictions.[15] The bill removes those restrictions from the jurisdiction of Judge Greene's court and places them in a statutory framework under which the Bell monopolies may apply to the Attorney General for entry into a restricted line of business.[16] Applications are reviewed under a competitive entry test

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[13] A few small equipment manufacturers, perceiving it in their self-interest to be absorbed into the economic orbit of the Bells' monopoly power, have thrown their lot with the Bells. And various segments of society have fallen sway to the Bells' siren song proclaiming that their entry will somehow make these markets *more* competitive, that they are somehow in a unique position to offer new products and services that a robustly competitive market has thus far, curiously, been unable to provide.

[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] For a more detailed description of the bill, *see infra* text accompanying note 467, and *infra* Part VI: Section-by-Section Analysis.

[16] For the long distance and alarm security information service markets, the Bells are eligible to apply for entry after a five-year transition period. This transition period is designed to provide appropriate notice before dramatic changes are made in the competitive structure of these two sensitive lines of business. A two-year transition period for equipment manufacturing and information services (other than alarm monitoring services), and a five-year transition period for electronic publishing, were removed during Committee markup by a vote of 18 to 15. As a result, the Bells are eligible to apply for entry into these markets immediately. *See infra* Part V(E): Markup of H.R. 5096.

which assesses whether there is still a substantial risk that monopolistic abuse would result from Bell entry. The test and application procedure, while lifted from the MFJ, include refinements designed to maximize opportunities for Bell entry by encouraging the Bells to focus their efforts where the test is most likely to be met, and by encouraging all parties to work toward accommodation whenever possible.[17]

In reporting this antitrust legislation, the Committee does not intend, or imply by indirection, that the Federal Communications Commission and State regulatory bodies should not continue to play their important role in overseeing the operation of the multifaceted telecommunications industry. H.R. 5096 in no way diminishes or constrains the province of these bodies as the appropriate implementers of regulatory policy developed in other Committees of Congress with jurisdiction over non-antitrust telecommunications regulatory policy. Thus, H.R. 5096 is carefully drafted to deal only with the antitrust policy implicated in the structural injunctions set forth in the MFJ. To this effect, the bill includes an explicit savings clause for all other Federal laws.

B. THE CASE FOR H.R. 5096

During the Subcommittee's examination of the MFJ and the history of competition policy in the telecommunications industry, several recurring patterns became apparent. First is the pattern of deferring to the regulatory process until a competitive crisis reveals its fundamental shortcomings. Second is the pattern of resorting in such crisis to Sherman Act antitrust action to free the marketplace from the Bell System's monopolistic chokehold. Third is the pattern of reverting to oblivious reliance on the regulatory process in lieu of sustained antitrust enforcement. Fourth is the pattern of realization that continuing congressional oversight is essential to ensure that vigorous antitrust enforcement is not compromised. And fifth is the pattern of unremitting effort by the Bell System to undermine public and congressional support for sustained antitrust enforcement through a litany of canards about its destructive effects on the telecommunications industry and about the multiplicity of societal "benefits" to be derived from unleashing the Bell monopoly to serve its self-appointed role as the handmaiden of technological progress.

The Bells monopolies' reaction to H.R. 5096 is all-too-consistent with this pattern. Although H.R. 5096 is designed to *facilitate* entry by the Bell monopolies into the restricted markets in accordance with competitive considerations, the Bells are pressing for no less than unconditional surrender of the MFJ restrictions. In furtherance of this objective, a number of myths and distortions have been leveled against the bill. They are addressed briefly here, and in more detail throughout the body of this report.

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[17] *See infra* text accompanying note 467 and *infra* Part VI: Section-by-Section Analysis.
The bill also contains four prohibitions, based on the antitrust statutes and the antitrust principles underlying the MFJ, which apply after Bell entry into competitive telecommunications-related markets, for so long as the Bell company continues to have monopoly power. The prohibitions are against anticompetitive discrimination, anticompetitive cross-subsidies, anticompetitive recombination among the Bell monopolies, and anticompetitive joint activity among the Bell monopolies.

1. Role of antitrust law

The Bell monopolies claim that H.R. 5096 places telecommunications policy in the courts under antitrust law, instead of in the regulatory bodies where it rightfully belongs. But the bill in no way intrudes into telecommunications policy or into the province of telecommunications regulators. H.R. 5096 deals only with the core Sherman Act antitrust concern of preserving the competitive framework of the telecommunications marketplace. Experience has demonstrated repeatedly that the regulatory apparatus is incapable of protecting a competitive marketplace against the determined resistance of a colossal monopoly.[18] Likewise, the antitrust laws make no claim to administer any aspect of telecommunications policy which does not result in a monopoly or a restraint of trade.

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,[19] has written the Committee in strong support of H.R. 5096. Professor Baxter reaffirmed 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.[20]

The Committee has also received statements endorsing the competitive principles embodied in the MFJ, prepared by two of the Nation's foremost antitrust experts, Philip Areeda of Harvard Law School and Judge Robert Bork.[21]

2. Special interests

The Bell monopolies claim that H.R. 5096 is designed to serve a narrow group of special interests seeking protection *against* competition. The Bells claim that it is precisely because they would be such vigorous competitors that they are being opposed. But this assertion is contradicted by the fact that the supporters of H.R. 5096 include not just those who would be attempting to compete in the shadow of the Bell monopolies—the thousands upon thousands of businesses, large and small, already competing vigorously against each other in a vibrant free market. The supporters of H.R. 5096 also include major governmental and non-profit consumer advocates, senior citizen groups, and current and former law enforce-

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[18] *See infra* text accompanying notes 96–111, 134–43, 193–228, 292–313.

[19] *See infra* text accompanying notes 236–241.

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

[21] Written statements of Robert Bork, Philip Areeda, *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part II), Hearings before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (February 19, 1992) (forthcoming 1992) (attachment to testimony of Robert E. Allen).

ment officials, as well as hundreds upon hundreds of large business and educational *users* of telecommunications services.

While competitive telecommunications businesses have a natural concern about the size and financial resources of a company that can draw upon a guaranteed rate of return from its regulated monopoly, that concern is not so parochial in this instance. For the Bell companies at this time control the lifeline to the customers of every competitor in the telecommunications market: the local telephone exchange bottleneck. In antitrust terminology, the local telephone exchange bottleneck is an "essential facility," which gives the Bells an inherent ability and—for activities in which they are engaged themselves—a natural incentive to impede competition in lines of business dependent on that essential facility.[22] As one witness testifying before the Subcommittee on Economic and Commercial Law put it, "We do not fear competition. We fear unfair competition." [23] That this distinction is genuine in their minds is supported by the fact that in 1989, when Judge Greene lifted the temporary restriction against entry into electronic publishing by AT&T—itself a giant, with $37 billion in assets, but no longer possessing monopoly power in long distance—not a single electronic publisher was opposed.[24]

3. Jobs [25]

The Bell monopolies claim that H.R. 5096 prevents them from creating new American jobs. But this claim is not only refuted by the historical tendency of a monopoly to depress healthy competition—and, therefore, innovation and job creation.[26] It is also refuted by a recent Labor Department study which estimated that, for the telecommunications switching equipment market alone, Bell entry could result in an estimated loss of 18,000–27,000 American jobs.[27]

This Bell claim is also refuted by an officer of the International Brotherhood of Electrical Workers, who told the Subcommittee in 1991:

> [L]ifting . . . the restrictions on the Regional Bell Operating Companies . . . 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 . . . Our first and foremost concern . . . is the loss of thousands of union jobs in America . . . If the RBOCs are free to manufacture for

[22] *See infra* notes 225, 253, and accompanying text.
[23] Testimony of Robert M. Johnson, *quoted infra* in text accompanying note 377.
[24] *United States* v. *Western Elec. Co.*, 1989-2 Trade Cas. (CCH) 68,673 (D.D.C. July 28, 1989).
[25] *See also infra* discussion of Bell claims regarding Competition, New Products, Rural America, The Disabled and Other Special Needs.
[26] Judge Learned Hand observed the lessons of history:

> 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.

United States v. *Aluminum Corp. of America*, 148 F.2d 416, 427 (2nd Cir. 1945).
[27] Department of Labor, *Employment Implications of Eliminating the Domestic Manufacturing Prohibition of the AT&T Consent Decree* (December 1989) (transmittal memorandum from Roderick DeArmant, Deputy Secretary of Labor, to Michael Boskin, Chairman of the Council of Economic Advisors).

themselves, why would 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.[28]

The Bell claim is also refuted by the president of the Communication Workers of America, who told the Subcommittee in 1989 that CWA opposed lifting any of the MFJ restrictions except under the competitive entry test.[29]

4. The entry test

The Bell monopolies claim that the test under H.R. 5096 for their entry into competitive markets is draconian. But the line-of-business restrictions in the MFJ are precisely what has created and nurtured the competitive markets.[30] The bill's entry test is premised on core Sherman Act principles, and is based on the MFJ's entry test—a court-imposed *relaxation* of the more permanent isolation of the Bells' local telephone monopoly power envisioned in the Justice Department's enforcement action and agreed to by the Bell System.[31] The bill further relaxes the entry test through refinements to the application process and an emphasis on market-by-market evaluation.[32]

5. Competition [33]

The Bell monopolies claim that H.R. 5096, by not granting them immediate entry into the competitive markets, harms competition and innovation and costs jobs. But it is the Sherman Act-mandated *absence* of the Bell monopolies from these markets that has allowed competition to take root and flourish. There are now millions of

[28] Testimony and statement of Stephen T. Lynn, *infra* text accompanying notes 453-454.
[29] *See* Statement of Morton Bahr, *infra* text accompanying notes 365-68. Curiously, in 1991—after winning RBOC support for a provision in S. 173 purporting to obligate the RBOCs to include a modicum of domestic content in any telecommunications equipment they manufactured—CWA appeared to have completely reversed field on the manufacturing and information services restrictions, while continuing to oppose lifting the long distance restriction because of the very same dangers of monopoly abuse. *See infra* notes 426-35 and accompanying text.

The validity of CWA's strange conversion is brought into serious question by a letter received recently by a Member of Congress from a CWA officer, complaining that the Bell monopolies were coercing their employees into writing and calling their Representatives in Congress in opposition to H.R. 5096.

> 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).
[30] *See infra* text accompanying notes 262-77, 371, 383.
[31] *See infra* text accompanying notes 252-53, 467.
[32] *See infra* Part VI: Section-by-Section Analysis.
[33] *See supra* discussion of Bell monopoly claims regarding Jobs; *see infra* regarding New Products, Rural America, The Disabled and Other Special Needs.

jobs being provided by thousands of competing equipment manufacturing, long distance, and information service firms.[34] These firms have entered the market or increased their market presence on the promise of a free market shielded from the cutthroat monopolistic practices that typified the industry under the Bell System.[35] No theoretical econometric model purporting to show that Bell entry would create new competition (or its corollary, new jobs) has taken into account the tendency of monopolies to *stifle* competition, *retard* innovation, and *reduce* employment.[36]

6. New products [37]

The Bell monopolies claim that H.R. 5096 prolongs the denial of important new products and services to the public that only they are in a position to provide. But the MFJ has resulted in a proliferation of new products and services.[38] Throughout its history, with few exceptions, the Bell System strenuously *resisted* the introduction of new products and services, either by itself or by competitors.[39] The Bells currently have a monopoly only on local phone service in their regions; they certainly do not enjoy a monopoly on technological creativity or expertise. History has proven that the most conducive environment for innovation and new product availability is a competitive market. Accordingly, H.R. 5096 facilitates Bell entry into the competitive markets as soon as their entry no longer constitutes a major anticompetitive threat.

7. Information services

The Bell monopolies claim that H.R. 5096 unfairly "turns back the clock" by restricting their entry into information services, despite the fact that Judge Greene has lifted the restriction. But Judge Greene made clear that he believed he was *forced* to lift the restriction—despite the fact that the competitive entry test had not been satisfied, and in disregard of the proper respective roles of the Justice Department and the courts in antitrust matters.[40] His decision is on appeal, and the information services restriction may yet be reinstated judicially. It is essential that an appropriate competitive entry test remain the cornerstone of antitrust policy in the move away from the MFJ restrictions. Nonetheless, H.R. 5096 permits a Bell monopoly to continue engaging in an information service to the extent it is already lawfully doing so.[41]

8. Focus on the Bell monopolies alone

The Bell monopolies claim that H.R. 5096 is unconstitutional because it replaces the MFJ with a statutory framework that applies only to them rather than to all local telephone companies generi-

[34] *See infra* text accompanying notes 269, 274, 276.
[35] *See infra* text accompanying notes 373, 392.
[36] *See supra* note 26; *see infra* text accompanying notes 86–95, 193–224.
[37] *See supra* discussion of Bell monopoly claims regarding Jobs, Competition; *see infra* regarding Rural America, The Disabled and Other Special Needs.
[38] *See infra* text accompanying notes 262–77, 371, 383.
[39] *See supra* note 26; *infra* text accompanying notes 86–95, 193–224.
[40] *See infra* text accompanying notes 333–336.
[41] The bill extends this special exemption to any information service which the Bell was providing to customers as of 60 days prior to enactment. Of course, should the final judgment in the case reverse the district court's decision, this provision would be moot.

cally. They claim that this not only amounts to a "bill of attainder," but also violates separation-of-powers requirements by supplanting a judicial decision. But Supreme Court precedent clearly indicates that there is no constitutional impediment to passing legislation that supplants 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.[42]

Congress's constitutional authority to make competition policy is well-settled.[43] The rational governmental basis for directing this particular legislation at the Bell monopolies is two-fold. First, the Bells alone exercise immense local exchange monopoly power concentrated throughout a vast contiguous region; the local exchange operations of even the Bells' closest runners-up are widely dispersed. Second, the very purpose of H.R. 5096 is to provide a proper mechanism to govern the orderly *release* of the Bell monopolies from the line-of-business restrictions; it would make no sense to *impose* these restrictions on firms who were never parties to the Justice Department's Sherman Act enforcement action and are not seeking to be excused from an antitrust consent decree.[44]

9. Free speech

The Bell monopolies also claim that H.R. 5096 is unconstitutional because it prohibits their provision of information services unless the competitive entry test is satisfied. They claim that this violates their First Amendment freedom of expression. But freedom of expression does not include the right to monopolize a medium of expression, and the absolute breadth of the Bells' contention disregards critical and accepted distinctions in First Amendment law between "pure" speech and "commercial" speech. The core values underlying the First Amendment—the American *public's* right to receive information from a wide diversity of sources—depend on the existence of a free information marketplace.[45] In providing antitrust-based protection to the free market in information services, the bill furthers not only antitrust values, but also First Amendment values.

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[42] *E.g., Nixon* v. *Administrator of General Services,* 433 U.S. 425, 468–84 (1977); *See infra* notes 489–99 and accompanying text.

[43] *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).

[44] *See infra* Part VI: Section-by-Section Analysis. The impassioned constitutional arguments leveled against H.R. 5096 have been refuted by a wide variety of legal scholars, including one commissioned by *the Bell monopolies themselves* to refute those arguments when they were leveled against a Bell-supported bill in a previous Congress. He wrote:

> 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. . .

Memorandum of Robert Pitofsky, Professor of Law, Georgetown University School of Law, *Legislating With Respect to Line-of-Business Restrictions on Bell Operating Companies: An Appropriate Role for Congress* 1 (August 1, 1989).

[45] In *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), the Supreme Court stated that the purpose of the First Amendment is to achieve "the widest possible dissemination of information from diverse and antagonistic sources." In *Red Lion Broadcasting* v. *FCC,* 395 U.S. 367, 390 (1969), the Court stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.'

These constitutional arguments against the MFJ and H.R. 5096 have been rejected wholesale by other legal scholars, and most pertinently, by Judge Greene as well.[46]

10. De novo court determination

The Bell monopolies claim that the requirement in H.R. 5096 that contested applications for entry be assessed *de novo* by a court is unnecessarily burdensome and time consuming, and that the court should give more deference to the Attorney General's viewpoint. But the bill's procedure follows closely the procedure for Justice Department involvement under the MFJ and other antitrust laws.[47] To eliminate *de novo* review would radically alter the Justice Department's traditional role as enforcer, not adjudicator, of the antitrust laws. For constitutional separation-of-powers reasons as well, it is essential that the chief enforcement department of the Executive Branch not be given adjudicatory responsibilities.[48]

The bill does, however, eliminate *de novo* court consideration of applications which are not further contested after the Attorney General's determination. Only if the Attorney General's determination is contested does the court make an independent, *de novo* determination regarding the application. In this regard the bill departs from the MFJ and adopts the suggestion of the Bell monopolies.[49]

11. The transition period

The Bell monopolies claim that the phased transition period in H.R. 5096 for Bell eligibility to apply for entry is unnecessary; that the transition should take place immediately upon enactment, particularly if there is to be an entry test of any kind.[50] But a transition period phased in over a reasonable period of time provides an orderly transition from the MFJ to the more open process set forth in the bill. It also parallels the MFJ, which provides for three-year "breathing periods" between reviews of the line-of-business restrictions. A transition period provides fair notice to the many thousands of businesses already present in the competitive market, whose livelihoods would be directly affected. During the hearings before the Subcommittee on Economic and Commercial Law, the concept of a phased-in transition period was endorsed by numerous witnesses, including witnesses who generally supported the Bell

[46] *MFJ Opinion, supra* note 1, at 183–85, 224. *See infra* notes 471–88 and accompanying text.

[47] *See infra* discussion of *de novo* review in Part VI: Section-by-Section Analysis. The distinction the bill makes between contested and uncontested applications is important because it preserves the right of any interested party to appeal—the same right and framework that has been upheld and utilized in other antitrust applications. *See id.*

[48] The concern is far from abstract. Questionable Justice Department conduct in negotiating past antitrust consent decrees led Congress in 1973 to *stop* judicial deference to the Department by conditioning entry of a proposed consent decree, or proposed change to a consent decree, on court approval after public notice and extensive judicial review. And the current uncertainty regarding the legal status of the information services restriction is due in large measure to the appeals court's apparent disregard for the presiding court's preeminent role. *See infra* text accompanying notes 333–34.

[49] *See infra* discussion in Part VI: Section-by-Section Analysis.

[50] This claim made some headway during the Committee markup, when the entire transition period was eliminated in one stroke by a roll call vote of 18 to 15. Later in the markup, however, the Committee upon reconsideration restored the transition period for long distance service and for alarm security information services.

monopolies' position regarding some of the line-of-business restrictions.[51]

12. Rural America

The Bell monopolies claim that H.R. 5096 deprives rural America of the benefits of the "information age," because only the Bells will extend the services outside the major population centers. This is a variation of the recurring Bell argument that the Bell monopolies are somehow uniquely suited to provide something that a robust free market has failed to provide.[52] In the case of Rural America, this argument is refuted by ancient as well as recent history.

Originally, the Bell System grew up in the cities, ignoring the needs of rural areas. Responsibility for rural telephone service was thus typically assumed by independent competitors.[53] Even today, the Bells provide service to much of rural America only through interconnection with small independent telephone companies—interconnection that the Bell System agreed to provide only after the Justice Department brought a Sherman Act enforcement action.[54]

Today, a Bell monopoly is free to make available *any* information service to *any*one, *any*where in its region, through the "gateways" authority granted by Judge Greene in 1988.[55] Rural America has not benefited from the Bells' new authority, however, because the Bells have not used it to any appreciable extent.[56] The Bells have sought to excuse their failure on the grounds that it is "not profitable" for them to provide information services that they do not control. But a fundamental tenet of antitrust is that the price at which a service becomes sufficiently "profitable" to entice a monopolist to provide it is always higher than the price which will entice a firm in a competitive environment to provide it.[57]

The thrust of the entry test in H.R. 5096 is that as soon as the prospect of Bell entry into a competitive market truly heralds more competition rather than less, Bell entry will be permitted.

13. The disabled and other special needs

The Bell monopolies claim that H.R. 5096 prevents them from providing special services to the disabled, to educational institutions, and to various others with special needs. This is yet another variation of the recurring Bell argument that the Bell monopolies will do more than a robust free market will do.[58] And the argument is refuted in the same way: a free market will spur innovation into all market niches in which a reasonable profit can be

[51] *See infra* text accompanying notes 361–63, 386.

[52] *See supra* discussion of Bell monopoly claims regarding Jobs, Competition, New Products; *see infra* regarding The Disabled and Other Special Needs.

[53] *See infra* note 88 and accompanying text.

[54] *See infra* notes 102–110, 358 and accompanying text.

[55] *See infra* note 329 and accompanying text.

[56] *See infra* notes 329, 378, 382 and accompanying text.

[57] *See supra* notes 3, 26.

[58] *See supra* discussion of Bell monopoly claims regarding Jobs, Competition, New Products, Rural America.

made, and it always takes more profit to satisfy a monopolist than to satisfy a firm competing under free market conditions.[59]

Again, the thrust of the entry test in H.R. 5096 is that as soon as the prospect of Bell entry into a competitive market truly heralds more competition, rather than less, Bell entry will be permitted.

14. Regulatory capabilities

The Bell monopolies claim that H.R. 5096 is unnecessary—as are the MFJ's line-of-business restrictions—because regulation will adequately limit the Bells' anticompetitive tendencies. But a review of past regulatory experiences and current regulatory limitations reveals that regulation is no match for the entrenched Bell monopolies. The Justice Department commenced each of its three Sherman Act enforcement actions against the Bell System during this century precisely because regulation had utterly failed to rein in the Bell System's anticompetitive tendencies.[60]

Judge Greene concluded in his 1987 triennial review decision that regulation was still "entirely inadequate"—that "discrimination against competitors and cross-subsidization are far more difficult to detect, prevent, and rectify through regulation now than they were in 1982." [61] In a 1987 study, the General Accounting Office found that FCC staffing limitations allowed only infrequent audits, "conceivably once every 16 years." [62]

And there has been no discernable improvement in regulatory capability or resources since then.[63] In fact, Federal regulation has proven incapable of limiting Bell monopoly abuses in those fields where Judge Green considered the risk of anticompetitive harm to be minimal and permitted Bell entry.[64]

HEARINGS

On May 7, 1992, Congressman Jack Brooks, Chairman of the House Judiciary Committee, introduced H.R. 5096, a bill to supersede the line-of-business restrictions in the AT&T Consent Decree and to codify its antitrust-based test for lifting those restrictions.

H.R. 5096 is an outgrowth of oversight hearings of the telecommunications industry conducted by the Subcommittee on Economic and Commercial Law of the House Committee on the Judiciary during the 101st and 102d Congresses.[65]

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

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[59] 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.

[60] *See infra* text accompanying notes 18, 96–111, 134–43, 193–228, 292–313.

[61] *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 569 (D.D.C. 1987) [hereinafter *District Court Triennial Review Opinion*], *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 283, 112 L.Ed. 283 (1990).

[62] General Accounting Office, *Telephone Communications—Controlling Cross-Subsidy Between Regulated and Competitive Services* 54 (October 23, 1987).

[63] *See infra* notes 283–291, 461 and accompanying text.

[64] *See infra* text accompanying notes 292–313.

[65] The Subcommittee also held oversight hearings on the MFJ during the 96th, 97th, and 100th Congresses under Chairman Rodino. *See infra* note 349.

Service, Pacific Bell; Barbara Easterling, Executive Vice President, Communications Workers of America; William T. Esrey, President and Chief Executive Officer, United Telecommunications, Inc.; Allen R. Frischkorn, President, Telecommunications Industry Association; Sam Ginn, Chairman and Chief Executive Officer, Pacific Telesis Group; Albert Halprin, Partner, Myerson, Kuhn & Sterret; Alan C. Hasselwander, Chairman, United States Telephone Association, and President and Chief Executive Officer, Rochester Telephone Corp.; Robert M. Johnson, President, and Chief Executive Officer, 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, 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 Chief Executive Officer, MCI Communications Corporation; Edward E. Whitacre, Jr., Chief Executive Officer, Southwestern Bell; Cathleen Black, President and Chief Executive Officer, American Newspaper Publishers Association; Gene Kimmelman, Legislative Director, Consumer Federation of America; Edward 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 18, 1992, to consider competition policy in the telecommunications industry. Testimony was received from Robert E. Allen, Chairman and Chief Executive Officer, American Telephone & Telegraph Company; David Easterly, President, Cox Newspapers; Cathleen Black, President and Chief Executive Officer, American Newspaper Publishers Association; Ivan Seidenberg, Vice Chairman, Telecommunications, NYNEX Corporation; Bert C. Roberts, Jr., President and Chief Executive Officer, MCI Communications Corporation; Dwight D. Opperman, President and Chief Executive Officer, West Publishing Company; Stephen T. Lynn, President, International Brotherhood of Electrical Workers, Local 1898; Daniel J. Bruns, President & Chief Executive Officer, General Videotex Corporation;

John V. Roach, President & Chief Executive Officer, 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, 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.

Additional statements were submitted to the Subcommittee from other interested parties.

COMMITTEE ACTION AND VOTE

On May 28, 1992, the Subcommittee on Economic and Commercial Law met to mark up H.R. 5096. The Subcommittee ordered the bill favorably reported to the full Committee by a rollcall vote of 10 to 6.

The Committee on the Judiciary convened on July 1, 1992, to mark up H.R. 5096. Chairman Brooks offered an amendment to shorten the applicable dates after which a Bell operating company may apply for authorization to enter a restricted line of business. The amendment was adopted by voice vote. Next, Chairman Brooks offered an amendment which would except from the bill's competitive entry test information services in which Bell operating companies have been engaged during the period beginning October 7, 1991, and ending 60 days before enactment. A perfecting amendment was offered by Congressman Bryant to except alarm monitoring services offered by Bell operating companies from this grandfather clause. The Bryant perfecting amendment was accepted, and the Brooks amendment, as modified by the Bryant amendment, was adopted by voice vote.

An amendment offered by Congressman Campbell that further tailored the post-entry antitrust prohibitions to conform more precisely to certain other antitrust statutes was adopted by voice vote. The phase-in periods amended earlier by the Brooks amendment were eliminated entirely by an amendment offered by Congressman Fish, which passed by a rollcall vote of 18 to 15. In response to the Fish amendment, Congressman Bryant offered an amendment to restore the five-year phase-in periods for interexchange and alarm monitoring services, which was agreed to by voice vote. On a rollcall vote of 24 to 9, a quorum being present, the Committee ordered H.R. 5096, 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 nineteenth 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.[66]

To counter the threat posed by unrestrained monopoly power to American economic liberty and political democracy, Congress enacted the Sherman Act in 1890.[67] Senator John Sherman, a Republican from Ohio, explained during debate the magnitude of the threat:

> 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.[68]

The Sherman Act enshrines competition as the "charter of economic liberty" [69] 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." [70] The Sherman Act not only im-

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[66] *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 and 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).

[67] 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 66, 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 and Brock, *supra* note 66, at 26.

[68] 21 Cong. Rec. 2460 (1890).

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

[70] 15 U.S.C. 1, 2.

poses 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,[71] railroad,[72] aluminum,[73] cast-iron pipe,[74] tobacco,[75] meat-packing,[76] and explosive[77] 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.[78] 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.[79] In 1882, Bell Telephone designated Western Electric Company, in which it had purchased a majority interest, as the exclusive manufacturer of its patented telecommunications equipment.[80]

Initially, Bell Telephone issued only temporary licenses, after which it could exercise its option to purchase the licensee's assets.[81] 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.[82] By 1894, Bell had acquired controlling interest in most of its licensees.[83]

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

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

[72] *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).

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

[74] *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).

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

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

[77] *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).

[78] For a history of the development of the Bell Telephone monopoly, *see, e.g.,* Robert Bornholz and 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).

[79] Bornholz and Evans, *supra* note 78, 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. This was the last major shake-up in control of the Bell System until its reorganization in 1982-84 under the MFJ. *Id.* at 8-9, 11-12.

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

[81] *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. Department of Justice, *Plaintiff's Third Statement of Contentions and Proof; United States* v. *Western Elec. Co.,* No. 74-1698 (January 10, 1980), at 1787 [hereinafter *1980 Justice Dept. Brief*].

[82] *1939 FCC Report, supra* note 81, at 19; *1980 Justice Dept. Brief, supra* note 81, at 1787.

[83] *1939 FCC Report, supra* note 81, at 19; *1980 Justice Dept. Brief, supra* note 81, at 1787.

leased directly to consumers), and the long-distance lines (which connected the operating companies to each other).[84] 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.[85]

In 1878 Bell Telephone was able to use a patent suit to drive its first potential competitor, Western Union, out of the telephone business.[86] 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.[87] 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.[88] The independents also established competing service in areas where there was public dissatisfaction with Bell Telephone's service.[89]

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.[90] It refused to sell Western Electric equipment to the independents, and attempted to acquire control of alternative sources of equipment.[91] And it isolated competing independents by refusing

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[84] Bornholz and Evans, *supra* note 78, at 9-10.

[85] *Id.* at 10.

[86] *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.

[87] *1980 Justice Brief, supra* note 81, at 1788-89; Decision to Divest, *supra* note 80, at I-3. In 1907 the 6 million telephones in service were equally divided between Bell and the independents. *1939 FCC Report, supra* note 81, at 129-30.

[88] *1939 FCC Report, supra* note 81, at 129-30, 132-33. *1980 Justice Dept. Brief, supra* note 81, 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. Department 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 Dept. Brief, supra* note 81, at 1806-1810; *Special Reports, Telephones: 1907,* 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 Dept. Brief, supra* note 81, 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 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 new farms within 10 years. By 1979, 94 percent of American farms had telephone service. *1980 Justice Dept. Brief, supra* note 81, at 1809-10; REA Telephone Annual Statistical Rep. 18 (1960); Dept. of Agriculture, *Agricultural Prices* 29-30 (October 31, 1979).

[89] J. Stehman, The Financial History of the American Telephone and Telegraph Company 84-95 (1967 reprint); *1980 Justice Dept. Brief, supra* note 81, at 1788.

[90] *1939 FCC Report, supra* note 81, at 136; *1980 Justice Dept. Brief, supra* note 81, at 1790.

[91] *1939 FCC Report, supra* note 81, at 137; *1980 Justice Dept. Brief, supra* note 81, at 1790-91.

to interconnect either its exchanges or its long distance lines with them, while selectively acquiring independents in strategic positions.[92] 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.[93]

By 1912 the Bell System again dominated the market.[94] By 1925, when it established Bell Telephone Laboratories to conduct its research and development, it was an entrenched nationwide monopoly.[95]

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 [96] established the pattern of paying little heed to competition as an objective.[97] The Mann-Elkins Act of 1910, in which Congress gave the Interstate Commerce Commission regulatory authority over long distance telephone service, required only that rates be "just and reasonable." [98] State utility commissions,

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[92] *1939 FCC Report, supra* note 81, at 136-37; *1980 Justice Dept. Brief, supra* note 81, at 1791, 1798; Bornholz and Evans, *supra* note 78, at 13.

[93] *Quoted in* 1914 Att'y Gen. Ann. Rep. 13-14.

[94] Peters, *supra* note 78, at 253.

[95] Decision to Divest, *supra* note 80, 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 78, at 10.

[96] 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 80, at I-4.

[97] Bornholz and Evans, *supra* note 78, 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."

[98] 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

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for their part, generally *precluded* competition by refusing to certify any telephone company which would duplicate service already available.[99]

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).[100] AT&T then continued the expansion and acquisition efforts begun by Bell Telephone.[101]

In 1911 and 1912 several independent telephone companies complained about AT&T's acquisition practices to the Attorney General, who simply referred the complaints to the ICC for investigation.[102] In 1913, however—after a change in Administration—the new Attorney General concluded that the Justice Department's intervention was necessary.[103] 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.[104] When ordered by State regulators to interconnect, AT&T retaliated by cutting its rates to predatory levels and providing substandard interconnection service.[105] AT&T had succeeded in acquiring a number of independent long distance companies through these tactics, including Northwestern Long Distance, an independent in the Pacific Northwest.[106]

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.[107] 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.[108] 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 compet-

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> 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 adopted 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 1566-67 (statement of ICC Commissioner S. Eastman); *1980 Justice Dept. Brief, supra* note 81, at 1831; Decision to divest, *supra* note 80, at I-5.

[99] *See* Decision to Divest, *supra* note 80, at I-4.

[100] Bornholz and Evans, *supra* note 78, at 11.

[101] *Id.*

[102] Peters, *supra* note 78, at 253-54.

[103] *Id.* at 254.

[104] *Id.*

[105] *Id.*

[106] *Id.*

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

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

ing companies).[109] 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.[110] The consent decree terminated the Sherman Act enforcement action, as well as the ICC investigations.[111]

Within eight years, however, the Kingsbury Commitment and the 1914 consent decree had been completely nullified. Following the complaints of 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.[112] When the citizens of Spokane voted to consolidate their independent into the Bell Sytem—as permitted under the consent decree—the presiding court modified the decree to accommodate their desire.[113] A further modification in 1922 actually permitted AT&T to reacquire Northwestern.[114] 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.[115] The Willis-Graham Act of 1921 [116] 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 tendencies.[117] 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.

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[109] *Id.*

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

[111] Peters, *supra* note 78, at 255.

[112] 1914 Att'y Gen. Ann. Rep. 14; Peters, *supra* note 78, at 256.

[113] *United States* v. *AT&T* (D. Or. 1914) (order of Sept. 7, modifying decree of March 26, 1914); Peters, *supra* note 78, at 255.

[114] *United States* v. *AT&T* (D. Or. 1922) (order of Oct. 20, modifying decree of Mar. 26, 1914); Peters, *supra* note 78, at 255.

[115] 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 81, at 100; *1980 Justice Dept. Brief, supra* note 81, at 1800-01.

[116] 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).

[117] *See* Peters, *supra* note 78, 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 81, at 142; *1980 Justice Dept. Brief, supra* note 81, at 1804.

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 met an acquisition it could not find reason to approve; between 1921 and 1934 the ICC approved 272 of 275 acquisitions.[118]

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.[119] In his 1934 final report to Congress, Dr. Splawn recommended creation of a new Federal commission with expanded powers to regulate the telephone industry.[120] 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.[121]

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.[122]

In response to the Splawn and Roper reports, Congress enacted the Communications Act of 1934,[123] 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.[124] It would also

[118] Peters, *supra* note 78, 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).

[119] H.R. Res. No. 59, 72nd Cong., 1st Sess. (1931); Decision to Divest, *supra* note 80, at I-7.

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

[121] *Study of Communications by an Interdepartmental Committee*, 73rd Cong., 2d Sess. (January 23, 1934); Decision to Divest *supra* note 80, at I-7.

[122] *Splawn Report, supra* note 120, at pt. I, pp. XXX-XXXI.

[123] 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.

[124] *Hearings on S. 2910 before Senate Interstate Commerce Comm.*, 73rd Cong., 2d Sess. 78-82 (1934) [hereinafter *1934 Hearings*]; *1980 Justice Dept. Brief, supra* note 81, at 1838.

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.[125]

During the hearings on the legislation, AT&T President Walter Gifford attacked these provisions as "drastic." [126] 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.[127] 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.[128]

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.[129] 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.[130] 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.[131] Western Electric used creative accounting practices to artificially inflate the equipment's cost, the Commission contended, which resulted in higher operating company costs, and therefore higher rates charged to local telephone customers.[132]

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.[133]

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[125] *1934 Hearings, supra* note 124, at 78-82; *1980 Justice Dept. Brief, supra* note 81, at 1838.
[126] *1934 Hearings, supra* note 124, at 78-82; *1980 Justice Dept. Brief, supra* note 81, at 1838.
[127] 78 Cong. Rec. 8824 (1934); *1980 Justice Dept. Brief, supra* note 81, at 1839.
[128] *1934 Hearings, supra* note 124, at 199; *1980 Justice Dept. Brief, supra* note 81, at 1839.
[129] Pub. Res. 8, 74th Cong. (1935); *see 1980 Justice Dept. Brief, supra* note 81, at 1841.
[130] H.R. Doc. No. 340, 76th Cong., 1st Sess. (1939).
[131] Peters, *supra* note 78, at 260-261.
[132] *Id.*
[133] *Brooks, supra* note 86, at 208-231.

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.[134] 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.[135] 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.[136]

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.[137] 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.[138]

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.[139]

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.[140] The Department also asked that Western Electric and Bell Laboratories be required to license their patents to competitors on a reasonable basis.[141] In the words of the Justice Department's lead attorney in

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[134] *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 78, at 259.

[135] Peters, *supra* note 78, at 260.

[136] National Ass'n of R.R. and Utils. Comm'rs, *Proceedings of the Sixtieth Annual Convention* 92–95 (1948); Peters, *supra* note 78, at 260.

[137] *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 142, at 1719, *vacated and replaced*, 1982–2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24, 1982).

[138] 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 they 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.*

[139] *Id.*

[140] *Id.; see also* Peters, *supra* note 78, at 261.

[141] *United States* v. *Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246, *reprinted in 1958 Hearings, infra* note 142, at 1719.

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;"[142] or, in the words of one industry analyst, "substitute the discipline of competition for the unattainable discipline of regulation."[143]

In 1956 the antitrust suit was settled by a consent decree[144] which 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.[145] The Department abandoned this structural relief on the premise that Western Electric's sales to the Bell operating companies were subject to "indirect regulation."[146]

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.[147] But the Bell System, whose lawyers had suggested the use of the word "maintain" in the decree, concluded that the accounting system already in effect at Western Electric met this requirement, and hence that no change was necessary.[148]

The 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.[149] 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.[150]

Finally, the Decree required Western Electric to grant an applicant a nonexclusive license for any existing Bell patent on a royalty-free basis and for any future Bell patents at a reasonable and nondiscriminatory royalty.[151] 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.[152]

Thus, unlike the agreement terminating the previous antitrust prosecution of the Bell monopoly, the 1956 consent decree had little

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[142] *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*].

[143] F. Scherer, Industrial Market Structure and Economic Performance 518–42 (1970).

[144] *United States* v. *Western Elec. Co.,* 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. Jan. 24, 1956) *reprinted in 1958 Hearings, supra* note 142, at 1845; *vacated and replaced,* 1982-2 Trade Cas. (CCH) ¶ 64,900 (D.D.C. Aug. 24, 1982).

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

[146] *1958 Hearings, supra* note 142, at 3691.

[147] *1959 Report, supra* note 145, at 357.

[148] *1958 Hearings, supra* note 142, at 2620.

[149] *1959 Report, supra* note 145, 355–356.

[150] *Id. at 97–98.*

[151] *1958 Hearings, supra* note 142, at 4079 *et seq.*

[152] *1959 Report, supra* note 145, at 108.

relevance to the original premise of the case: that the exclusive purchasing arrangement between Western Electric and the rest of the Bell monopoly was inherently anticompetitive and inflationary.[153] The disappointing and puzzling retreat of the Department from the original vigor of the case brought in 1949 proved not to be a unique turn of events: in the aftermath of victory in the 1982 consent Decree, the Department again appeared to play devil's advocate to itself, challenging the very thrust of the case.

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,[154] the House Committee on the Judiciary conducted an investigation to determine whether the "Department of Justice had given AT&T special and preferred treatment." [155]

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.[156]

Although AT&T had made no headway in undermining the Justice Department's resolve during the Truman Administration,[157] 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 determine whether any should be dismissed.[158] 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

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[153] Peters, *supra* note 78, at 264.

[154] The Committee found that the consent decree was based on a "theoretically dubious, factually false, and legally irrelevant premise. . . ." *Report of the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. 290 (1959).

[155] *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.

[156] *Report of the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st Sess. 290 (1959).

[157] 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.

[158] *Hearings, supra* note 142, at 1946, 2017, 2165.

at the Greenbrier Resort Hotel in White Sulphur Springs, West Virginia.[159]

During this visit General Brownell told Mr. Price "that a way ought to be found to get rid of the case."[160] 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." [161]

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," [162] 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.[163] Secretary Wilson sent the letter over his own signature.[164]

Over the next 2 1/2 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.[165]

In late 1954 General Brownell assigned Edward Foote, a new Justice Department lawyer "lacking in antitrust experience," [166] to take charge of the settlement negotiations and report directly to him.[167] 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.[168]

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[159] *1959 Report, supra* note 145, 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.

[160] *Id.* at 53.

[161] *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.

[162] 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.

[163] *Id.* at 57.

[164] *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.

[165] *Id.* at 59-60.

[166] *Id.* at 65.

[167] *Id.*

[168] *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 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.

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.[169] Mr. Foote followed up with several summer sessions with AT&T lawyers to work on a possible consent decree.[170]

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.[171] Mr. McConnaughy had formerly been counsel to Ohio Bell Telephone Company.[172] Alerted by Mr. Foote, AT&T contacted every Commissioner well in advance of the visit.[173] 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." [174]

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.[175] Over the opposition of every Department lawyer involved in the litigation,[176] the Justice Department agreed to the painless settlement of which General Brownell had first hinted to AT&T at the Greenbrier Resort.[177]

F. Antitrust consent decree reforms and the Tunney Act

The revelations 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 Committee's concern that the Justice Department's consent decree procedures were shrouded in a "twilight zone" of secrecy and unaccountability.[178]

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[169] *Id.* at 68. This meeting was also arranged by General Brownell's friend Bayard Pope.
[170] *Id.* at 71.
[171] *1958 Hearings, supra* note 142, at 3686.
[172] *1959 Report, supra* note 145, 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.
[173] *1958 Hearings, supra* note 142, at 2423.
[174] *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.
[175] *1959 Report, supra* note 145 at 83.
[176] *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 then settled without divestiture. *Id.* at 84-5, 90.
[177] *Id.* at 94.
[178] *Id.* at 15.

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.[179] 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.[180] Renewed congressional concern led to enactment of the "Antitrust Protection and Procedures Act of 1974," commonly referred to as the Tunney Act,[181] to "substitute sunlight for twilight." [182]

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.[183] 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.[184]

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." [185] 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." [186] The Department's consent decree proposals were, therefore, to be subjected to close judicial scrutiny rather than a judicial "rubber stamping." [187] 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 that consideration.[188] 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

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[179] 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).

[180] *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).

[181] 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, 93rd Cong., 1st Sess. (1973) [hereinafter *1973 Senate Report*]; H. Rep. No. 93-6535 [hereinafter *1973 House Report*].

[182] *1973 House Report, supra* note 181, at 6–7.

[183] Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(b)(1982)).

[184] *Id.*

[185] *1973 Senate Report, supra* note 181, at 4.

[186] *1973 House Report, supra* note 181, at 8.

[187] *Id.*

[188] Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(e)(f) (1982)).

it.[189] The court was also to play an active role in shaping the "appropriate judicial procedures" for "future modifications" to a consent decree.[190]

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.[191] 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.[192]

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.[193] 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.[194] 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.[195] Protracted but substantively ineffective FCC inquires ensued, with AT&T arguing that to permit customers to attach non-Bell equipment to the network would degrade service and endanger telephone employees.[196]

The first of these inquiries [197] concerned the Hush-a-Phone, a cup-like device that attached to a telephone to enable a more private conversation.[198] In 1948 the Hush-a-Phone Corporation challenged 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.[199] The United

[189] *1973 House Report, supra* note 181.
[190] *Id.* at 9.
[191] Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. 16(g) (1982)).
[192] *1973 Senate Report, supra* note 181, at 7.
[193] *See* Fortune Directory, Fortune Magazine, July 1957 supp., at 28.
[194] David S. Evans, *Introduction, in* Breaking up Bell (D.S. Evans ed., 1983).
[195] Brooks, *supra* note 86, at 298.
[196] *Id.*
[197] An earlier competitive challenge to AT&T, that 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 Westen 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."
[198] *Hush-a-Phone Corp.,* 20 F.C.C. 391, 392 (1955), *rev'd,* 238 F.2d 266 (D.C. Cir. 1956).
[199] *Id.* at 394.

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.[200]

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.[201] 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.[202] Rather than take his complaint to the FCC, Mr. Carter filed a private Federal antitrust suit.[203] The court ordered the case removed to the FCC, but retained jurisdiction to revisit the matter after the FCC had made its ruling.[204]

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 failed to provide guidelines on interconnection, leaving the decision up to AT&T.[205] 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.[206] The complaints continued, eventually forcing the FCC to establish its *own* pre-testing and registration program for AT&T's "protective connection arrangement" policy.[207]

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.[208] 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 Division.[209] The Bell System's reaction was characteristically hostile; the FCC's attempt to ascertain the competitive implications proved characteristically halting.

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[200] *Id.*

[201] *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).

[202] *Id.*

[203] *Id.* at 189.

[204] *Id.* at 188.

[205] *Carterfone,* 13 F.C.C. 2d 430, *aff'd on recon.,* 14 F.C.C. 2d 605 (1968); Decision to Divest, *supra* note 80, at I-10.

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

[207] *Intrastate and Foreign Message Toll Telephone Service, First Report and Order,* 56 F.C.C. 2d 593 (1975), *modified on recon.,* 58 F.C.C. 2d 716 (1976), *Second Report and Order,* 58 F.C.C. 2d. 736 (1976), *aff'd sub nom. North Carolina Utilities Commission* 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.

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

[209] *Id.* at 229-230.

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; no practical alternatives for interconnection existed.[210] 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.[211]

In 1956, the FCC began reviewing its policy of licensing private microwave systems only to organizations with specialized internal communication needs—such as broadcasters, railroads, and fire departments—to determine if a wider range of private systems should be approved.[212] 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.[213]

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.[214] 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.[215] 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.[216]

The FCC was quickly inundated with applications from companies seeking to offer more extensive long distance services, with MCI leading the way.[217] 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" [218]—but failed to issue guidelines regarding access to the Bell System's local exchange facilities.[219]

Thus left to its own devices by the FCC, AT&T exploited its monopoly bottleneck as it had throughout its history. Complaints abounded that AT&T was delaying or denying interconnection to its competitors and was engaging in predatory pricing.[220]

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[210] *See* Roger G. Noll and Bruce M. Owen, *United States* v. *AT&T: An Interim Assessment, in* Future Competition in Telecommunications 146-149 (Steven Bradley & Jerry Hausman eds., 1990) [hereinafter Noll and Owen].
[211] *See* Evans, *supra* note 194, at 1-2.
[212] *Allocation of the Frequencies in the Bands Above 890 MC.,* 27 F.C.C. 359, 360-361 (1959).
[213] *Id.* at 359.
[214] *Microwave Communications, Inc.,* 18 F.C.C. 2d 953 (1969).
[215] Decision to Divest, *supra* note 80, at I-10.
[216] *Microwave Communications, Inc.,* 18 F.C.C. 2d 953 (1969).
[217] Peters, *supra* note 78, at 266.
[218] *Specialized Common Carrier Decision,* 29 F.C.C. 2d 870 (1971).
[219] Decision to Divest, *supra* note 80, at I-10.
[220] Peters, *supra* note 78, at 267.

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." [221] 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.[222] 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.[223] MCI and other competitors and would-be competitors of the Bell system turned to the Justice Department for help.[224]

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

By the fall of 1974, it was again apparent that the regulatory resolve was not present to curtail the Bell System's anticompetitive tendencies. The FCC, while claiming boldly to be a forum where complaints about monopolistic practices would be received and vigorously pursued had, instead, become a regulatory "graveyard" for telecommunications competition policy, 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 [225]—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 providing access to the local telephone network by giving interexchange carriers technically inferior connections and charging them greater access charges or by denying

[221] In *MCI Telecommunications Corp.* v. *F.C.C.*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) and *MCI Telecommunications Corp.* v. *F.C.C.*, 580 F.2d 590 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 980 (1978) (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.

[222] 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 Dept. Brief, supra* note 81, at 1843–44; *Overview of the Federal Communications Commission: Hearings before Subcomm. on Telecommunications of the Senate Commerce Comm.*, 92d Cong., 2d Sess. 24–29 (1972).

[223] Noll and Owen, *supra* note 210, at 147.

[224] *See infra* text accompanying note 380.

[225] 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 Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983); *Alaska Airlines*, v. *United Airlines*, 948 F.2d 539 (9th Cir. 1991).

equipment manufacturers essential information 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'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.[226] The Department had concluded that the vertically integrated structure of the Bell System—combining the local exchange monopolies with related competitive functions—was inherently anticompetitive.[227] The very existence of the Bell monopoly discouraged other firms from attempting to compete in telecommunications markets. The Department, therefore, 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.[228]

Congress also considered a number of legislative responses to the competitive issues raised by AT&T's vertically integrated monopoly.[229] Many of these bills, rather than seeking to separate the bot-

[226] 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.

[227] 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.).

[228] 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* decision (*supra* note 221) 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, through the MFJ, and the courts to ultimately impose appropriate interconnection standards.

[229] *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

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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.[230] Once again, at the first sign of possible alternative treatment in a different forum, AT&T sought to shift the focus of the prosecutorial effort and have the 1974 Sherman Act suit dismissed. Thus, it argued that Congress "is a more appropriate forum for a resolution of the fundamental issues of industry structure than are the courts." [231] 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 antitrust division is doing off on some other tack." [232]

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 the Committee Report Congressman Jack Brooks expressed his additional views that:

> 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 regulate domestic common carrier acquisitions); H.R. 13015, 95th Cong., 2d Sess. (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), S. 898, 97th Cong., 1st Sess. (1981) and H.R. 5158, 97th Cong., 1st Sess. (1981) (latter three bills would have exempted the Bell System from restrictions on providing telecommunication facilities, services, and equipment).

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

[231] *Id.* at 2.

[232] *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.

to smother competition and innovation as it is to enhance those objectives.[233]

The Judiciary Committee's adverse report sounded the death knell for H.R. 6121, which ultimately was not taken up by the full House of Representatives or 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 providing AT&T antitrust violations and obtaining monetary settlements.[234]

Due to a number of jurisdictional[235] 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.[236] Several Reagan Cabinet members, including Commerce Secretary Baldrige and Defense Secretary Weinberger, sought to circumvent the litigation;[237] but Mr. Baxter, a judicial conservative, and an uncompromising prosecutor when it came to these Sherman Act violations of the antitrust law, persevered, arguing that the Bell System antitrust suit "was the one good thing the [Justice Department] Antitrust Division had done in the last 30 years."[238] 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. Subsequent to the opening arguments, the parties privately sought to negotiate 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

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[233] *Id.* at 41.

[234] *See, e.g., MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 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 Systems, Inc.* v. *American, Tel. & Tel. Co.*, 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).

[235] AT&T contended telecommunications industry regulatory had conferred antitrust immunity to the Bell System and provided exclusive jurisdiction to the FCC. The court twice rejected these contentions. *United States* v. *American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976); *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978). *See also Southern Pacific 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 System* v. *AT&T*, 615 F.2d 1372 (5th Cir. 1980).

[236] 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.

[237] *See* Steve Coll, The Deal of the Century: The Break Up of AT&T 185-86, 189, 211 (Atheneum 1986).

[238] *Id.* at 182.

rejected AT&T's motion to dismiss,[239] the parties commenced further negotiations. On January 8, 1982, Baxter and AT&T agreed to a proposed antitrust settlement under which the local Bell operating companies would be divested from AT&T and, as a "prophylactic measure," 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.[240] They would also be required to notify their management employees of the provisions of the MFJ. 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.[241]

With keen awareness of the broad-based dissatisfaction with what many viewed as the politically influenced Justice Department settlement of the 1949 antitrust action, the court decided to conduct extensive proceedings under the Tunney Act to determine whether the proposal was in the "public interest." [242] Based on evidence introduced at the trial and comments from over 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

[239] *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981).

[240] 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.

[241] *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. *American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976); *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978) (cases holding FCC regulation was not incompatible with Justice Department antitrust action).

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

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.[243]

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]. [244] 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." [245] 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.[246]

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 Companies 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 here, too, they would be able to subsidize the prices of their services with revenues from the local exchange monopoly.[247]

The Department of Justice 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:

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[243] *MFJ Opinion, supra* note 1, 552 F. Supp. at 223.
[244] *Id.* at 162.
[245] *Id.*
[246] *Id.* at 163.
[247] *Id.* at 189 (footnote omitted).

> 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.[248]

Based on this evidence and other submissions, the court concluded that "the [FCC] has struggled, largely without success, to stop [anticompetitive] practices . . . through the regulatory tools at its command." [249]

Judge Greene approved the settlement, subject to a few modifications,[250] and on August 24, 1982, the consent decree became final.[251] The most important of Judge Greene's changes to the proposed settlement 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 proposal 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." [252] 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 . . . that there is no substantial possibility that an operating company could use its monopoly power to impede competition in the relevant market." [253]

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

[248] *See District Court Triennial Review Opinion, supra* note 61, 673 F. Supp. at 531.
[249] *MFJ Opinion, supra* note 1, 552 F. Supp. at 223.
[250] *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1982).
[251] Because it constituted a modification of the 1956 consent decree, it is known as the "Modification of Final Judgment," or "MFJ."
[252] *MFJ Opinion, supra* note 1, 552 F. Supp. at 194.
[253] *Id.* at 225. This test finds its basis directly in Sherman Act doctrine—described as early as 1912 in *United States* v. *Terminal Railroad Association (supra* note 225)—regarding "essential facilities" or "strategic bottlenecks." *See District Court Triennial Review Opinion, supra* note 61, 673 F. Supp. at 536.

of information services involving control of information content—implicated important First Amendment values.[254]

The AT&T divestiture became effective on January 1, 1984, creating seven independent regional Bell operating companies out of the 22 local Bell operating companies.[255] 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.[256]

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; [257] this process has become known as the MFJ's "triennial review." [258] 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.[259]

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.[260] 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." [261]

I. Competitive effects stemming from the 1984 Modification of Final Judgment

Prior to the effective date of 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 interexchange services market and well in excess of 90 percent

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[254] 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).

[255] 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. 1983).

[256] At the end of 1991 the seven RBOCs (occasionally 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.

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

[258] The first recommendations by the Department of Justice were made in 1987, and are still on appeal. On July 17, 1989, the court held that the Department could postpone filing its next triennial review recommendation until the appellate review process was completed. *United States* v. *Western Elec. Co.*, 1989-2 Trade Cas. (CCH) ¶ 68,670 (D.D.C. 1989).

[259] *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* (January 19, 1990). Judge Greene has granted 140 some waivers, permitting the RBOCs entry into a number of businesses pursuant to the waiver procedure. The fields of business into which the RBOCs have been permitted entry include (1) the provision of relay services to deaf and speech-impaired customers; (ii) the offering of cellular services between designated geographic areas; (iii) interexchange services in connection with emergency 911 services; and (iv) time and weather information services.

[260] *See, e.g., District Court Triennial Review Opinion, supra* note 61, 673 F. Supp. at 529 (approximately 170 organizations and individuals permitted to intervene in triennial review proceedings).

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

of many equipment manufacturing markets.[262] 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 MFJ, AT&T's previous monopoly market shares have dropped substantially in both equipment manufacturing and long distance. As of 1991, AT&T's long distance market share has fallen to approximately 62 percent,[263] and its share of many of the equipment manufacturing markets have seen even steeper reductions.[264]

Simultaneous with the steep decline in AT&T market shares, the equipment and long distance markets have experienced striking price reductions. This was acknowledged by the Department of Justice in its 1987 triennial review report to Judge Greene.[265] 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," [266] and "Telephony 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." [267] The long distance market has also seen significant price reductions since the MFJ. According to the FCC, during the period from January 1984 to January 1992, AT&T's charges for interstate calls have been reduced by a full 40 percent.[268]

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[262] *See Competition in the Interstate Interexchange Marketplace*, Notice of Proposed Rulemaking, 5 F.C.C. 2d 2627, 2630 (1990) (in 1982, AT&T's share of the long distance market approximated 95 percent); U.S. Department of Justice, Antitrust Division, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry* (prepared by Peter W. Huber as consultant to the Department of Justice) at 14.9 Table CO.6 (January 1987) [hereinafter *Huber Report*] (in 1982 the Bell System purchased a full 95 percent of its switches from affiliates).

[263] Federal Communications Commission, *Long Distance Market Shares: First Quarter, 1992*, at 3 (June 26, 1992).

[264] By 1986, AT&T's previous monopoly control had been reduced to the following market shares: (i) private branch exchanges (used for switching)—20 percent; (ii) telephone handsets—36 percent; (iii) key systems (smaller versions of private branch exchanges)—25 percent; (iv) digital central office switches—49 percent; (v) metal cable—50 percent; (vi) microwave equipment—17 percent; and (vii) fiber-optic cable—36 percent. *Huber Report, supra* note 262, at 16.4 Table 5; 17.6 Table T.2; 14.7 Table CO.4; 15.4 Table M.3, M.5.

[265] *Report and Recommendation of the U.S. Department of Justice 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"), 190-91 ("significant price decreases" for public branch exchanges"), 200 ("prices of handsets, paging sets and key systems have fallen steadily in recent years"); *Huber Report, supra* note 262, 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").

[266] Independent Data Communications Manufacturers Association, Inc., Northern American Telecommunications Association and Telecommunications Industry Association, *The Post-Divestiture U.S. Telecommunications Equipment Manufacturing Industry: The Benefits of Competition*, 3-5 (March 2, 1990) based on Bureau of Economic Analysis and internal data). *See also* Walter G. Bolter and James W. McConnaughey, "Innovation and New Services," in *After the Breakup: Assessing the New Post—AT&T Divestiture Era*, 285, 292-3 (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 (the prices for CPE have "dropped significantly" since divestiture).

[267] Telephony Magazine, December 16, 1991, 16, 24.

[268] Federal Communications Commission, *Trends in Telephone Service* 13 (March 3, 1992). *See also* U.S. Department of Commerce, *U.S. Industrial Outlook 1991*, 29-3 (1991) ("[t]he key factor driving the long distance industry, especially the residential market, is price competition").

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While AT&T maintained only a limited presence in the information services industry prior to divestiture, under the MFJ this market has also become vibrant and diverse. Commerce Department data reveals that the "U.S. information service industry is well developed with 24,223 establishments serving the marketplace . . . [which includes] nearly 1 million employees." [269] The Commerce Department also reports that the major U.S. suppliers of electronic information services are well established in overseas markets and they derive an estimated 30 percent of their revenues from foreign sources.

The information services, equipment manufacturing, and long distance markets are all characterized by the strong growth of highly innovative businesses.[270] The 1992 U.S. Industrial Outlook study notes that "[i]nformation service firms are finding innovative and cost effective ways to create, store, manipulate, and cross-correlate information based increasingly on input from their customers." [271] The United States information services industry is responsible for more than 50 percent of the world's 6,200 information data bases.[272] The equipment manufacturing market [273] has also seen a substantial growth in the number of small and minority-owned manufacturing firms.[274] The vast diversity of equipment products is reflected in "Telephony's Directory and Buyer's Guide," which listed 850 different types of products in the 1975 edition, 1,040 in the 1980 edition, 1,150 in the 1985 edition, and 1,349 in the 1988 edition.[275] The interexchange services market has also been characterized by the creation of numerous significant competitors [276] and innovations.[277]

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,* Report and Order and Second Further Notice of Proposed Rulemaking, 4 F.C.C. 2d 2873, 2995, 3339-40 (1989).

[269] U.S. Department of Commerce, *U.S. Industrial Outlook 1992,* at 26-1 (1992). A much larger number of additional jobs are indirectly supported by the information services industry. *See U.S. Industrial Outlook* 1991, *supra* note 268, at 27-1.

[270] The FCC recently 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,* Notice of Inquiry, No. 92-134, at 2 (July 17, 1992).

[271] *U.S. Industrial Outlook 1992, supra* note 269, at 26-2.

[272] *Id.*

[273] In 1991, the Nation's overall trade deficit in equipment manufacturing improved by $235 million and reflected a surplus of $1.1 billion in the crucial area of high-end telecommunications equipment, such as network transmission equipment. U.S. Dep't of Commerce, Office of Telecommunications, *U.S. Telecommunications Trade in 1991* (Year End, 1991).

[274] The number of Hispanic, black and other minority-owned electronic and telecommunications manufacturing firms increased from 286 to 781 from 1982 to 1987. U.S. Department of Commerce, Economics and Statistics Information, *Bureau of the Census, 1987 Survey of Minority-Owned Business Enterprises* (April 1991).

[275] *The Post-Divestiture U.S. Telecommunications Equipment Manufacturing Industry: The Benefits of Competition, supra* note 266, at 2.

[276] According to the FCC, there are currently in excess of 400 interexchange competitors. *See AT&T Communications* v. *MCI Telecommunications Corp.,* 7 F.C.C. 2d 807, 808 (1992). In addition to AT&T, MCI and US Sprint, the market includes a dozen additional long distance carriers with annual revenues in excess of $130 million. *Long Distance Market Shares: First Quarter,* 1992, at 13.

[277] In February 1989, former MCI Chairman William McGowan noted that his company alone had increased its core offerings since divestiture from 5 to 60. "McGowan Knocks FCC's 'Piecemeal Deregulation,'" Network World, February 6, 1989. The FCC has noted that between July 1, 1989, and March 1, 1992, AT&T introduced 77 new long distance services. *Price Cap Performance Review for AT&T, supra* note 270, at 2. These innovations include incoming and outgoing 800 service, teleconferencing, video conferencing, and least-cost long distance routing.

The competitive environment stimulated by the MFJ principles stands in stark contrast to the local exchange business, which continues to be dominated by the RBOC monopolists. Since the effective date of the MFJ, local exchange rates have increased at a level in excess of the rate of inflation [278] and the RBOCs have eliminated more than 69,000 jobs.[279] The RBOCs assert that their entrance into those lines of business restricted under the MFJ without having passed a competitive entry test will increase, not decrease jobs, and cite a May 1992 report prepared for the RBOCS detailing the economic impact of their participation in the information services industry.[280] However, the conclusions of the study are based on several key questionable assumptions—for example, an *assumed* resulting reduction in telecommunications prices and growth in productivity—which have no ascertainable or quantifiable basis. Moreover, the RBOC study assumes no anticompetitive behavior by the RBOCS—an assumption at odds with the entire history of the telecommunications industry as well as recent RBOC behavior. The more likely result of RBOC entry into the competitive lines of business without passing a competitive entry test is large-scale job loss as existing competitors are displaced by anticompetitive actions. A December 1989 Department of Labor staff study on the impact on the U.S. jobs from lifting the MFJ's manufacturing restriction concludes that "an estimated 18,000-27,000 U.S. jobs could be lost (possibly more depending upon the RBOCs' behavior)" if just 2 or 3 RBOCs joint venture with a foreign firm to manufacture only one important product—switching equipment.[281] This conclusion by the Department of Labor is supported by a 1987 Commerce Department report which noted:

> [T]here is a substantial concern in one situation. That situation would be if a Bell company undertook to manufacture digital central office switches in partnership with a foreign-based firm, and overseas markets (including the foreign partner's home market) remained closed to U.S. firms. It is our view that, absent appropriate safe- guards . . . joint venturing [with regard to central office switches] would likely cause significant harm to American competitive technology and trade positions, and could pose the threat of destroying this country's indigenous central office equipment manufacturing capacity.[282]

J. Recent regulatory developments

Since divestiture, the FCC has continued to oversee telecommunications regulatory matters, primarily focusing its recent proceedings on information services and other enhanced telecommunication services which are not governed by the MFJ. These proceed-

[278] *See Trends in Telephone Service, supra* note 268, at 9, 11, and table 7.

[279] *See* American Telephone and Telegraph Co., *Information Statement and Prospectus* (Nov. 8, 1983) and 1991 RBOC Annual Reports.

[280] WEFA Group, *The Economic Impact of BOC Participation in the Information Services Industry* (May 1992).

[281] Letter from Roderick A. DeArment, Deputy Secretary of Labor, to Michael Boskin, Chairman of the Council on Economic Advisors (January 19, 1990).

[282] U.S. Department of Commerce, National Telecommunications and Information Administration, *Assessing the Effects of Changing the AT&T Antitrust Consent Decree* (February 4, 1987).

ings were intended to increase access to the RBOC local exchange network on a nondiscriminatory basis, without the threat of anticompetitive cross-subsidies. However, the regulations have not achieved their purpose—either because they were poorly conceived and articulated, or because they have not been fully implemented and tested.[283]

In its "Computer III" decision, the FCC removed the structural separation (*i.e.*, separate subsidiaries) requirement between RBOC offering of basic telephone and enhanced services and attempted to substitute "nonstructural" safeguards.[284] The Computer III decision has been criticized as permitting increased RBOC anticompetitive abuse,[285] and in 1990, the FCC's withdrawal of structural safeguards was overturned and remanded by the Ninth Circuit Court of Appeals.[286] Among other things, the Ninth Circuit 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.[287]

To achieve the objectives contemplated by its Computer III inquiry, the FCC has attempted to develop a number of nonstructural regulatory concepts. The FCC's Open Network Architecture (ONA) rules were designed to require the RBOCs to unbundle their monopoly services so that they can be obtained at separate rates geared to individual services.[288] As of yet, however, the concept remains largely untested and unimplemented; and it has been challenged by RBOC customers as being biased and overly favorable to the RBOCs.[289] The FCC has also sought to develop a set of detailed

[283] The RBOCs assert 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 do not presently exist at the Federal or State levels. *See infra* text accompanying note 290. 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 Utility Commissioners, *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 of regulators second guessing subjective engineering and procurement judgement. *See, e.g.*, 3 Phillip Areeda and 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).

[284] *Third Computer Inquiry*, Report and Order, 104 F.C.C. 2d 958 (1986), *modified on reconsideration*, 2 F.C.C. 2d 3035 (1987), F.C.C. 2d 88-9 (Released February 18, 1988), *rev'd sub nom. People of State of California* v. *F.C.C.*, 905 F.2d 1217 (9th Cir. 1990).

[285] *See, e.g.*, Robert Frieden, *The Third Computer Inquiry: A Deregulatory Dilemma*, 38 Fed. Comm. L.J. 393 (January 1987).

[286] *People of State of Cal.* v. *F.C.C.*, *supra* note 284.

[287] *Id.* at 1238. It is indeed rare that an agency's determination is struck down based on a standard of review that affords, perhaps, the ultimate in judicial deference. That the FCC was operating at a "theoretical" level in deciding to remove the structural safeguards rather than the empirical level of analysis does not bode well for the FCC shedding its image as an academy of laissez-faire, hands-off policymakers who place unbounded faith in the potential for "good works" by enhanced monopolists. In response to the Ninth Circuit reversal, the FCC has reinstated the RBOC ONA obligations on an interim basis. *In re Computer III Remand Proceedings*, 118 P.U.R. 4th 450 (F.C.C. 1990).

[288] *In re Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 F.C.C. 2d 1 (1988).

[289] *California* v. *F.C.C.*, Nos. 90-70336 consol. cases (9th Cir., docketed July 5, 1990). Even the FCC acknowledges that RBOC unbundling is subject to a variety of technical and operational

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cost allocation rules. These rules are quite similar to earlier unsuccessful attempts to regulate the Bell System. Moreover, past experience does not engender great confidence in relying on FCC enforcement of such requirements. For example, in a 1987 report, the General Accounting Office concludes:

> FCC plans to audit carrier records periodically, but at existing staffing and auditing levels these audits will be infrequent, conceivably once every 16 years. At this staffing level, FCC's substantive role may be limited to responding to complaints or problems brought to its attention. . . . Overall, the level of oversight we see the FCC prepared to provide will not, in our opinion, ultimately provide telephone ratepayers or carrier competitors positive assurance that FCC's joint cost rules will guard against cross-subsidy.[290]

At the time of the GAO report, the FCC maintained only 15 full-time auditors; the number has not increased appreciably since that time.[291]

K. Recent RBOC anticompetitive conduct

The post-divestiture period has been characterized by the continued inability of the FCC to enforce its regulatory protections against RBOC abuses. Since the 1988 promulgation of the FCC formal enforcement process, less than five percent of the complaint cases against telephone carriers have been resolved by the FCC within the 15-month maximum time limit mandated by Congress.[292] Recently, the number of active FCC enforcement staff attorneys assigned new cases has actually *dropped* by 40 percent.[293]

Most disturbing, during this period the RBOCs have been found to have committed a number of anticompetitive violations—many eerily reminiscent of pre-divestiture Bell System abuses. The RBOCs have been found to have utilized their control of the local exchange monopoly to impede competition in a number of areas, including: (i) voice storage and retrieval; [294] (ii) directory publish-

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difficulties. *See Filing and Review of Open Network Architecture Plans,* No. 88-2, Phase I, Memorandum Opinion and Order, 4 F.C.C. 2d 1, 42, 69-70 (1988); Memorandum Opinion and Order on Reconsideration, 5 F.C.C. 2d 3084, 3086, 3097 n. 23 (1990); Memorandum Opinion and Order, 5 F.C.C. 2d 3103, 3109, 3116 (1990).

[290] GAO, *Telephone Communications—Controlling Cross-Subsidy Between Regulated and Competitive Services,* RCED-88-34 (October, 1987), at 54.

[291] Chairman Alfred C. Sikes admitted that the FCC had only 14 field auditors and three supervisors to cover a full 256 audit areas, *see March 1992 Hearings supra* note 457 (tr. at 76-78).

[292] Roy Morris & J. Scott Nichols, *Federal Communications Commission Enforcement: Telecommunications Crisis for the 1990's,* at 1 (1992). This study was prepared at the request of Allnet Communication Services and was based on a publicly available examination of the FCC enforcement process.

[293] *Id.*

[294] *See, e.g.,* Georgia Public Service Commission, Docket No. 4000-U, *In the Matter of the Commission's Investigation in Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service,* June 4, 1991 (Southern Bell undermined competition in the voice mail market); State of Wisconsin Department of Justice, *Press Release,* July 27, 1989 (Wisconsin Bell agreed to pay $1.2 million for adding services onto basic rate); Pennsylvania State Telephone Regulation Report, April 19, 1990, pp. 4-5 ($42 million fine paid by Pennsylvania Bell for misleading customers regarding custom calling features).

ing;[295] (iii) cellular telephone services;[296] (iv) equipment sales;[297] (v) equipment servicing;[298] (vi) international services;[299] and (vii) equipment procurement.[300] In addition, the RBOCs have been found to have overcharged for phone services and improperly allocated costs (such as lobbying fees) to the ratemaking base borne by utility customers.[301] The total excess costs borne by ratepayers resulting from RBOC anticompetitive violations during this period is estimated to be in excess of $20 billion.[302] The magnitude and scope of these competitive abuses is particularly disturbing given that the MFJ has precluded RBOC participation in the markets most susceptible to abuse.[303]

Although the Committee does not attempt here to describe all of the RBOC anticompetitive abuses since divestiture,[304] it may be useful for the record to identify some of their misconduct:

(i) In December 1989, NYNEX was found to have circumvented both the market and regulators by extracting $118 million in excess profits from regulated subsidiaries and local telephone customers during the years 1984–1988.[305] NYNEX accomplished this by selling equipment to its regulated subsidiary at an inflated price—in effect, illegally siphoning profits from regulated to unregulated businesses. Because the FCC failed to effectively investigate this problem (which was originally disclosed by the press and downplayed by NYNEX),[306] the New York Public Service Commission was forced to take strong corrective action.[307]

[295] *See, e.g., Great Western Directories* v. *Southwestern Bell Telephone Co.*, No. CA-2-88-0218 (N.D. Tex. July 27, 1990) (Southwestern Bell assessed $15 million in antitrust damages for anticompetitive conduct); SEARUC Southern Task Force, *Report on BellSouth Corp. and Affiliates* (Sept. 1990) (cross-subsidization of directory publishing).

[296] *See, e.g., Huber Report, supra* note 262, at 4.9–4.19 (several RBOCs offering technically inferior interconnection to cellular competitors and charging discriminatory interconnection rates).

[297] *See, e.g.,* SEARUC Southern Task Force, *supra* note 295. (BellSouth cross-subsidization of equipment sales).

[298] *See, e.g., In re Annual 1989 Access Tariff Filings,* 4 F.C.C. 2d 3638 (1989) (all seven RBOCs found to have misallocated maintenance costs).

[299] *See, e.g., In re Application of Pacific Bell,* No. 91-11-023 (Nov. 6, 1991); California Public Utilities Commission, *Audit Report on Pacific Telesis,* 1-5 (July 11, 1986) (cross-subsidization of competitive international services).

[300] *See e.g., In Re New York Telephone Co.,* 5 F.C.C. 2d 5892 (1990).

[301] *See, e.g.,* State of Wisconsin Department of Justice, *Press Release,* July 27, 1989; California Public Utilities Commission, Executive Summary, *Report on the Affiliated Relationship of Pacific Bell and the Pacific Telesis Group* (June 1986).

[302] *See Divestiture Plus Eight: The Record of Bell Company Abuses Since The Break-Up of AT&T,* Consumer Federation of America, 13 (Dec. 1991).

[303] The MFJ explicitly permitted the RBOCs to participate in directory publishing and to provide customer premises equipment. Since the effective date of the MFJ, the restrictions on RBOC offerings of non-telecommunications services and products have been lifted, and the RBOCs have been permitted to offer information gateways and voice storage and retrieval.

[304] For a detailed description of the numerous RBOC post-divestiture abuses, *see Divestiture Plus Eight: The Record of Bell Company Abuses Since the Break-Up of AT&T* (detailing 44 anticompetitive abuses); *The Never-Ending Story: Telephone Company Anticompetitive Behavior Since the Break-Up of AT&T,* National Cable Television Association (April 1991) (detailing 60 anticompetitive abuses); *Incidents of Telco Abuse,* Association of Telemessaging Services International, Inc. (Feb. 21, 1992) (detailing 10 anticompetitive abuses).

[305] 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.

[306] John Wilke, *NYNEX Milked Local Companies, Workers Say,* Boston Globe, Dec. 22, 1988, at 1; *see also infra* note 357 and accompanying text.

[307] The New York Public Service Commission found additional abuses and corruption at NYNEX, determined that the FCC's methods of analysis were inaccurate, and continued to investigate after the FCC had ceased its inquiry. Testimony of Charlie Donaldson, Assistant Attorney General, New York, *March 1992 Hearings, infra* note 457. NYNEX subsequently agreed to restrict all contact between its regulated and unregulated subsidiaries. New York Public Service Commission, *Press Release,* Feb. 20, 1992.

(ii) In 1990, a U.S. district court jury awarded over $15 million in antitrust damages against Southwestern Bell for improperly leveraging its monopoly control of the local exchange into "yellow pages" directory publishing.[308]

(iii) In 1984, Judge Harold Greene found Pacific Bell to have discriminated against coinless phone competitors by refusing to provide service unless expressly ordered to do so by the California Public Utilities Commission. Judge Greene stated that Pacific Bell's actions "not only violate the decree; they strike at its heart." [309]

(iv) In 1991, the Georgia Public Service Commission found that Southern Bell had undermined competition in the voice mail market by providing its rivals inferior service, rejecting their collocation requests, manipulating the local network, and withholding information regarding network changes. The Georgia Public Service Commission was forced to recommend implementation of "regulatory controls [to] prevent and/or deter monopoly abuse of the [voice mail] market." [310]

The RBOCs have also been found to have directly violated the MFJ's line-of-business restrictions. For example, in 1990 a grand jury returned a criminal indictment against NYNEX for illegally providing information services.[311] In 1989, U.S. West entered a civil enforcement consent order acknowledging violations of the MFJ's prohibition against offering information services.[312] Finally, in 1991 U.S. West agreed to pay a $10 million fine—the largest antitrust penalty ever levied by the Justice Department—for again violating the MJF's line-of-business restrictions.[313]

L. RBOC efforts to eviscerate the 1984 Modification of Final Judgment

The core of the MFJ is its competitive entry test, prohibiting RBOC market presence in the information services, equipment manufacturing and long distance markets until there is "no substantial 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 AT&T and the Justice Department, and approved by Judge Greene in light of the overwhelming evidence of the Bell System's anticompetitive structure, which combined local exchange bottleneck with competitive functions. Such structure, together with the Bell System's historical willingness to use it to anticompetitively further its own economic ends, had decimated the telecommunications competitive landscape.

Beginning in 1984, the RBOCs have conducted a relentless and far-reaching political and public relations campaign to eliminate these core line-of-business restrictions without the requisite show-

[308] *Great Western Directories* v. *Southwestern Bell Telephone Co., supra* note 295.
[309] *United States* v. *Western Electric Co.,* 583 F. Supp. 1257 (D.D.C. 1984).
[310] Georgia Public Service Commission Docket No. 4000-U, *supra* note 294. The FCC has subsequently asserted jurisdiction over this matter. *In re Petition for Emergency Relief Filed by BellSouth,* 7 F.C.C. at 1619 (1992).
[311] *United States* v. *NYNEX Corp.,* Crim No. 90-02388 (HHG) (May 31, 1990); *United States* v. *NYNEX Corp.,* 788 F. Supp. 16 (D.D.C. 1992).
[312] *United States* v. *Western Electric Co.,* 1989-1 Trade Cas. (CCH) ¶68,421 (D.D.C. 1989).
[313] *United States* v. *Western Electric Co.,* 1991-1 Trade Cas. (CCH) ¶69,329 (D.D.C. 1991).

ing that the competitive entry test could be met. Much like the political efforts surrounding the dilution of the prior Sherman Act case resulting in the 1956 Consent Decree, a central focus of the RBOC strategy has been directed at persuading the Department to alter its position regarding the continued need for the restrictions. The Department's reversal occurred with surprising speed, given the Department's meticulous prosecution of the case and subsequent negotiations surrounding settlement. The Department of Justice "formally" acknowledged its change of position regarding the restrictions in 1987 when it first submitted its triennial review report to the district court. However, a review of the record—as constructed variously by a court-appointed Independent Counsel [314] and during subsequent investigations and Congressional hearings [315]—indicates that well in advance of the announced switch by the Department, 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 (former counselor to Mr. Meese, and later "of counsel" to a law firm retained by the RBOCs in connection with the triennial review proceeding),[316] and William Clark (former Interior Secretary and National Security Advisor to President Reagan, and later Director of the RBOC Pacific Telesis).[317] According to then Assistant Attorney General William Weld, Mr. Meese during this period took "unusual steps" to permit his continued participation in the MFJ determinations by the Department.[318]

The groundwork for the reversal in position by the Department of Justice was laid as early as February 1985, when Mr. Wallach wrote the new Attorney General recommending that the Department consider conducting a review of the MFJ.[319] Shortly thereafter, at Mr. Meese's request, Mr. Wallach interviewed candidates for the position 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).[320] In October 1985, a mere six weeks after taking office, and

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[314] 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 Independent Counsel In Re Edwin Meese III*, Division No. 87-1, at 27 (1988).

[315] *See Department of Justice Oversight Hearing: Hearings on S. 1085 before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 53 (1988) [hereinafter *S. 1085 Hearings*]. The Department of Justice, Office of Professional Responsibility also investigated Meese's participation with the RBOCs and, like the Independent Counsel, found that he probably violated conflict of interest laws.

[316] *Report of Independent Counsel In Re Edwin Meese, supra* note 314, at 457. In August 1989, E. Bob Wallach was found guilty of fraudulent conduct arising out of his association with Wedtech Corporation, a now-defunct New York military contractor. *United States* v. *Eugene Robert Wallach*, No. S 87 Cr. 985 (S.D.N.Y. 1988); 733 F. Supp. 769 (S.D.N.Y. 1990) (motion for new trial denied).

[317] *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).

[318] *See S. 1085 Hearings, supra* note 315, at 53; *Report of Independent Counsel In Re Edwin Meese III, supra* note 314, at 26.

[319] *Report of Independent Counsel In Re Edwin Meese III, supra* note 314, at 457.

[320] *Id.* at 402–03.

well in advance of the official change in Departmental 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.[321]

Mr. Ginsburg's memorandum continued with an eight-point plan for implementing this policy.[322]

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.

Having persuaded the Department of Justice to retreat from its support for the line-of-business restrictions as the core feature of the MFJ, the RBOCs next sought to convince presiding Judge Harold Greene that the restrictions should be lifted. However, in its first triennial review opinion, the proposition was flatly rejected. Judge Greene found that (i) the RBOCs had continued to maintain bottleneck monopoly control with respect to the local exchange, and (ii) regulations continued to be ineffective in curbing potential RBOC anticompetitive abuses.[323] With respect to the continuing RBOC bottleneck problem, the 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 deliver 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.[324]

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[321] *Id.* at 411.
[322] *Id.*
[323] *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,* 111 S.Ct 283, 112 L.Ed. 2d 238 (1990).
[324] *Id.* at 540 (emphasis in original; footnotes omitted).

In connection with its finding that telecommunications regulation continued to be incapable of limiting anticompetitive abuses, the district court concluded:

> [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.[325]

As a result of these findings, the court held that the record did not warrant removal of the MFJ's core line-of-business restrictions in the area of information services,[326] equipment manufacturing,[327] and long distance services.[328] The court did hold, however, that the facts 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."[329]

In 1990, the court of appeals upheld Judge Greene's determination maintaining the prohibitions against RBOC entry into equipment manufacturing and long distance services.[330] However, the circuit court put aside a competitive analysis to accept an ingenious "procedural" argument offered by the RBOCs to eliminate

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[325] *Id.* at 579.

[326] With regard to information services, the court held:

> 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.

Id. at 567.

[327] With regard to the equipment manufacturing restriction, the court wrote:

> [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. There is no justification for removing the manufacturing restriction, and the requests for such removal will be denied.

Id. at 562.

[328] In the area of interexchange services, the court noted:

> [W]ith the exception of the minuscule amount of traffic that bypasses the Regional Companies' facilities, [the RBOCs'] 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.

[329] The court indicated that it was prepared to exempt the RBOCs from the MFJ's information service restriction with regard to the transmission of information generated by others. The offering of such information services, known as "gateways," is analogous to the "Teletel" and "Minitel" interactive data systems offered by the French state-owned telephone company. The court subsequently elaborated on the meaning of information gateways and permitted the RBOCs to enter the voice storage and retrieval information services markets (such as voice messaging and sophisticated answering machine type services, and electronic mail). *U.S.* v. *Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988). As of yet, the RBOCs have not elected to offer gateway information services on a broad scale.

[330] *United States* v. *Western Elec. Co.*, 900 F.2d 283 (D.C. Cir. 1990) [hereinafter *Circuit Court Triennial Review Opinion*], *cert. denied* 111 S. Ct. 283 (1990).

the MFJ's information services restriction. In their appeal, the RBOCs noted that even though scores of third party intervenors had opposed 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. As a result of this failure, the RBOCs argued, the language of Section VIII(C) of the MFJ [331] should be ignored and RBOC entry into information services should not have to meet the court-supervised competitive entry test. The circuit court accepted this argument and remanded the case to the district court with instructions to apply a so-called "public interest" test (rather than a competitive entry test) to RBOC entry into information services. Under this test, the circuit court held the district court could only disallow RBOC entry that would be *"certain to lessen competition* in the relevant market." [332] The district court would also be required to defer to the Department of Justice regarding whether RBOC entry would be in the "public interest," and could consider only "present" market conditions in its analysis.

The appellate decision in the 1990 triennial review contradicts established law regarding antitrust consent decrees in several fundamental respects. The decision is inconsistent with Supreme Court precedent which requires appellate courts to defer on the merits to the trial court—which in this case actually drafted the language in question.[333] It also contradicts interpretations of the MFJ previously accepted by the parties—who in the present case had not previously objected to the application of the competitive entry test. The circuit court interpretation represents a significant abdication of the Judiciary's responsibility—elaborated in the Tunney Act—to independently determine the application of the antitrust laws in consent decree situations. Moreover, the circuit court decision ignores longstanding antitrust jurisprudence and principles on the proper showing of competitive effect required under the antitrust laws. As the Supreme Court noted in the landmark case of *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), the antitrust law is based on "probabilities not certainties." [334]

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.[335] On July 25, 1991, Judge Greene reluctantly lifted the restriction on RBOC entry into information services while providing a stern warning of the likely anticompetitive effects of his decision:

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[331] *MFJ Opinion, supra* note 1, 552 F. Supp. at 131.

[332] *Circuit Court Triennial Review Opinion; supra* note 330, 900 F.2d 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.

[333] In *United States* v. *Atlantic Refining 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 official who drew up and administered the decree from the start; and, where the trial court concludes that the interpretation is in fact the one the parties intended.

[334] *See also Hospital Corp. of America* v. *F.T.C.,* 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").

[335] *United States* v. *Western Elec. Co.,* 767 F. Supp. 308 (D.D.C. 1991).

> 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.[336]

The district court's decision allowing the RBOCs into the field of information services is currently on appeal to the D.C. Circuit.[337] Because of the district court's concern that substantial market investments depended upon its decision, which was subject to reversal, the court stayed its effect pending completion of the appellate process. The court-ordered stay was subsequently vacated.[338]

The overall course of judicial events has resulted in considerable uncertainty in the information services market,[339] and has caused widespread confusion regarding the remaining applicability of the MFJ's competitive entry test. Taking advantage of the legal disarray created by the D.C. Circuit in its triennial review decision, the RBOCs have aggressively sought to erode the MFJ's remaining protections in equipment manufacturing and long distance. The RBOCs now argue that even where AT&T—an original party to the MFJ—opposes modification of a line-of-business restriction, the newly devised "certainty" standard should govern.[340] Although the circuit court has recently rejected such reasoning, its decision is currently subject to appeal, and there are a number of remaining judicial avenues under which the RBOCs may continue to seek to weaken the MFJ's competitive protections.[341]

Simultaneous with their court assault on the core legal protections of the MFJ, the RBOCs have been seeking legislative relief from the line-of-business restrictions. RBOC legislative activities have often been accompanied by what can only be called questionable heavy-handed tactics with regard to their employees, suppliers, and customers.[342] Several legislative initiatives have been in-

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

[337] No. 91-5263 (D.C. Cir., docketed August 1, 1991).

[338] *United States* v. *Western Elec. Co.,* No. 82 Civ. 00192 (D.C. Cir. October 7, 1991), *cert. denied,* 112 S. Ct. 336 (1991).

[339] In its annual review of the information services, industry, the Commerce Department concluded that Judge Greene's decision, as dictated by the D.C. Circuit, "has added a substantial dimension of uncertainty to all market planning within [the information services] sector." *U.S. Industrial Outlook 1992, supra* note 269, at 26–1.

[340] *United States* v. *Western Elec. Co.,* No. 90-5333 (D.C. Cir. 1992) (RBOCs asserted that *in any case* where the Department of Justice supported an RBOC waiver request, the certainty standard should govern).

[341] For example, the RBOCs may attempt to continue to weaken the MFJ's protections by seeking to modify the decree outright (*see id.* at 21, note 17) or by requesting a narrow construction of the MFJ's terms (*see, e.g., U.S.* v. *Western Elec. Co.,* 675 F. Supp. 655 (D.D.C. 1987)).

[342] 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. Many suppliers, in fear of RBOC retribution, have felt forced to organize anonymously, through a "No Name" Coalition.

troduced to lift the line-of-business restrictions entirely,[343] weaken the competitive entry test,[344] or alter the Justice Department's jurisdiction to enforce the antitrust principles of the MFJ.[345]

During the 102d Congress, the Senate approved a bill, S. 173, the "Telecommunications Equipment Research and Manufacturing Competition Act of 1991," which would remove the MFJ's equipment manufacturing restriction. S. 173 includes a domestic content provision which purports to ensure that RBOC manufacturing activity does not result in the export of U.S. jobs overseas; but the provision is subject to a number of exemptions and loopholes which could nullify its intended effect.[346]

The disarray in antitrust policy engendered at the Federal level has been accompanied by attempts to overturn the competitive principles of the MFJ at the State level as well. For example, the State of New Jersey recently adopted a law allowing the local RBOC affiliate, New Jersey Bell, to offer information services statewide.[347] In the event Judge Greene's 1991 remand opinion is reversed on appeal, the New Jersey law would be inconsistent with the MFJ's line-of-business restrictions. Initiatives such as this in New Jersey and other States[348] only serve to contribute to the widespread confusion and uncertainty in the telecommunications industry resulting from piecemeal attacks on the MFJ.

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. With the attempted piecemeal unraveling of the MFJ in a variety of forums, the Subcommittee on Economic and Commercial Law began developing a record to assist the Committee in considering legislation to replace the line-of-business restrictions administered by Judge Greene under the MFJ with a statutory framework that would permit the Bell operating companies to enter the competitive lines of business under procedures and conditions that properly safeguard competition without stifling innovation gains. H.R. 5096 is the product of five hearings

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[343] *See* S. 2362, 99th Cong., 2d Sess. (1986); H.R. 3687, 99th Cong., 1st Sess. (1985); 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. 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); H.R. 3515, 102d Cong., 1st Sess. (1991);

[344] *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. 1523, 102d Cong., 1st Sess. (1991); H.R. 1527, 102d Cong., 1st Sess. (1991); S. 173, 102d Cong., 1st Sess. (1991); H.R. 3515, 102d Cong., 1st Sess. (1991).

[345] *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).

[346] *See infra* note 427.

[347] Law of Dec. 19, 1991, ch. 428, 1991 N.J. Laws 3617.

[348] *See, e.g.*, S. Con. Res. 69, Ind. Laws (Mar. 8, 1990) (proposed resolution to urge the United States Congress to remove MFJ line-of-business restrictions).

before the Subcommittee on Economic and Commercial Law over the past three years.[349]

A. Hearings in the 101st Congress

On August 1 and 2, 1989, the Subcommittee on Economic and Commercial Law held general oversight hearings regarding the MFJ and competition policy in the telecommunications industry.[350] 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 market. 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.[351]

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.[352]

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" [353] 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." [354] He also proffered, as examples of how the MFJ

[349] The Subcommittee has also held several hearings on issues related to the 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,* 97 Cong., 2d Sess. (January 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. (September 9 and 10, 1980).

[350] *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*].

[351] *See id.* at 97, 328, 400, 478.

[352] *United States* v. *Western Elec. Co.,* 675 F. Supp. 655 (D.D.C. 1987), *aff'd,* 894 F.2d 1387 (D.C. Cir. 1990).

[353] *1989 Hearings, supra* note 350, at 134.

[354] *Id.* at 132-33.

was keeping the RBOCs from fulfilling important unmet needs in society, two information services which he claimed were unavailable despite a demand for them.[355] 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." [356]

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 . . .[357]

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 1000 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.[358]

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." [359] 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.[360]

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[355] *Id.* at 140–41. 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."

[356] *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.

[357] *Id.* at 186–87. 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 them 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."

Several months later, NYNEX was criminally indicted for this "administrative oversight." *See infra* note 449.

[358] 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 Dept. Brief, supra* note 81, at 13; *United States* v. *Western Elec. Co.*, 569 F. Supp. 990, 1008–1010 (D.D.C. 1983)).

[359] *1989 Hearings, supra* note 350, at 144–45.

[360] *Id.* at 146.

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 and development, "while continuing to bar them for some longer period of time from the actual fabrication of equipment." [361] Dealing with the restrictions on such a phased basis would provide an "orderly mechanism for the transition." [362] 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." [363]

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.[364]

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

[361] *Id.* at 377–78.
[362] *Id.* at 400.
[363] *Id.* at 329.
[364] *Id.* at 230–31.

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 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? [365]

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.[366]

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," [367] he suggested the

[365] *Id.* at 235-36.
[366] *Id.* at 237.
[367] *Id.* at 232.

RBOC's 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 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.[368]

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.[369]

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.[370] They're bottlenecks for long dis-

[368] *Id.* at 233.
[369] *Id.* at 226.
[370] *See infra* text accompanying notes 424-425 regarding AT&T's continued tendency to focus on the manufacturing and long distance restrictions to the exclusion of the information services restriction.

tance 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.

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.[371]

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[371] *1989 Hearings, supra* note 350, at 6–8.

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 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." [372]

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.[373]

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

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[372] *Id.* at 63.
[373] *Id.* at 65.

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 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." [374]

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." [375] 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.[376]

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." [377]

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

[374] GAO, Telephone Communications, RCED-88-34 (October 1987), at 3, *quoted in 1989 Hearings, supra* note 350, at 222.

[375] *1989 Hearings, supra* note 350, 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 Utility Comm'rs., *Summary Report On The Regional Holding Company Investigations* 17 (September 18, 1986), *quoted in 1989 Hearings, supra* note 350, at 277.

[376] *1989 Hearings, supra* note 350, at 249, 253.

[377] *Id.* at 327.

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 monopoly transmission lines would raise the same core Sherman Act concerns that led to the MFJ. "The [RBOCs] already control the medium. . . . Now they want to control the message." [378] He indicated newspaper publishers could support allowing the RDOC's to engage in electronic publishing outside their region, but only if there were "tough legislation to prevent . . . collusion and misconduct." [379]

Philip L. Verveer, a Washington attorney, testified on behalf of the National Cable Television Association. As a Justice Department lawyer in the 1970's and former chief of the FCC's Common Carrier Bureau, he had headed the investigation and litigation of the Department's antitrust action against the Bell System. 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." [380] 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

[378] *Id.* at 267.
[379] *Id.* at 280.
[380] *Id.* at 289.

> act on their ineluctable incentives and abilities to exploit and extend their monopolies in competitive markets.[381]

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, and such a 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.[382]

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." [383] 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." [384]

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 of justify any of these propositions. And, just as before divestiture, none of them withstands scrutiny.

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381 *Id.* at 292.
382 *Id.* at 296.
383 *Id.* at 286.
384 *Id.* at 328.

> 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 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.[385]

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." [386] 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." [387]

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

[385] *Id.* at 439–41.
[386] *Id.* at 381.
[387] *Id.* at 402.

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 capital necessary to maintain and expand their R&D programs.[388]

Referring to the RBOCs' argument that the manufacturing restriction was harming the U.S. trade balance as a "red herring," [389] 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.[390]

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.[391]

388 *Id.* at 395.
389 *Id.* at 403.
390 *Id.* at 396 (emphasis in original).
391 *Id.* at 401

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 corporate, 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.[392]

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. . . .[393]

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

[392] *Id.* at 419-20.
[393] *Id.* at 420.

> 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.[394]

Edwin B. Spievack, president of the North American Telecommunications Association, testified on behalf of the 750 telecommunications 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." [395]

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." [396]

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." [397] 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 consumers alike" that were "the basis of the Government's antitrust case in the first place." [398]

[394] *Id.* at 484.
[395] *Id.* at 456.
[396] *Id.* at 464.
[397] *Id.* at 488/
[398] House Committee on the Judiciary, *Press Release*, August 1, 1989.

B. Hearings in the 102d Congress

1. First Session—1991

When the Subcommittee held its next general oversight hearing on the MFJ, on August 1, 1991,[399] it took place against the backdrop of two major developments. First, the Senate had passed legislation two months earlier which would remove the MFJ's manufacturing restriction and permit 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 of 1991, would attempt to substitute FCC post-entry regulatory measures in lieu of the MFJ 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 "certainty" of competitive harm standard. In a July 25, 1991, decision Judge Greene 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.[400]

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 con-

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[399] *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*, 102d Cong., 1st Session. (August 1, 1991) (forthcoming 1992) [hereinafter *1991 Hearings*].

[400] *United States* v. *Western Elec. Co.*, 767 F. Supp. 308, 326 (D.D.C. 1991) (footnote omitted).

gressional 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,"[401] producing an "absolute chilling effect . . . on advancement."[402] Removing the restriction, he said, would "help America regain its service leadership in the telecommunications marketplace and strengthen America's position in world trade."[403] "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 . . ."[404]

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.[405] Supporters of the restriction, he maintained, are simply afraid to "compete with us to bring new services to the American people."[406]

Mr. Whitacre assured the Subcommittee that "existing and proposed" regulatory safeguards would adequately protect competition in the telecommunications industry.[407] 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."[408] 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.[409]

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.[410]

[401] Statement of Edward E. Whitacre, *1991 Hearings, supra* note 399, at 3.
[402] *Id.* at 20.
[403] *Id.*
[404] *Id.* at 20-21.
[405] *Id.* at 14.
[406] *1991 Hearings, supra* note 399 (tr. at 27).
[407] Statement of Edward E. Whitacre, *1991 Hearings, supra* note 399, at 16.
[408] *1991 Hearings, supra* note 399 (tr. at 28).
[409] *Id.* (tr. at 43).
[410] Statement of Kenneth B. Allen, *1991 Hearings, supra* note 399, at 7.

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." [411] He told the Subcommittee that it was "critical to move quickly." [412] 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." [413] Bell monopoly entry into information services would continue to be premature, he said, unless and until workable and effective safeguards could be developed and tested, including antitrust-type entry standards.[414]

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.[415] He did remark, however, that the safeguards proposed in S. 173 appeared inadequate.[416]

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." [417]

AT&T Vice Chairman Randall L. Tobias, in contrast, urged the Subcommittee to "leave things alone." [418] 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." [419]

The MFJ had benefitted the telecommunications equipment and long-distance markets enormously, Mr. Tobias said.[420] 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.[421] 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." [422] If the Subcommittee were to consider any legislation, he said, it should be a "comprehensive approach" and "embody the fundamental pro-competitive 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." [423]

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

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411 *Id.* at 5.
412 *Id.* at 9.
413 *Id.* at 5.
414 *Id.* at 10-11.
415 *1991 Hearings, supra* note 399 (tr. at 203).
416 *Id.*
417 Statement of Cathleen Black, *1991 Hearings, supra* note 399, at 1.
418 *1991 Hearings, supra* note 399 (tr. at 49).
419 *Id.* (tr. at 64-65).
420 *Id.* (tr. at 29-30).
421 Statement of R.L. Tobias, *1991 Hearings, supra* note 399, at 1, 17.
422 *1991 Hearings, supra* note 399 (tr. at 32).
423 *Id.*

merely made a "decision to be neutral." [424] 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. But if it meant that the fundamental decree, as it applied to manufacturing and information services, 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.[425]

The most astounding transformation of viewpoint occurred in the Communication Workers of America (CWA). Two years previously, CWA had expressed profound skepticism of the RBOCs' motives and concern about the anticompetitive effects of lifting any of the MFJ's line-of-business restrictions.[426] Now—after collaborating with the RBOCs on a dubious "domestic content" provision in S. 173 purporting to guarantee American jobs [427]—CWA was apparently ready to cast aside its earlier views and support the Bells down the line on manufacturing and information services.[428]

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[424] *Id.* (tr. at 84).

[425] *Id.*

[426] *See supra* text accompanying notes 364-69.

[427] The provision requires only that final assembly of components take place in the United States. If an RBOC "first makes a good faith effort to obtain equivalent component parts manufactured within the United States at reasonable prices, terms and conditions," it may then purchase foreign component parts costing as much as 40 percent of the final sales price of the assembled product. Research and development activities—a major "component" of the final sales price of sophisticated equipment—are permitted to be conducted entirely outside the United States.

During Senate debate on S. 173, Senator Howard Metzembaum noted that "componentry costs almost never exceed 40 percent of the *cost* of most network equipment products, let alone their *sales* revenue." The benefits of the provision for American workers were, he said, "at best speculative and at worst, illusory." 137 Cong. Rec. S7080 (June 5, 1991) (emphasis added).

[428] Curiously, CWA maintained its concern about the anticompetitive effects of lifting the MFJ's *long distance* restriction. *Compare* statement of Barbara J. Easterling, *1991 Hearings, supra* note 399 and accompanying text, at 4, *with supra* text accompanying note 366. During questioning, Ms. Easterling even conceded that the MFJ had had significant pro-competitive effects: "We can say a lot of competition came on the scene, and as a result of that, a lot of new innovative pieces of equipment came on the market and have helped the people." *1991 Hearings, supra* note 399 (tr. at 192).

Accordingly, CWA advocated swift House endorsement of S. 173[429] and complete congressional passivity regarding Judge Greene's decision lifting the information services restriction.[430]

Two years previously, CWA President Morton Bahr had noted that regulation had never been successful in countering anticompetitive Bell monopoly practices.[431] Now, CWA Executive Vice President Barbara J. Easterling was insisting that regulation could be relied upon. As to manufacturing, CWA was content with the regulatory scheme set out under current law, as modified by S. 173—provided the "domestic content" provision remained intact.[432] And as to information services, it was incumbent on opponents of RBOC entry to work with the Bells to establish the appropriate rules.[433]

Two years previously, Ms. Easterling herself had scoffed at the RBOC monopolies' claims that the MFJ had caused any substantial loss in American telecommunications equipment manufacturing jobs, laying the blame for the closing of several AT&T plants squarely at the feet of the RBOCs for purchasing equipment overseas.[434] Now, she was criticizing AT&T for closing down its plants, and praising the RBOCs—on the basis of S. 173's "domestic content" provision—for their intention to create new American Jobs.[435]

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.[436] 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 in-

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[429] Statement of Barbara J. Easterling, *1991 Hearings, supra* note 399, at 5.

[430] *1991 Hearings, supra* note 399 (tr. at 181).

[431] *See supra* text accompanying note 364.

[432] Ms. Easterling made clear that if the "domestic content" provision were weakened or dropped, CWA would oppose S. 173. Statement of Barbara J. Easterling, *1991 Hearings, supra* note 399, at 3. Ms. Easterling was reminded that President Bush had vowed to veto S. 173 *unless* the "domestic content" provision was dropped. *1991 Hearings, supra* note 399 (tr. at 183).

[433] *See* Statement of Barbara J. Easterling, *1991 Hearings, supra* note 399, at 4-5.

[434] *See supra* text accompanying note 369.

[435] *See 1991 Hearings, supra* note 399 (tr. at 195).

[436] 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." Statement of Edwin B. Spievak, *1991 Hearings, supra* note 399, at 2.

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.

1991 Hearings, supra note 399 (tr. at 119-20).

formation services restriction, within a Bell monopoly's region as well as outside it.[437] 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.[438]

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." [439] He counseled all interested parties to continue to "talk to us if not to each other." [440]

2. Second Session—1992

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 without a final judgment being rendered in the case. 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.[441] 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,[442] 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'

[437] *See* Statement of Stephanie Biddle, *1991 Hearings, supra* note 399, at 3–12.
[438] *See id.* at 13–26.
[439] House Committee on the Judiciary, *Press Release,* August 1, 1991.
[440] *1991 Hearings, supra* note 399 (tr. at 207).
[441] 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).
[442] *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 2), Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* 102d Cong., 2d Sess. (February 19, 1992) (forthcoming 1992) [hereinafter *February 1992 Hearings*].

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, 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 1500 organizations as signatories.[443]

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.[444]

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: the "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." [445]

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.[446]

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[443] 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 procompetitive 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.

February 1992 Hearings, supra note 442 (tr. at 108).

[444] *Id.* (tr. at 3-7).

[445] Statement of Robert E. Allen, *February 1992 Hearings, supra* note 442, at 3. 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." *February 1992 Hearings, supra* note 442 (tr. at 26).

[446] Statement of Bert C. Roberts, Jr., *February 1992 Hearings, supra* note 442, at 5.

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:

> 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.[447]

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 Dominoes must contract with Pizza Hut for delivery of their pizzas with no protection from abuse and dirty tricks." [448]

Presenting a markedly different view was Ivan Seidenberg, Vice President of NYNEX Corporation, testifying on behalf of the seven RBOCs. Mr. Seidenberg advocated the immediate removal of all remaining line-of-business restrictions, as not only good for innovation and competition, but good 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." [449]

Mr. Seidenberg left no doubt that the RBOCs would now demand not only that Congress remain passive as 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." [450] He cited the stock RBOC criticisms against the MFJ restrictions and the stock RBOC reassurances regarding the efficacy of regulation:

> As with the manufacturing and information services restrictions, the long distance prohibition has outlived its

[447] Statement of Dwight D. Opperman, *February 1992 Hearings, supra* note 442, at 6, 9.

[448] Statement of David E. Easterly, *February 1992 Hearings, supra* note 442, at 3.

[449] Statement of Ivan Seidenberg, *February 1992 Hearings, supra* note 442, at 2. Astonishingly, during questioning by Congressman Bryant, Mr. Seidenberg was seemingly unaware of whether or not his company, NYNEX, had been criminally indicted for violating the MFJ. NYNEX had, in fact, been indicted almost two years earlier for criminal contempt under 18 U.S.C. 401(3), for willfully violating section II(D)(1) of the MFJ by providing information services through its subsidiary Telco Research. The indictment is still pending.

[450] *February 1992 Hearings, supra* note 442 (tr. at 45).

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 state safeguards and powerful regulatory tools currently in place.[451]

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 enformation services market that has limited competition. Entry by regional Bell companies is likely to increase the responsiveness of this market.[452]

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 en-

[451] Statement of Ivan Seidenberg, *February 1992 Hearings, supra* note 442, at 24.
[452] Statement of Dan Bruns, *February 1992 Hearings, supra* note 442, at 4.

hance, competition within the telecommunications industry.[453]

Mr. Lynn further elaborated on this concern in additional testimony submitted for the record:

> 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.[454]

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.[455]

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." [456]

On March 18, 1992, the Subcommittee held another hearing to receive testimony from Federal and State enforcement and regulatory officials.[457] There was a marked contrast in view between the Federal officials and the State officials.

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[453] Statement of Stephen T. Lynn, *February 1992 Hearings, supra* note 442, at 2, 5.
[454] Response to supplemental questions for the record, Stephen T. Lynn, *February 1992 Hearings, supra* note 442.
[455] Statement of Stephen T. Lynn, *February 1992 Hearings, supra* note 442, at 4-5.
[456] House Committee on the Judiciary, *Press Release,* February 19, 1992.
[457] *Competition Policy in the Telecommunications Industry: A Comprehensive Approach (Part 3), Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* 102nd Cong., 2nd Sess. (March 18, 1992) (forthcoming 1992)) [hereinafter *March 1992 Hearings*].

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 the Department had commissioned outside consultant Peter Huber to conduct.

> 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.[458]

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."[459]

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.[460]

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.[461]

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

[458] Statement of James F. Rill, *March 1992 Hearings, supra* note 457, at 9. *See* discussion *supra,* notes 314-22 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."

[459] Testimony of James F. Rill, *March 1992 Hearings, supra* note 457 (tr. at 20).

[460] Statement of Alfred C. Sikes, *March 1992 Hearings, supra* note 457, at 10.

[461] *March 1992 Hearings, supra* note 457 (tr. at 76–78).

agreed to just a few years ago." [462] 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 monopolies. 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.[463]

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 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.[464]

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

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[462] Statement of Hubert H. Humphrey III, *March 1992 Hearings, supra* note 457, at 7.

[463] Testimony of Hubert H. Humphrey III, *March 1992 Hearings, supra* note 457 (tr. at 37, 39–40).

[464] Statement of William J. Cowan, *March 1992 Hearings, supra* note 457, at 12–13.

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 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.[465]

An exchange between Chairman Brooks and Mr. Cowan following the testimony summed up the low regard in which the Bells appear to hold regulators 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.[466]

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.

C. Introduction of H.R. 5096[467]

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 supersedes 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 is the competitive entry test, based closely on the test in the MFJ, which requires the Bell operating

[465] Statement of Charlie Donaldson, *March 1992 Hearings, supra* note 457, at 5, 7.
[466] *March 1992 Hearings, supra* note 457 (tr. at 64).
[467] For a further explanation of the bill and an elaboration of the points made here, *see infra* Part VI: Section-by-Section Analysis.

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." In speaking of "any relevant market for the activity," rather than simply "the market it seeks to enter," as the MFJ does, the bill further emphasizes a market-by-market analysis, which is characteristic of the antitrust laws. Anticipating that a Bell applicant may be able to satisfy the entry test for some product, service, and geographic markets before others, this emphasis is designed to encourage and enable the Bells to enter new markets as promptly and completely as competitive considerations will permit.

The bill's entry requirements would not apply to any activity for which the Bell operating company has already been granted entry by Judge Greene under the MFJ's competitive entry test. Information service activities for which the Bells have received authorization in evasion of the MFJ's competitive entry test—that is, pursuant to Judge Greene's July 26, 1991, decision—would generally be required to meet the bill's competitive entry test. A Bell operating company would be permitted, however, to continue offering a given information service to customers in a given market to the extent it was lawfully doing so 60 days or more before the bill becomes law. Whether any such activity is lawful will ultimately be determined by the outcome of the pending appeal of the July 26 decision.

The procedure established in the bill follows 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 first applies to the Attorney General for approval; if there is objection to the Attorney General's decision by the RBOC or an independent party, the application can be considered *de novo* by a Federal district court.

The bill's procedure departs from the MFJ in four important respects. First, the Attorney General's decision becomes final if no one files a timely request for *de novo* court determination. Second, the Bell applicant has an equal right to request a *de novo* court determination if dissatisfied with the Attorney General's decision. Third, the Attorney General is required to make a decision regarding an application within 130 days. And fourth, the request for *de novo* court determination need not be filed with Judge Greene, but may be filed in any Federal district court where venue would be proper under the antitrust laws. These departures have the effect of expanding Bell opportunities to enter the competitive lines of business and expediting the consideration process.

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 is 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 and 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.

D. Constitutionality of H.R. 5096

During the course of its consideration of the MFJ and H.R. 5096, the Subcommittee received written submissions regarding RBOC claims that codifying the MFJ's line-of-business restrictions would somehow violate the Constitution. The RBOCs have argued first that H.R. 5096 would violate the First Amendment, because it would restrict their "freedom of speech" if they had to wait to provide information services until they meet the bill's competitive entry test—that is, until they can prove there is no substantial possibility they could use their monopoly power to impede competition in the information services market they seek to enter. Second, the RBOCs have argued that H.R. 5096 constitutes an unconstitutional bill of attainder that violates separation-of-powers principles, because it would apply only to them.

Advancing the RBOCs' position, Professor Laurence H. Tribe of Harvard Law School delivered a memorandum to Chairman Brooks supporting RBOCs' contention that H.R. 5096 was unconstitutional on both grounds.[468] In a letter to Chairman Brooks, the American Civil Liberties Union (ACLU) made similar constitutional assertions regarding H.R. 5096.[469]

Refuting the assertions of Professor Tribe and the ACLU, the American Law Division of the Library of Congress, Professor Burt Neuborne of New York University Law School, and Professor Henry P. Monaghan of Columbia University Law School provided written statements.[470] They all concluded that adoption of H.R. 5096 would not violate any RBOC constitutional rights.

1. First amendment analysis

Professor Tribe dismissed as "nebulous" any First Amendment interest in maintaining a diversity of information that might be threatened by RBOC anticompetitive abuse.[471] He acknowledged

[468] 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.

To the extent that Professor Tribe's criticisms of H.R. 5096 on First Amendment grounds were premised on the bill's complete prohibition against RBOC provision of many information services during the transition period, and the bill's complete prohibition against any new joint ventures between the RBOCs, *see id.* at 5-6, 8, his criticisms have been mooted by Committee amendments eliminating the transition period for information services and prohibiting only joint activities between RBOCs which "may . . . substantially lessen competition or tend to create a monopoly." *See infra* Subpart E: Mark-up of H.R. 5096.

[469] Letter from Morton H. Halperin and Robert S. Peck, American Civil Liberties Union (June 29, 1992).

[470] Henry Cohen, *Freedom of Speech Issue Raised by H.R. 5096, 102d Congress, Concerning Power of Regional Bell Operating Companies to Provide Information Services,* American Law Division of the Library of Congress (1992); Johnny H. Killian, *Discussion of Bill of Attainder Arguments Made Against Bill to Restore Restrictions of Consent Decree in AT&T Cases,* American Law Division of the Library of Congress (1992); Memorandum of Burt Neuborne, *Congressional Power to Regulate The Entry of Regional Bell Operating Companies into the Business of Providing Information Services to Consumers: A Constitutional Analysis* (March 26, 1992); Letter from Burt Neuborne to Chairman Brooks (June 26, 1992); Memorandum of Henry P. Monaghan, *Constitutionality of H.R. 5096,* (May 27, 1992). Professor Neuborne was retained by the Newspaper Association of America, Professor Monaghan by AT&T.

[471] Tribe, *supra* note 468, at 9-10.

that the Supreme Court in *F.C.C.* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978) had rejected a First Amendment challenge against a total ban by the FCC on ownership of a radio or television station by a company that owns a daily newspaper in the same town.[472] At the same time, however, he asserted that the government interest in maintaining a diversity of information sources involved in that case was somehow different from the government interest in maintaining a diversity of information sources in the telecommunications area.[473] Specifically, he asserted that the "scarcity" rationale which was applied in *National Citizens Committee* to the limited radio frequencies in the electromagnetic spectrum would not apply with respect to telecommunications; but he overlooked the "scarcity" created by a totally *monopolized* local telephone exchange bottleneck.[474] In addition, he neglected to mention a crucial element of the Court's *rationale* in *National Citizens Committee:* that "the [FCC] regulations are not content related; moreover, their purpose and effect is to promote free speech, not restrict it." [475] This is a rationale that applies with equal force to the MFJ and H.R. 5096.

Professor Tribe also claimed Judge Greene himself for support, on the basis of *United States* v. *Western Electric Co.,* 673 F. Supp. 525, 586 n.273 (D.D.C. 1987), in which Professor Tribe claimed that Judge Greene had "assumed that [the information services restriction] did not offend the First Amendment primarily on the theory that the RBOCs *consented* . . . and therefore waived any First Amendment rights." [476] In the full footnote that Professor Tribe cites for his authority, however, Judge Greene actually makes the exact opposite point:

> There is *no merit* to the contention that the information services restriction infringes the Regional Companies' own First Amendment rights. Like all business establishments, those engaged in, or those that, as the Regional Companies here, consider engaging in, publishing are subject to the antitrust laws. Moreover, common carriers are quite properly treated differently for First Amendment purposes than traditional news media.
>
> A consent decree was entered into in this case pursuant to the antitrust laws prohibiting the Bell System and its successors from engaging, *inter alia,* in the information services business. *The decree did not constitute an infringement of First Amendment rights any more than would have a decree to that effect entered by the Court without consent, after full litigation.*

(citations omitted) (emphasis supplied).

The ACLU made similar constitutional assertions, all the while voicing a strong concern that an RBOC might abuse its monopoly

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[472] *Id.* at 10.

[473] *See id.* Professor Tribe also conceded that the Supreme Court had upheld against a First Amendment challenge a ban on the placement of political signs on public utility poles, in furtherance of the government interest in preventing "visual clutter." *Id.* at 13.

[474] *Id.*

[475] 436 U.S. at 801.

[476] Tribe, *supra* note 468, at 11.

power to "advantage" its own subsidiaries over its competitors,[477] and suggesting regulatory safeguards against RBOC anticompetitive abuse.[478] The ACLU urged the Committee to adhere to the principle, enunciated by the Supreme Court in *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), that "[f]reedom to publish means freedom for all and not for some." [479] In *Associated Press* however, the Court *rejected* the Associated Press's argument that Sherman Act prosecution threatened its First Amendment freedoms.

> Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment . . . The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[480]

With regard to the First Amendment concern, American Law Division Legislative Attorney Henry Cohen noted that the RBOCs' First Amendment rights do not exempt them from legislation intended to protect fair competition in the telecommunications industry.

> This conclusion is based on the fact that H.R. 5096 is an antitrust proposal, and, in *Associated Press* v. *United States,*[481] the Supreme Court held that "[t]he First Amendment affords not the slightest support of the contention that a combination to restrain trade in news and views has any constitutional immunity." It commented in the same case that "[t]he fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." In fact, the Court wrote, "[t]he First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose re-

[477] *Id.* at 2-3.
[478] *Id.* at 1.
[479] *Id.* at 5.
[480] 326 U.S. at 20. *Associated Press* was a Sherman Act case in which the news association was held to have engaged in an illegal combination in restraint of trade.
[481] 326 U.S. 1, 20 (1945).

straints upon that constitutionally guaranteed freedom." [482]

Mr. Cohen noted that in *Associated Press* the Supreme Court had upheld federal regulations that restricted newspapers from owning radio stations. He reasoned that the information services restriction in H.R. 5096 was no different than the restriction in *Associated Press.* "In that instance, as in this one," he concluded, "the purpose . . . was to promote free speech, not to restrict it." [483]

Professors Neuborne and Monaghan also rejected the notion that H.R. 5096 impinged on the First Amendment. Like Mr. Cohen, they cited a number of specific Supreme Court precedents which upheld governmental actions restricting private conduct in order to help assure a diverse marketplace of ideas, which in their judgment would be controlling in the case of H.R. 5096.

For example, they cited *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), in which the Supreme Court upheld regulations promulgated by the FCC to prevent the emergence of dominant national radio networks capable of unfairly limiting access to diverse points of view. They cited *Associated Press* (the case cited by the ACLU), in which the Supreme Court *rejected* newspaper publishers' First Amendment protestations, holding that the antitrust laws prohibited the emergence of powerful combinations of newspapers capable of driving competitors from the information marketplace. They cited *Red Lion Broadcasting Co.* v. *F.C.C.,*[484] in which the Court stated, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." And they cited *F.C.C.* v. *National Citizens Committee for Broadcasting* (the case Professor Tribe had attempted to distinguish) as being squarely on point.[485]

Mr. Cohen emphasized the limited and incidental effect H.R. 5096 would have on the RBOCs' First Amendment rights, noting that "the restriction that H.R. 5096 would impose on the BOCs is aimed at the potential anticompetitive effect of their providing information services, not at the content of their speech." [486] He went on to add:

> [T]he bill does not ban the [BOCs] outright from providing information services; it merely bans them where there is a substantial possibility that they would impede competition . . . [The Supreme Court] has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association.[487]

Professor Neuborne reiterated these points, noting that "H.R. 5096 makes no effort to limit free speech activities of BOCs that do

[482] Cohen, *supra* note 470, at 2-3..
[483] *Id.* at Summary.
[484] 395 U.S. 367, 390 (1969).
[485] They also cited *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951); *Citizen Publishing Co.* v. *United States,* 394 U.S. (1969); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956); and *Austin* v. *Michigan Chamber of Commerce,* 110 S. Ct. 1391 (1990).
[486] Cohen, *supra* note 470, at 4-5.
[487] *Id.* at 6.

not involve their telecommunications monopoly . . . "[N]othing in [H.R. 5096] hinders BOCs from utilizing their considerable resources to operate a newspaper, buy a theater, publish books or produce speech for transmission by radio and television." [488]

2. Bill of attainder analysis

Professor Tribe characterized H.R. 5096 as a bill of attainder against the RBOCs. He dismissed the well-established distinction in bill of attainder jurisprudence, the distinction between a "regulatory" purpose and "punitive" one, as "a thin reed on which to rest." [489] He stated flatly that "any attempt to single out the RBOCs for special regulation would offend basic constitutional principles." [490]

The bill of attainder arguments of Professor Tribe were also refuted.[491] Johnny H. Killian, a senior specialist and attorney in the American Law Division of the Library of Congress, as well as Professors Neuborne and Monaghan, stated that the specific identification of the RBOCs in H.R. 5096 noted by Professor Tribe did not implicate bill of attainder concerns because there was *no punitive intent.* Mr. Killian explained why the distinction between regulatory and punitive intent, which Professor Tribe had dismissed as a "thin reed," was in fact crucial in bill of attainder analysis:

> Present . . . in the case of a bill of attainder are two elements—the requisite specificity and the intent to punish—but the existence of the former element without the latter is insufficient to establish the existence of a bill of attainder, and it is in this regard that Professor Tribe's memorandum is deficient.[492]

Mr. Killian pointed out that Professor Tribe's own treatise was emphatic in this regard:

> "It is only laws that inflict *punishment* on legislatively specified individuals that the bill of attainder ban condemns, and [it is] plain that not all burdens may be deemed punishments for this purpose even when legislative 'specification' is shown." [493]

He also noted that in *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977), the Supreme Court, in upholding legislation to

[488] Memorandum of Neuborne, *supra* note 470, at 3.
[489] Tribe, *supra* note 468, at 16.
[490] *Id.* at 14.
[491] *The RBOCs themselves* presented the Subcommittee with what was tantamount to a refutation of the bill of attainder and separation of powers claims against H.R. 5096. Three years ago, when the RBOCs were seeking to *build* support for a *different* bill, they provided a memorandum from Professor Robert Pitofsky of Georgetown University Law School on the *opposite* side of these constitutional issues. Professor Pitofsky wrote:

> 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. . .

Memorandum of R. Pitofsky, *Legislating With Respect to Line-of-Business Restrictions on Bell Operating Companies: An Appropriate Role for Congress* (August 1, 1989).
[492] Killian, *supra* note 470, at 2.
[493] *Id.* at 2-3, *quoting* Laurence H. Tribe, *American Constitutional Law* 650-51 (2d ed. 1988) (emphasis in original).

assert Federal Government control over former President Nixon's Presidential papers, had held that the former President "constituted a legitimate class of one" on whom Congress could "fairly and rationally focus." [494] Further, the law was nonpunitive in that it (1) did not inflict any punishment traditionally judged to be prohibited by the Bill of Attainder Clause, (2) could be said to rationally further legitimate nonpunitive legislative purposes, and (3) had no legislative record evincing a punitive motivation.[495]

Based on their review of H.R. 5096 and the accompanying legislative record, Messrs. Killian, Monaghan, and Neuborne all concluded that the bill was not intended to punish the RBOCs,[496] but merely to subject their actions to legitimate antitrust standards, and would, therefore, easily pass constitutional muster.[497] Professor Monaghan went on to explain specifically why it was rational and constitutionally appropriate for H.R. 5096 to apply only to the RBOCs and not to other local telephone exchange providers, such as GTE:

> Congressional concern with RBOCs alone is plainly rational and thus satisfies any requirements of the attainder clause . . . Congress can surely conclude that the RBOCs present unique problems. Each RBOC controls essential local exchange facilities in all, or virtually all, the major metropolitan areas in its geographic region. As courts have found,[498] each of the RBOCs has market power significantly greater than the only other comparably sized local exchange carrier, in that GTE's widely dispersed exchanges are primarily rural and suburban in character and otherwise differ from the RBOCs'.[499]

3. Committee conclusion regarding constitutional arguments

Based on its review of the submitted statements and its independent review of the precedents, the Committee concluded that the RBOCs' constitutional objections against H.R. 5096 were unfounded. The Supreme Court has held on a number of occasions that the government may apply antitrust and competitive principles to the news and information marketplace to encourage the free flow of a diversity of ideas by restricting particular entities.

Professor Tribe's contention that the rationale of these cases is limited to those matters involving limited frequencies on the electromagnetic spectrum is simply not compelling. First, of course, *Associated Press* involved the *print* media. Second, the Committee regards the local exchange bottleneck as an even scarcer commodity than the electromagnetic broadcast spectrum, and the risk of

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[494] 433 U.S. at 472, *quoted in* Killian, *supra* note 470, at 3.
[495] 433 U.S. at 473-84.
[496] As explained in the description of H.R. 5096 and the section-by-section analysis (Part VI), *infra*, the bill includes a number of grandfather clauses intended to minimize any possible economic hardship on the RBOCs, and liberalizes the procedure for RBOC entry into the restricted lines of business as compared with the MFJ.
[497] The Library of Congress also noted that there was no constitutional impediment which would prevent Congress from superseding a Judicial decree, as H.R. 5096 would do in certain respects. Mr. Killian noted that instances of Congress altering a judicial determination through a statutory revision "are legion." Killian, *supra* note 470, at 7.
[498] *See United States* v. *GTE*, 603 F. Supp 730 (D.D.C. 1984).
[499] Monaghan, *supra* note 470, at 4.

RBOC hegemony as even more significant in this regard. The Committee also takes note of the fact that in Judge Greene's 1982 Tunney Act decision he flatly stated that the MFJ's restrictions on RBOC entry into the information services market "did not constitute an infringement on First Amendment rights." [500]

The Committee found the RBOCs' bill of attainder arguments to be similarly lacking in merit. The purpose of H.R. 5096 is not to exact punishment on the RBOCs for past activities, as would be necessary to constitute an unlawful bill of attainder. Rather, the bill establishes an orderly process by which the ROBCs may *enter* all of the competitive lines of business, including information services. In this regard, the bill's specific identification of the RBOCs is no different in nature than *Nixon* v. *Administrator of General Services,* in which the specific identification of President Nixon for purposes of seizing control of his Presidential papers was upheld as being nonpunitive and rational and, therefore, constitutional.

E. Mark-up of H.R. 5096

On May 28, 1992, the Subcommittee on Economic and Commercial Law met to mark up H.R. 5096. No amendments were offered or adopted at that time. The Subcommittee ordered the bill reported favorably to the full Committee on the Judiciary 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 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 terms 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 would permit a Bell operating company to continue providing any information service in a particular geographic market to the extent the company was law-

[500] 673 F. Supp. at 586 n.273.

fully 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 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 noted, 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—and 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.

Section-by-Section Analysis

SECTION 1. SHORT TITLE

Section 1 states the short title of the legislation: the "Antitrust Reform Act of 1992."

SECTION 2. AUTHORIZATION

Section 2 establishes the procedure for a Bell operating company (BOC) to simply obtain antitrust authorization to enter a competitive market, notwithstanding the line-of-business restrictions in section II(D) of the MFJ. The definition of "Bell operating company" in the bill—taken from the MFJ—is an all-encompassing term which includes the parent regional Bell holding companies (RBOCs) and their related enterprises engaged in competitive markets.

The procedure follows closely the procedure currently used under the MFJ by a BOC in seeking to lift, or obtain a "waiver" from, the restrictions. Under both the MFJ and the bill, a BOC applies first to the Attorney General, with a subsequent *de novo* determination by the court if so requested. The court would grant the application only if the BOC proves that it meets the competitive entry test: that "there is no substantial possibility that it could use its monopoly power to impede competition" in the market it seeks to enter.

Subsection (a) governs application by a BOC to the Attorney General for authorization to engage in a line of business now restricted under section II(D) of the MFJ. Those lines of business are (1) research and development relating to telecommunications equipment or customer premises equipment, (2) manufacture or provision of telecommunications equipment, or manufacture of customer premises equipment, (3) information services,[501] or (4) interexchange (long distance) telecommunications. As ordered reported, a BOC would be eligible to apply immediately upon enactment of this Act for all currently restricted lines of business, except with respect to interexchange telecommunications, or information services relating to an alarm monitoring service. Application for entry into these lines would be permitted after a 5-year transition period.

Research and development relating to telecommunications equipment and customer premises equipment is listed as a separate line of business from manufacture of such equipment. Although research and development is not listed separately in the MFJ's section II(D) line-of-business restrictions, Judge Greene in a December 3, 1987, opinion held that "design and development" of equipment was part of the manufacturing process, and thus within the restriction on manufacture.[502] This decision has created a measure of competitive uncertainty, with the BOCs asserting that it prevents them from contributing to innovation in telecommunications technology. The bill lists research and development as a separate line of business for two reasons: first, to clarify that the scope of the

[501] As discussed *supra* text accompanying note 336, Judge Greene has reluctantly lifted the information services restriction, based on his interpretation of an appellate court opinion disallowing for procedural reasons his use of the competitive entry test to maintain the restriction. That decision has now taken effect, but is under appeal.

[502] *United States* v. *Western Elec. Co.*, 675 F. Supp. 655 (D.D.C. 1987), *aff'd*, 894 F.2d 1387 (D.C. Cir. 1990).

manufacturing restriction is the same in the bill as in the MFJ; and second, to encourage the parties-in-interest, the Attorney General, and the courts to consider research and development as a distinct component of the manufacturing process, for which a BOC might be able to satisfy the competitive entry test at an earlier date.[503] It is quite possible that at an earlier point in time, a BOC might be able to show that there is no substantial possibility that it could use its monopoly power to impede competition in the market for research and development of (and nondiscriminatory licensing of patents for) equipment, so long as it is not actually manufacturing the equipment for supply to itself and its sister Bell monopolies as was prevalent under the anticompetitive pre-MFJ integrated Bell System structure. If so, the BOC should have the opportunity under the Act to apply for competitive authorization to enter the research and development field, the manufacturing field, or both.

The application procedure and the competitive entry test are expressly designed to focus on "relevant markets," an antitrust term of art that reflects another element of built-in flexibility to competitive analysis. This focus is emphasized to a greater extent in the bill than in the MFJ. Under the competitive entry test in the bill, the application is to be granted to the extent that the Bell applicant "proves that there is no substantial possibility that [it] or its affiliates could use monopoly power to impede competition *in any relevant market* for the activity to which the application relates" (emphasis added). This market-specific approach, traditional in antitrust analysis, recognizes that a BOC may be able to satisfy the competitive entry test for some product, service, and geographic markets before others. There is no justification for an "all or nothing" determination that could needlessly put off BOC entry for years in some market sectors.

Thus, under H.R. 5096, the BOC decides which markets to include in the application; of those markets, the Attorney General and the courts are to grant the authorization requested to the extent that the competitive entry test is satisfied for any relevant markets. This approach thus provides maximum flexibility for the Bells to achieve entry as quickly and completely as antitrust considerations will permit.

Subsection (b) governs the determination by the Attorney General regarding BOC application. The time for the Attorney General to evaluate an application is limited to 130 days after the application is received, at the end of which the Attorney General is to make a determination using the competitive entry test. The Attorney General's determination becomes final and takes effect immediately if no person (as that term is defined under the antitrust laws) subsequently files a timely civil action for a *de novo* court determination regarding the application. The time limit for the Attorney General's determination, and the finality of that determination if uncontested, are refinements to the MFJ procedure designed

[503] Special treatment of research and development has been a feature of antitrust policy for decades. Obviously, more competitive risk exists where market behavior is involved than at the pre-market stage of research and development. Recognizing this fact—as well as the generally procompetitive contribution of research and development to the economy—led this Committee to seek enactment of the National Cooperative Research Act of 1984. 15 U.S.C. § 4301 *et. seq.* (Pub. L. 98-462).

to provide a more expeditious process for resolving relatively noncontroversial applications and for bringing the other applications before the court.

Subsection (c) governs the determination by a court regarding an application. If the Attorney General's determination is contested—whether by the Bell applicant or by another person—and a civil action is timely filed, the court would make a *de novo* determination under the competitive entry test. The court's determination is stayed pending any appeal.

De novo court determination is in keeping not only with the procedure currently employed under the MFJ, but also with the traditional role of the Attorney General in antitrust enforcement matters. The Justice Department has been performing this very role for years under the MFJ, by virtue of its consideration of waiver requests and its recommendations to the court in connection with the triennial review proceedings. The Department of Justice is an Executive Branch enforcement agency, as opposed to an independent administrative agency with adjudicatory functions. The role of the Attorney General is as advocate and prosecutor, not as final arbiter. In this sense, it is a distinctly nonregulatory role. The internal judgments made by Department lawyers are part of its prosecutorial discretion, and do not generally carry the force of law. Thus, in pre-merger review under section 7a of the Clayton Act, the Department makes an initial evaluation, but the parties may choose to proceed with the merger even if the Department lodges an objection. If they do so, the Department's recourse is to bring a civil action, in which the Department's viewpoint is considered to be that of a party to the case and is accorded no special deference. The Committee rejected suggestions that the Department's traditional role in antitrust matters should be transformed into that of an adjudicatory body and its consideration of a Bell application expanded into a full-blown, on-the-record Administrative Procedure Act hearing.

In contrast to the MFJ, under which all Bell applications to lift or waive a line-of-business restriction come before a single judge who presides over the Consent Decree, the bill permits a civil action regarding a Bell application to be filled in any Federal district court in the district in which the Bell applicant resides or is found or has an agent. This is the traditional antitrust venue provision found in section 4 of the Clayton Act.

Language from section 4 of the Clayton Act is also used to describe who has standing to commence a civil action regarding a Bell application. The person commencing the civil action must be someone who might be "injured in its business or property" as a result of any determination regarding the application. By use of this phrase, the Committee intends that the well-established judicial treatment of antitrust standing be extended to the competitive entry test in H.R. 5096. The Bell applicant itself is listed separately to make clear that *it* may file a civil action if it contests the Attorney General's determination—another departure from the MFJ.

The standing requirement does not apply to the Attorney General's consideration of an application; any "interested person" may submit comments to the Attorney General, as frequently occurs with pre-merger notification filings under the Hart-Scott-Rodino

Act. Likewise, even during the court's consideration of an application, the Committee intends that all interested persons be permitted to file amicus briefs, and that the court be able to take any such brief fully into account. This is also similar to the procedure under the MFJ in which Judge Greene liberally grants authority for third party intervenors to participate in the court's proceedings.

SECTION 3. AUTHORIZATION AS PREREQUISITE

Section 3 establishes the general rule that entry by a BOC is permitted only if authorized in accordance with section 2 of the bill. Along with section 2, this section completes the bill's primary objective of superseding the MFJ's line-of-business restrictions with an antitrust-based procedure for BOC competitive entry, designed to ensure adherence to the Antitrust Protection and Procedures Act (the Tunney Act).

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 any affiliated enterprise" is taken directly from the MFJ provision establishing the line-of-business restrictions. The breadth of the definition of the term "affiliated enterprise" reflects the recognition, as articulated by Judge Greene in a January 31, 1992, opinion,[504] that even an indirect financial stake—such as, for example, a royalty or revenue sharing arrangement—can create the 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 previously authorized activities. There is an exception for any waiver or authorization granted by the presiding judge in the MFJ proceeding pursuant to the competitive entry test in section VIII(C) of the MFJ, if granted on or before the date of enactment, or if pending before the MFJ court on the date of enactment. There is also an exception for research and development in which a BOC was lawfully engaged under the MFJ prior to the date of enactment.

There is another exception for most information services provided by a BOC in a particular geographic market, to the extent the company was lawfully engaged in providing those services to customers in that geographic market during the period beginning on October 7, 1991, and ending 60 days before the date of enactment. October 7, 1991, is the date on which the U.S. Court of Appeals for the D.C. Circuit lifted Judge Greene's stay of his July 26, 1991 decision in which he reluctantly removed the information services restriction.[505]

It should be emphasized that Judge Greene's July 26 decision is currently on appeal The outcome of the appeal will determine whether or not the information services restriction was properly removed in the court proceedings, and will, therefore, determine whether the BOCs may continue to engage in information service activities undertaken since the stay was lifted. The Committee does

[504] *United States* v. *Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Jan. 31, 1992).
[505] *United States* v. *Western Elec. Co.*, Civil Action No. 82-0192 (D.C. Cir. October 7, 1991).

not intend to prejudge or influence the appeal; indeed, if Judge Greene's July 26 decision should be reversed and the information services restriction reinstated, then accordingly, the Committee intends that this exception for information services in which a BOC was "lawfully engaged" be controlled by that decision and rendered moot. The Committee intends only that, in the event that Judge Greene's decision is ultimately affirmed on appeal, the effective legislative reinstatement of the restriction by this bill should permit a BOC to continue providing any information service to customers in a particular geographic market to whatever extent it was lawfully doing so during the period described.

SECTION 4. PROHIBITIONS

Section 4 establishes four additional antitrust safeguards, or prohibitions, that will apply after entry by a BOC into a competitive line of business, for so long as the company continues to possess monopoly power in any market for exchange service (local phone service). These four prohibitions are grounded in antitrust principles and reflect concerns that were at the heart of the Sherman Act case that led to the MFJ. They are merely explicit restatements of antitrust prohibitions that would already govern market behavior in the telecommunications industry.

The first two safeguards directly prohibit the BOCs from abusing their monopoly power in the anticompetitive manner prevalent under the Bell System before the MFJ. A BOC with monopoly power which is engaged in a restricted line of business is prohibited from discriminating, in any relevant market, between itself or an affiliated enterprise and another person, or between any two other persons, with respect to any telecommunications product or service if the effect of such discrimination may be to substantially lessen competition, or to tend to create a monopoly, in any line of commerce. Telecommunications products and services related to the provision or use of a telecommunications service would, of course, include information incidental to such product or service. Consistent with antitrust principles, a BOC with monopoly power is also prohibited from using proceeds obtained from providing monopoly exchange service to subsidize, in any relevant market, a restricted line of business.

The antitrust safeguard against discrimination is lifted from "equal access" and "nondiscrimination" antitrust requirements in section II(A) and (B) of the MFJ, and is drafted to conform with the antitrust standards in the Clayton Act. The antitrust safeguard against cross-subsidization is also derived from safeguards employed by Judge Greene in granting waivers from the MFJ's line-of-business restrictions, and, again, is drafted to conform with the antitrust standards in the Clayton Act.[506]

The other two antitrust safeguards are also designed to prevent the seven regional Bell holding companies from augmenting their monopoly power. The bill prohibits a BOC with monopoly power

[506] *See United States* v. *Western Elec. Co.*, 592 F. Supp. 846, 870-72 (D.D.C. 1984) (setting forth general procedure for consideration of waiver requests); *see also United States* v. *GTE Corp.*, 603 F. Supp. 730, 737-738 (antitrust safeguards against cross-subsidization and discrimination applied with regard to telecommunications merger).

from recombining with another BOC, whether before or after entry into a competitive line of business, if the effect may be to substantially lessen competition, or to tend to create a monopoly, in any line of commerce; and from engaging jointly with another BOC in a restricted line of business in restraint of trade. These prohibitions derive exclusively from the Sherman and Clayton Act prohibitions that are applied to every industry. In no way does this safeguard supersede, alter, or overrule any other requirements imposed by any other agency with jurisdiction over the conduct involved.

An exception to these last two prohibitions is provided for BOCs already affiliated within the same regional BOC holding company to acquire exchange service assets from one another or to engage in joint activities. An exception is also provided for BOCs to continue engaging jointly in activities in which they were lawfully engaged jointly on the date of enactment, or in which they were lawfully engaged jointly at Bell Research Corporation on or before the date of enactment. These exceptions simply preserve the competitive posture of the BOCs prior to enactment of this legislation.

The four prohibitions in this section apply with respect to engagement by the BOCs in *any* activity described in section 2(a)(1), regardless of the source of a particular BOC's authority to engage in the activity. Some activities have been so authorized by a waiver or exception to the line-of-business restrictions that was granted by the court pursuant to the competitive entry test in section VIII(C) of the MFJ. The Bells may also be engaging in other activities prior to the date of enactment as a result of Judge Greene's July 26, 1991, decision in which he reluctantly lifted the information services restriction. The competitive safeguards in this section apply to all such activities.

Like the antitrust entry provisions of H.R. 5096, these antitrust safeguards do not interfere with any other Federal law, including the Communications Act of 1934. In particular, section 4(c) will not interfere in any manner with section 221(a) of the Communications Act, which provides a form of antitrust immunity to certain telephone company acquisitions and consolidations which elect to seek prior FCC clearance. Because of the savings clause found in section 8(c) of the bill, section 4(c) of the bill would apply only to those transactions which do not receive immunity pursuant to section 221(a).

SECTION 5. COMPLIANCE

Section 5 contains a requirement, based on the requirement in Section V of the MFJ, that each BOC advise its officers and relevant management personnel of the requirements of this Act and of the potential criminal liability for violating the Act. Each regional Bell holding company is required to certify to the Attorney General each year as to whether the company and its affiliates have remained in compliance with the Act's requirements.

SECTION 6. ENFORCEMENT

Section 6 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 and section 4 of the Sherman Act.

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 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 and incorporates 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 by the Attorney General regarding BOC entry into a restricted line of business, as specified in section 2(b)(2).

This subsection further provides that actions commenced to enforce a duty, claim, or right under the Act shall not be stayed pending any determination to be made by the Attorney General regarding an application for entry by a BOC. This provision does not refer to a civil action commenced under section 2(c) regarding the same application for entry; such a civil action must, of course, await the Attorney General's determination, or the passage of a sufficient period of time after the application is filed, as specified in section 2(c)(1).

Subsection (f) provides for the service of a subpoena requiring the attendance of a witness at a hearing or trial in connection with an action under the Act at any place within the United States.

SECTION 7. DEFINITIONS

Section 7 contains the definitions for terms used in the Act.

The definitions of "affiliate," "customer premises equipment," "electronic publishing," "exchange area," "exchange service," "information," "information service," "interexchange telecommunications," "telecommunications," "telecommunications equipment," "telecommunications service," and "transmission facilities" are drawn from definitions for such terms 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 Judge Green's opinion of December 3, 1987.[507]

The definition of "Bell operating company" is also modeled on the definition for such term in the MFJ. The definition is designed to subject to the bill'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

[507] *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).

BOC entry into those lines of business in accordance with antitrust principles.

The Committee rejected suggestions that the bill's entry requirements be written to cover all local exchange service providers—including companies who have no history of habitual monopolistic abuse, are not parties to the MFJ, and are not subject to its line-of-business restrictions. The Committee has carefully considered, and totally rejected, the notion that this focus on the Bell companies might somehow constitute an unconstitutional bill of attainder.[508] The bill focuses on the BOCs and their affiliates not out of any intent to punish them for past abuses of the Bell System, but simply in recognition of their unique position in seeking release from restrictions imposed under the MFJ. As Judge Greene has stated, the line-of-business restrictions are "prophylactic measures designed to prevent the regional Bell holding companies from abusing their power over the local telephone monopoly in any way." [509] They are "designed . . . to avoid a recurrence of the type of discrimination and cross-subsidization that were the basis of the AT&T lawsuit." [510]

The definitions of "exchange access" and "information access" are likewise modeled on MFJ definitions, except that the bill's definitions do not include various requirements pertaining to exchange access and information access which are included within the text of the MFJ definitions. The Committee considers these requirements to be of a regulatory nature, and any changes to or codifications of them more appropriately left to the agencies and congressional committees with responsibility for telecommunications regulatory policy. The MFJ's exchange access and information access requirements are, therefore, included in the savings clause provisions in section 8(a) of the bill, and thereby left unaffected.

The definition of "affiliated enterprise" is based on Judge Greene's opinion of January 31, 1992,[511] in which he held that the prohibitions against Bell monopoly entry into the restricted lines of business covered not only direct ownership, but also other financial and proprietary interests that would create the same anti-competitive structural incentives that the MFJ was designed to cure.

The definition of "antitrust laws" includes both the acts listed in the Clayton Act definition and the part of the Federal Trade Commission Act that confers antitrust enforcement authority. The definition is modeled on that used in other antitrust acts, such as the "National Cooperative Research Act of 1984," 15 U.S.C. 4301 et seq.

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.

The definition of "research and development" is modeled on the definition found in section 2 of the "National Cooperative Research Act of 1984."

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[508] *See supra* notes 489-500 and accompanying text.
[509] *United States* v. *Western Elec. Co.*, 592 F. Supp. 846, 869 (D.D.C. 1984).
[510] *MFJ Opinion, supra* note 1, 552 F. Supp. at 142.
[511] *United States* v. *Western Elec. Co.*, Civil Action No. 82-0192 (D.D.C. Jan. 31, 1992).

SECTION 8. RELATIONSHIP TO OTHER LAWS

This section contains savings provisions for other applicable laws.

Subsection (a) provides that. although the bill supersedes the MFJ's line-of-business restrictions—information services, interexchange telecommunications, and telecommunications equipment and customer premises equipment—the other parts of the MFJ are not affected. For clarity those other parts are explicitly enumerated.

Subsection (b) contains a savings clause for the other antitrust laws.

Subsection (c) explicitly provides that the bill shall not be construed to modify, impair, or supersede any other Federal law other than law expressly referred to in the bill. Thus, only the MFJ itself is superseded, and only insofar as the antitrust-based structural line-of-business restrictions. Federal laws establishing the telecommunications regulatory regime—including, in particular, the Communications Act of 1934—are completely unaffected by 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 this Act 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.

SECTION 9. AMENDMENT TO DEFINITION OF ANTITRUST LAWS APPEARING IN THE CLAYTON ACT

This section amends the definition of "antitrust laws" in the Clayton Act to include this Act. This is a traditional manner of amending the Clayton Act.

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 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. 5096, 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, August 4, 1992.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5096, the Antitrust Reform Act of 1992, as ordered reported by the House Committee on the Judiciary on July 1, 1992. We estimate that implementation of the bill would cost the federal government $5 million to $10 million annually, beginning one or two years after enactment, with lower costs in the initial years. These costs would be paid from appropriated amounts. Enactment of H.R. 5096 would not affect direct spending or receipts Therefore, pay-as-you-go procedures would not apply to the bill.

Under current law, as a result of a consent decree settling an antitrust case against the consolidated Bell system (AT&T), regional Bell telephone companies can enter certain competitive lines of business only after gaining waiver approval by the United States District Court of the District of Columbia. (Waiver applications are first reviewed by the Attorney General.) The lines of business include the following: (1) manufacture (including research and development) of telecommunications equipment and customer premises equipment, and (2) provision of interexchange telecommunications. A similar requirement pertaining to information services was recently removed by the court presiding over the consent decree. (The decision removing the restriction is now under appeal.) Under H.R. 5096, entry into any of these lines of business, including information services, by the regional Bell telephone companies would require approval only by the Attorney General. In addition, the bill would permit the Bell applicant or any competitor to contest the Attorney General's decision by commencing a civil action against the Attorney General in a United States district court for a de novo determination.

Enactment of H.R. 5096 likely would cause an increase in applications by regional Bell telephone companies to enter the aforementioned lines of business. This would result in increased costs to the Department of Justice to review applications and to respond to civil actions filed by Bell operators or their competitors, and increased costs to U.S. district courts to hear civil actions brought against the Attorney General. Based on information from the Administrative Office of the U.S. Courts and the Department of Justice, we estimate that implementation of H.R. 5096 would cost the federal government $5 million to $10 million annually, assuming appropriation of the necessary amounts, beginning one or two years after enactment of the bill. In the first year or two after enactment, annual costs to the federal government would be less than $5 million as applications and resulting civil actions would accumulate. Several years after enactment it is possible that the number of applications, and hence the resultant costs, could decrease, depending on the degree of success experienced by the Bell companies.

CBO estimates that enactment of H.R. 5096 would not affect the budget of state or local governments.

If you wish further details on this estimate, we will be placed to provide them, The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

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. 5096 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 (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CLAYTON ACT

That (a) "anti-trust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; *the Antitrust Reform Act of 1992;* and also this Act.

* * * * * * *

DISSENTING VIEWS OF HON. HAMILTON FISH, JR. AND HON. CARLOS J. MOORHEAD

This legislation, entitled the "Antitrust Reform Act of 1991" (H.R. 5096), was introduced on May 7, 1992 by Judiciary Committee Chairman Jack Brooks. While the Economic and Commercial Law Subcommittee had previously held three hearings on the general topic of telecommunications and antitrust, no hearing was ever conducted subsequent to the introduction of H.R. 5096, to focus on its overall approach or its specific provisions. Thus, there is virtually no Subcommittee or full Committee hearing record on legislation dealing with an issue of considerable national importance.[1]

H.R. 5096 was introduced directly in response to recent federal court decisions, which interpreted the AT&T Consent Decree or Modification of Final Judgment ("MFJ") so as to allow the seven Regional Bell Operating Companies ("RBOCs" or "Bell companies") to enter the information services business. *United States* v. *Western Electric,* 900 F.2d 283 (D.C. Cir.) cert. denied (1990); *United States* v. *Western Electric Company Inc.,* No. 82-0192 (D.D.C. July 25, 1991). To be specific, the principal purpose of the Brooks bill is to overrule those federal court decisions and to force the Bell companies to withdraw from the information services business—a business in which they are now legally engaged.

But, while the bill was primarily prompted by the information services litigation, it would also impose conditions—in addition to those already contained in the Consent Decree—on potential RBOC entry into telecommunications manufacturing and long distance service.[2] Further, the legislation would severely limit the ability and flexibility of the Bell companies to conduct various types of research and development in the telecommunications area.

The entry of the Bell companies into information services, particularly content-based information such as electronic publishing, has generated considerable debate. Opposition to Bell entry is particularly strong among newspaper publishers, who fear that an RBOC presence would adversely affect newspaper revenues from advertising and the classifieds. Bell entry into information services does raise questions about the effectiveness of federal and state regulation. It also focuses on the need for strong antitrust enforcement in the telecommunications area.

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[1] The Subcommittee reported H.R. 5096 by a 10-6 roll call vote on May 28 and the full Judiciary Committee reported the bill by a 24-9 roll call vote on July 1.

[2] On June 5, 1991, the Senate passed the "Telecommunications Equipment Research and Manufacturing Competition Act of 1991" (S.173) by a vote of 71-24. S.173 specifically would permit the Bell Operating Companies to design and manufacture telecommunications equipment through separate affiliates. The bill contains a requirement that most of the manufacturing be done in the U.S. and also prohibits the BOCs from entering into manufacturing joint ventures with each other. Nevertheless, the bill would essentially do away with the MFJ's manufacturing restrictions. Similar legislation (H.R. 1523; H.R. 1527) is also pending in the House.

However, in our view, the appropriate response to these concerns does not lie in the creation of a new, sweeping and unnecessarily restrictive federal law. The better policy approach is to insure that there are effective regulatory safeguards in place at both the federal and state levels, backed up by the safety net of statutory enforcement and damage remedies contained in the Communications Act and the antitrust laws.

I. Current Enforcement and Regulatory Structure

Five years ago, the General Accounting Office issued a report critical of the oversight capabilities of the Federal Communications Commission (FCC) and its Common Carrier Bureau. Since that time, the FCC has taken a number of significant steps, through the promulgation of new regulations and the strengthening of existing regulations, so that businesses and residential consumers are protected against possible discrimination and/or cross-subsidization. These new regulatory safeguards include strict accounting requirements and cost allocation rules, as well as "arms length" affiliate transaction rules. Thus, the FCC has adopted a detailed set of regulations governing the allocation of costs and transactions between regulated and competitive operations. In part, these require larger "tier one" common carriers (including the seven Bell companies) to file cost-allocation manuals, submit to independent audits and comply with broad reporting and record-keeping requirements.

In addition, the FCC has adopted open-network architecture (ONA) requirements aimed at insuring non-discriminatory access throughout the telecommunications network. The Commission has also installed a computerized, automated reporting and management information service (ARMIS) which allows the FCC to compare each Bell Company's expenditures and activities with their peers. Furthermore, a new "price cap" system has already been established by the FCC and in many states which serves to minimize the incentives for the Bell companies to engage in any type of cost shifting. Finally, the FCC sought and received from Congress increased fine and forfeiture authority. The FCC can now impose fines of up to $1 million per offense and even relatively minor violations of accounting rules can result in fines up to $250,000. The FCC Common Carrier Bureau does need additional resources in the form of more auditors but, most important, the regulations are now in place that enable them to do a truly effective job of RBOC oversight.

At the same time, the Antitrust Division of the U.S. Department of Justice needs to continue its course of tough enforcement as demonstrated in the *U.S. West* case. In that case, the largest civil fine ever obtained in an antitrust contempt case, (i.e. $10 million) was imposed on a Regional Bell Company for comparatively minor violations of the Consent Decree. Through this action, the Antitrust Division sent an important deterrent signal to the Bell companies.

This is a fundamental point that should not be overlooked in this debate. We already have the Sherman Act with its criminal penalties; we already have the Clayton Act with treble damage remedies for private parties who are harmed in their business or property.

Furthermore, the MFJ itself is still very much in force and its prohibitions against Bell entry into telecommunications manufacturing and interexchange (i.e. long-distance) service were recently upheld in both the District and Circuit Court of Appeals decisions previously cited. Given the FCC and state regulatory structure, the existing antitrust enforcement machinery and the availability of the treble damage remedy under the antitrust law for harmed private parties—is a new statute along the lines of H.R. 5096 really needed?

II. The Brooks Bill

Under the terms of H.R. 5096, the seven Regional Bell Operating Companies are prohibited from entering certain specified lines of business until affirmatively authorized to do so under the procedures established in the bill. These prohibited lines of business are: (a) research and development relating to telecommunications equipment or customer premises equipment; (b) information services (including electronic publishing); (c) manufacturing telecommunications equipment or customer premises equipment, and (d) interexchange (i.e. long distance) service.

As originally introduced, Chairman Brooks' bill imposed waiting periods (measured from the date of enactment) of three years on basic information services, five years on manufacturing, and seven years on long distance and electronic publishing. That is, the RBOCs would have had to wait for those time periods, before even being able to apply to seek permission to enter those businesses. However, during the Judiciary Committee's markup, the waiting periods with respect to information services, electronic publishing and manufacturing were removed as a result of the adoption of an amendment offered by Congressman Fish. Consequently, under the reported version of the bill, the RBOCs would be permitted to apply as of the date of enactment to enter into research and development (relating to telecommunications equipment or customer premises equipment), information services (except alarm monitoring services) and manufacturing. However, they still would have to wait for five years before applying for permission to enter long distance or to provide alarm monitoring services.

Applications to enter into prohibited lines of business must be made to the Attorney General. The application must describe "with particularity" the nature and scope of the activity, and each product market, service market, or geographic market for which authorization is sought. Not later than ten days after receiving the application, the Attorney General must see that it's published in the Federal Register. Interested persons are provided with an opportunity to comment on the application for sixty days after publication. Not later than 120 days after the application has been published, the Attorney General must issue a written decision on the application itself. An application may be approved only if the Bell company has demonstrated that "there is no substantial possibility that such company or its affiliates could use monopoly power to impede competition in any relevant market for the activity to which the application relates".

Then, any interested person "who might be injured in its business or property" may file a suit in a federal district court challenging the decision on an application. Judicial review consists of a completely *de novo* review regarding the subject. The court is required to apply the same entry test or competition standard as the Attorney General—i.e. proof that there is "no substantial possibility" that the Bell company or its affiliates could use monopoly power to impede competition in any relevant market.

In addition, the bill contains prohibitions against discrimination and cross-subsidization by the Bell companies. Also, the Bell companies are prohibited from entering into joint ventures with each other in research and development, information services, manufacturing, or long distance. The CEO of each Bell company is required to submit an annual certification in writing to the Attorney General that its officers and employees have been notified regarding the responsibilities under the Act. Criminal penalties attach for failure to notify or failure to file an accurate certification. The bill also imposes criminal penalties for the violation of its specific provisions and establishes a private right of action to seek treble damages and injunctive relief (analogous to what is already provided for under the Clayton Act).

III. Problems Presented by H.R. 5096

The approach taken in H.R. 5096 presents serious problems and raises numerous policy questions. In one sense, the bill is duplicative of remedies contained in existing law and seems unnecessary; in another sense, its restrictions and penalties exceed what is needed to effectively deter anti-competitive behavior.

The bill purports to codify the terms of the Consent Decree but, in fact, imposes a number of procedural requirements and substantive legal limitations on the Bell companies that are not contained in the Decree. The Decree makes Bell entry into new businesses difficult. H.R. 5096 would, in many cases, make such entry impossible. For example, the bill does not contain a general waiver provision and essentially does away with the judicial waiver process established pursuant to the Decree. That waiver procedure currently allows the Bell companies to petition the District Court for permission to enter both non-telecommunications and telecommunications businesses otherwise barred under the Decree on a case-by-case basis. In addition, the bill continues and exacerbates the restrictions that have prevented Bell company involvement in research and development regarding the manufacture of new telecommunications products.[3] The new court procedures established by H.R. 5096 effectively enable existing manufacturers to block Bell company R&D efforts for years to come.

[3] Bell company research and development is hampered by the MFJ because of the vagueness of MFJ restrictions. The exact definition of "manufacture" under the Decree is unclear. Consequently, batteries of lawyers and technicians must complete an in-depth analysis to determine whether a certain R&D activity might violate the MFJ. For instance, research for the issuance of generic product specification is permitted, but specific design and development is prohibited. While Bell companies can write product specifications and provide those to manufacturers, they cannot participate in the design process with those manufacturers, making it very inefficient to bring a product to market. H.R. 5096 would continue to create research and development disadvantages for the Bell companies.

In addition, the bill would overturn the federal district court and appeals court decisions that removed the information services restriction on the Bell companies. Again, as a result of that litigation, they are now legally free to provide information services to their customers and are doing so. This legislation would take that judicially-sanctioned business activity away from them for the foreseeable future.

Also, it is important to recognize that H.R. 5096 is not about protecting competition in a generic antitrust sense. In fact, many critics have labeled H.R. 5096 "special interest legislation", noting that it is specifically designed to protect advertising revenues and existing market share. There is no question but the effect of this legislation would be to preserve and protect the current marketplace situation (i.e. existing competitors). This is an ironic result for legislation which originated in an antitrust subcommittee and is supposed to be based upon antitrust principles. The federal antitrust laws were enacted to encourage competition, not to foreclose it. They exist to foster an economic climate encouraging new entrants into the marketplace—not to discourage or preclude them from doing so. But preventing new competition and new competitors lies at the heart of H.R. 5096. That is its fundamental aim.

Proponents of the bill contend that its prohibitions and barriers are necessary because of Bell control over the local telephone exchange network. They argue that the so-called "bottleneck" gives the RBOCs an unfair competitive advantage over competitors. It is true that the Bell companies are regulated monopolies that operate the local telephone exchange where they do business. But that does not mean that they cannot, fully consistent with the federal antitrust laws, legally conduct other nonregulated businesses. For example, electric utilities and gas companies are also regulated monopolies but many of them are engaged in other lines of business such as real estate development and investment banking.

Even more analogous is the fact that the restrictions contained in H.R. 5096 do not apply to all regulated local telephone companies, but just to the seven Bell companies. There are a number of regulated telephone companies (for example: GTE, Rochester Telephone, United, Centel, Southern New England Telephone and Cincinnati Bell) that provide local telephone service. If control over the local telephone exchange is really the problem, then why didn't the drafters of H.R. 5096 include all such companies in the bill?

The proponents' argument is essentially a rejection of regulation as the best means of assuring legal compliance without causing an artificial distortion of the marketplace. Why regulation is a satisfactory approach with such complex and important industries such as banking, securities, transportation, and energy—but not with telecommunications—is a question left unanswered by the proponents of H.R. 5096.

The bill is also at odds with a basic tenet of antitrust law known as the "essential facilities doctrine". An essential facility is a resource possessed or controlled by one entity, that is vital to the economic viability of its competitors. For the doctrine to apply, it must not be economically feasible or possible for those competitors to duplicate the facility and an essentially equivalent facility must not be available through an alternative source. Typical examples of essential facilities are electric transmission lines, gas pipelines and railroad tracks.

In such circumstances, the owner of the essential facility is required to make it available to its competitors on fair and reasonable terms. So, competitors must be granted access to and use of the essential facility. But that does not mean that the owner is prohibited from using its own facility for its own commercial purposes. The doctrine requires fair access for competitors, not that the owner exclude itself from the commercial benefits of its own property. The Brooks bill, however, prohibits the Bell companies from using their own facilities in connection with any of the specified lines of business for the foreseeable future.

This legislation will also generate enormous amounts of litigation, clogging the federal courts and artificially delaying Bell entry into any of the enumerated lines of business for many years. Section 2(c) establishes an extremely low threshold with respect to legal standing to sue, beyond anything contained in the antitrust laws or the Federal Rules of Civil Procedure. Under its terms, "*any person who might be injured*" (emphasis added) is given standing to go to federal court and challenge the Attorney General's decision on a particular application. These suits can be brought in any district court and, irrespective of the merits, would necessitate a full trial.

In written comments submitted on behalf of the Administration to the Committee on the Judiciary, dated May 28, 1992, Commerce Secretary Barbara Hackman Franklin stated:

> . . . virtually any person taking issue with the Department's determination could petition in almost any United States District Court and obtain de novo review of DOJ's determination. This could expose courts to a flood of new cases, and raise the risk of inconsistent adjudications. Furthermore, *any* appeal from either the DOJ's or a district court's ruling would automatically stay the effect of the ruling and result in years of additional delay in obtaining competitively beneficial entry by the BOCs into new businesses.

Commenting on those same provisions in H.R. 5096, Attorney General William Barr stated in his June 30, 1992 letter to the Committee:

> In combination, these provisions create the opportunity for entrenched competitors to misuse the process to shield themselves from competition, to the detriment of the public.

Under the federal antitrust laws, actual injury or an imminent threat of loss or damage must be demonstrated before a person has standing to challenge a particular act as anti-competitive or potentially anti-competitive. This legislation departs from that seventy-five year old standard and as a result will encourage unjustified, unnecessary, dilatory and counterproductive litigation.

Similarly, complete de novo review of each DOJ decision on an application is unnecessary and unwise. By giving no deference to the Attorney General's determination, H.R. 5096 directly conflicts with existing standards under the antitrust laws and the overwhelming number of federal statutes governing judicial review of agency administrative decisions. For example, the Clayton Act's standard for judicial review of administrative orders provides that the administrative findings of fact, "if supported by substantial evidence, shall be conclusive." 15 U.S.C. § 12 (c). Similarly, the standard for judicial review under the Federal Trade Commission Act is that the FTC's findings of fact, "if supported by evidence, shall be conclusive." 15 U.S.C § 45 (c). Furthermore, in the context of judicial review of the Attorney General's decisions under the Newspaper Preservation Act (NPA), the Attorney General's legal conclusions are entitle to deference provided that the Attorney General's interpretation of the statute is reasonable. With respect to the Attorney General's factual findings under the NPA, these findings can only be set aside by the reviewing court if they are arbitrary, capricious, or an abuse of discretion. More broadly, the Administrative Procedure Act (APA) governs rulemakings and adjudications by virtually all federal agencies. 5 U.S.C. §§ 551–559. The standard of judicial review for agency decisions under the APA, where the underlying statute does not require a hearing, is whether or not the agency was "arbitrary or capricious." 5 U.S.C. § 706.

The very structure of H.R. 5096 places the Department of Justice in a quasi-adjudicatory role, much like that of a regulatory agency. Why then grant the Attorney General administrative review authority and yet give his determination literally no deference? Clearly, it is highly unusual for Congress to require an entire new trial on the merits once an issue has been reviewed and a determination rendered by the agency charged with the enforcement of a particular law or set of laws. Assuming that the competition standard or entry test to be applied by the courts is sufficient to protect against an anti-competitive result, why waste judicial resources on an entire new trial in every instance?

The competition standard or entry test applied by this legislation imposes an unnecessarily high threshold ("no substantial possibility") on the Bell companies to justify their entry. See: Section 2(c)(2)(A)(i). It is an extremely restrictive standard, and in the view of some antitrust experts, may be impossible to meet while these entities remain as regulated local telephone companies. Such a result is far too harsh and would deprive this country of a vast array of technological advances. While this test is contained in section VIII (C) of the MFJ, it is not the standard that was applied by the United States Court of Appeals for the District of Columbia in the information services litigation. Instead, the Court relied on section VII of the MFJ and, through it, applied the public interest test contained in the Tunney Act. 15 U.S.C. 16; § 5(e); (f) of the Clayton Act. That is the general standard which is applicable to other antitrust consent decrees.

The MFJ was agreed to in 1982 and became effective on January 1, 1984. Since that time, America's telecommunications landscape has greatly changed. At the time the Decree was signed, there was only one manufacturer of telecommunications equipment of any consequence in the United States. That was Western Electric, an affiliate of the then unified AT&T system. Now there are literally thousands of companies that make and sell customer premises equipment as well as more sophisticated telecommunications equipment inside the United States. Also, there are scores more purchasers of such equipment than was true ten years ago, including seven separate regional telephone companies. The fact is that no Bell company has the power to foreclose competition in the telecommunications equipment market by choosing to purchase its own products rather than those of a nonaffiliated company, as did AT&T prior to divestiture.

Similarly, at the time of the AT&T breakup, the information services industry was in its virtual infancy. In contrast, today there are hundreds of well-established companies that provide a wide array of information services to both residential and business customers. The vast majority of information service providers use the telecommunications network in a manner essentially indistinguishable from other telephone customers. Any attempt at discrimination would prove highly costly with the benefits uncertain. Further, FCC and most state regulations now provide effective safeguards against possible discrimination. Because the competitive marketplace situation has substantially changed over the last decade, and because discrimination and cross-subsidization are far less likely to go undiscovered, we believe that Bell entry no longer presents anti-competitive problems to the same degree that would have been the case at the time of the AT&T breakup.

In our view, a more equitable, balanced entry test should determine whether or not the Bell companies are allowed to enter the specified lines of business. Such a test could be based upon either the aforementioned Tunney Act or on the merger standard language contained in section 7 of the Clayton Act.

The Tunney Act was enacted in the mid-70s as an effort to try to ensure that affected parties would have an opportunity to comment on a proposed Consent Decree before it went into effect. It also provides those same parties with an ongoing right to ensure that the terms of a Consent Decree are enforced. Under a Tunney Act standard, the court would balance the possibility that a Bell company could impede competition in the market that it seeks to enter against the potential benefits resulting from its entry into that market. It would consider the competitive impact of Bell entry, by weighing the potential antitrust risks and considering the likelihood of anti-competitive behavior as well as the pro-competitive advantages of Bell entry into the market. So, a court would consider: (1) the competitive impact of the activity that is the focus of the application; (2) the impact of Bell entry on the public generally and on individuals alleging that they are likely to be injured by such activity; and (3) the public benefit, if any, to be derived by Bell entry into the particular activity.

In making its determination under the Tunney Act standard, the court may take testimony from expert witnesses and government officials. In addition, it could appoint a special master, if necessary, or convene on the record hearings where interested persons or entities could appear before the court regarding the particular application. Under this approach all the comments and objections filed with the Attorney General during the application stage would be reviewed and would be made part of the court's record. Thus, the entry test would be a more balanced evaluation—gauging the competitive impact on the public and on particular persons, while considering the public benefits of Bell entry to consumers.

Another option, if legislation like this is to be enacted, would be to utilize the standard contained in section 7 of the Clayton Act. It is employed by the antitrust enforcement agencies (the Justice Department and the Federal Trade Commission) to analyze the competitive impact of proposed mergers, acquisitions, and joint ventures. In this context, proposed Bell entry would be evaluated on the basis of whether the effect of such entry "may be to substantially lessen competition, or tend to create a monopoly, in any line of commerce in any section of the country". This competitive standard has the advantage of numerous legal precedents—enforcement agency decisions, the existence of detailed merger guidelines, and extensive case law—all of which could be relied upon by the Attorney General and the courts. Also, just as with the Tunney Act standard, it would not preordain a decision against the Bell companies in every instance. Each application or case would be judged on its own merits and balanced competition factors would be applied.

IV. Constitutional Issues

Serious constitutional questions have also been raised regarding provisions contained in H.R. 5096. On June 29, 1992, the American Civil Liberties Union (ACLU) submitted its detailed comments on the bill to Chairman Brooks. Their analysis contained the following observations:

> Our review of H.R. 5096 suggests that it raises serious First Amendment and other constitutional issues and should not be enacted as presently written. . . .
>
> Plainly, as written, the bill fails to comply with constitutional requirements. In brief, it usurps the role of the courts by superceding (sic) a rendered judicial judgment rather than setting general rules to govern anti-competitive practices in the information services industry . . . [I]t improperly places the burden on the RBOCs to prove to the Attorney General that they would not be able to use monopoly power to eliminate or impede competition and further enjoins entry into the information services field if a private party seeks judicial review of the Attorney General's decision. This last aspect of the bill remains an unconstitutional prior restraint and appears to violate the First Amendment's overbreadth doctrine.

The ACLU analysis concludes that H.R. 5096 unconstitutionally usurps the role of the courts because it singles out the Bell companies, rather than proscribing rules of general applicability. Further, it improperly places the burden of proof on the RBOCs to show that anti-competitive practices will not occur, when that burden should be on the government or private parties challenging Bell entry.

Similarly, Lawrence H. Tribe, Esquire, the Tyler Professor of Constitutional Law at Harvard Law School, submitted a detailed brief entitled "Comments on the Brooks Bill (H.R. 5096): A Constitutional Perspective". Professor Tribe begins his analysis by criticizing the waiting periods contained in the original version of the bill, noting that they would violate the First Amendment. Second, as with the ACLU analysis, Professor Tribe concludes that the standards by which the Attorney General and the federal courts are to review the validity of applications for entry also violate the First Amendment. He says, in part:

> the standard by which the Attorney General and federal courts are to review applications by RBOCs to provide information services (including electronic publishing) is impermissible under the First Amendment. The standard requires the RBOCs to shoulder the burden of proof, which is a requirement of dubious constitutionality.

Professor Tribe goes on to amplify his criticism of the entry standard specified in the bill (i.e. "no substantial possibility" . . . that an RBOC "could use monopoly power to impede competition in any relevant market"). He states that it "is in no sense congruent with the traditional First Amendment test for speaker-based exclusions". Professor Tribe is also critical of section 4(d) of the bill, as imposing "a virtual categorical ban" on joint cooperative activities by the RBOCs, particularly because this restriction would extend to electronic publishing joint ventures thereby implicating the First Amendment.

Perhaps most importantly, Professor Tribe criticizes H.R. 5096 as being an unconstitutional bill of attainder. That is, by singling out only the Regional Bell Operating Companies as opposed to any other local telephone companies, the legislation is punitive in nature and inconsistent with that constitutional requirement. The Tribe brief states:

> In my view, any attempt by Congress to single out the RBOCs for special regulation would offend basic constitutional principles. First, Congress' function is to prescribe general legislative rules, not to target named individuals and groups for special burdens or restrictions on liberty. It is a mistake to see this precept as simply as a function of the Bill of Attainder Clause; Art.I, §9, cl.3; the point is much more fundamental. It goes to the core distinction between the Article I function of Congress to promulgate laws and the Article III duty of courts to apply those laws to particular cases and controversies.

He goes on to emphasize that "a measure that singles out by name a group of specific persons (whether corporate or natural) for special punitive treatment is an impermissible bill of attainder."

Thus, both the ACLU and a nationally recognized constitutional scholar have concluded that this legislation presents serious constitutional questions because of the onerous restrictions and limits it places on the Bell companies.

V. Economic and Social Implications of H.R. 5096

As Congress considers this legislation, it should carefully weigh its implications for our economy as well as its implications for consumer access to a variety of telecommunications products and services. While H.R. 5096 clearly deals with important legal issues, the antitrust and competition factors are not the only factors to be considered in this debate. This bill would indefinitely postpone Bell entry into information services and telecommunications manufacturing. The result will be fewer U.S. dollars invested in the American economy, fewer jobs for American workers, and fewer marketplace choices for American business and American consumers.

H.R. 5096 could virtually undermine the incentive for the Bell companies, who serve 75% of the nation's telecommunications users, to invest in and further develop the telecommunications infrastructure of this country. Without question, it creates incentives for the Bell companies to go overseas with their investments, rather than creating jobs here in the United States. It severely restricts the ability of seven of the nation's thirty largest corporations to engage in research and development in their very areas of expertise.

The restrictions placed on joint ventures between the Bell companies is particularly puzzling. This is true given the fact that this Committee has approved legislation (known as the "National Cooperative Production Amendments") in two consecutive Congresses that would encourage joint production ventures among otherwise competing companies. The joint production bill (H.R. 1604), sponsored by Judiciary Committee Chairman Brooks, was unanimously approved by our Committee in June, 1991. It amends the National Cooperative Research Act of 1984 (15 U.S.C. § 4301 et. seq.), a law which encourages cooperative R & D activities by applying the rule of reason to such ventures and limiting antitrust damages. Those same benefits would be applied to joint manufacturing ventures under H.R. 1604. Identical legislation passed the House of Representatives in the 101st Congress and analogous legislation (S. 479) passed the United States Senate on February 27, 1992. The Bell companies are not restricted from cooperating with each other under the existing provisions of the National Cooperative Research Act. However, by virtue of H.R. 5096, they would be prospectively prohibited from entering into joint ventures with each other in R & D, manufacturing, information services or long distance.

H.R. 5096 would interfere with the many contributions that the Bell companies could make to the development of new technologies and intellectual property in the United States. Given their resources and expertise, the Bells could be expected to make significant contributions to both patent and copyright development as part of an expanded telecommunications R & D effort. H.R. 5096 would indefinitely postpone such possibilities.

Unfortunately, the bill implicitly establishes a preference for foreign investment in the United States and foreign acquisition of U.S. companies, because major foreign telecommunications companies would have greater access to the U.S. market than the Bell companies or their affiliates. Since divestiture, over seventy U.S. telecommunications companies have merged with or been acquired by foreign companies. There is nothing in H.R. 5096 that would reverse this trend or assist the United States in developing a better balance of payments vis-a-vis foreign competitors in the telecommunications area.

This legislation also places major roadblocks in the way the Bell companies bring the benefits of the information age to all Americans. During Judiciary Committee consideration, Committee members received letters and other written statements from a variety of organizations which stressed the positive contributions the Bell companies could make in their respective areas. This included educators (elementary, secondary and higher education), health care professionals, organizations representing the elderly and the disabled, as well as groups representing the interests of rural America. For example, the American Council on Education and the American Association of State Colleges and Universities sent the following comments to Chairman Brooks:

> America's higher education institutions need access to information services on a readily available and reasonably-priced basis. This is critical for maintaining the excellence of our nation's higher education system, expanding learning and teaching options, and broadening the availability of information that is the heart and soul of education. The public switched telephone network can provide ubiquitous and easy interconnection between a variety of users and their specific systems.
>
> We believe that the Committee should approach this matter with great caution. Our nation's colleges and universities and their students and faculties need access to a wide variety of information services and technologies as soon as possible and as easily as possible. Delaying or complicating the entry of Bell companies will not help us achieve this goal.

The Committee also heard from organizations representing disabled Americans, expressing their strong opposition to H.R. 5096. One such letter (dated May 7) to Chairman Brooks was signed by the National Network of Learning Disabled Adults, Telecommunications for the Deaf, and The World Institute of Disability. That letter contained the following comments:

> Your introduction of H.R. 5096 reflects a failure to understand the interests of people with disabilities in an accessible telecommunications network . . . [Y]our bill rolls back the authority of telephone companies to build accessibility into public networks and the products they produce . . . [I]f the network is built to meet the needs of those of us with functional limitations of sight, hearing, mobility and learning, then it will be all the more functional for everyone else.

Another basic issue in this debate is job creation and job opportunities for American workers.[4] It's particularly notable that the two major telecommunications unions, the Communications Workers of America and the International Brotherhood of Electrical Workers, oppose H.R. 5096. In a letter dated May 12, 1992 to Chairman

[4] A recent study by the Wharton Economic Forecasting Associates (the "WEFA Group") projected that Bell company entry into information services would create 1.46 million additional jobs by the year 2001. That same study also predicted that Bell entry into the information services market would create a net increase of $110 billion in the nation's domestic product by the year 2001. WEFA Group is a leading international econometric consulting firm.

Brooks, the Communications Workers of America expressed the following concerns:

> Jobs are created by companies entering new markets or new lines of business within a given market. The MFJ line of business restrictions have inhibited job creation in this country by preventing seven of the nation's top thirty corporations from entry into expanding, growth oriented U.S. telecommunications markets. In order to invest in these promising market areas, the Bell companies may go overseas to create jobs but not here in the United States.
>
> While job creating opportunities in the U.S. are foreclosed by MFJ restrictions on the Bell companies, foreign companies are free to come here and exploit these markets . . . [W]e question whether our nation's domestic policy establishes a preference for foreign investment and the creation of jobs by foreign companies instead of promoting the growth of American companies . . . [C]odification of the MFJ restrictions would only make a bad situation worse in numbers of U.S. jobs, foreclosing adjustments in the face of changing competitive conditions."

The bottom line in this debate is American competitiveness and economic progress for all Americans. Virtually every day there is an announcement of a new technology, a new system, a new service, a new alliance, or another invention that carries data faster or more colorfully than before. Does it make sense to codify in a statute, restrictions that prevent such promising telecommunications entities as the Bell companies from participating in this information age revolution? Such a result is clearly not necessitated by the antitrust concerns involved. That concern can be fully addressed through aggressive regulation and the full enforcement of existing laws. Why should companies from Japan or France be allowed to enter telecommunications markets while at the same time we keep major U.S. companies out of those same markets? There is no question that we need a proper balance between regulatory safeguards and antitrust enforcement, on the one hand, and Bell entry into information services and manufacturing, on the other. We do not believe that H.R. 5096 reflects or achieves that proper balance.

HAMILTON FISH, Jr.
CARLOS J MOORHEAD.

ADDITIONAL VIEWS OF MR. HYDE

I firmly believe that the Regional Bell Operating Companies ("Bell Companies") should be allowed entry without delay into the telecommunications equipment and customer premises equipment manufacturing industries. I made clear this position in March of 1991 when I co-sponsored H.R. 1523, Representative Oxley's legislation allowing the Bell Companies immediate, regulated, entry into these markets. My vote in support of H.R. 5096 in Committee reveals no change of heart. It merely recognizes that H.R. 5096 provides appropriate statutory standards for deciding upon Bell Company entry into the information services industry. Unfortunately, these standards are wholly inappropriate for manufacturing and threaten America's ability to regain preeminence in this vital field.

The seven Bell Companies are among the largest and most technologically sophisticated corporations in America. They take in $80 billion in annual revenue, provide phone service to 80% of our nation's population, and control over half of our telecommunications industry's capital assets. America should be relying on these companies to put us in the vanguard of the worldwide telecommunications revolution. Instead, we have been busy erecting Chinese walls preventing them from using their invaluable telecommunications know-how and great store of available funds for manufacturing applications. Since their creation in 1984, the Bell Companies have been forced to turn away small American manufacturers with bold ideas for joint ventures and with urgent needs for venture capital. The Bell Companies have had no choice but to look for investment opportunities overseas. They have plowed back a paltry 1% or so of revenues into research and development because of a lack of ability to market their inventions. And, in the meantime, our telecommunications trade surplus has become a deficit, U.S. companies' share of new telecommunications patents has been plummeting, over 70 U.S. telecommunications companies have merged with or been acquired by foreign concerns, and AT&T, the largest domestic telecommunications manufacturer, has cut 60,000 manufacturing jobs. Over 190 U.S. telecommunications equipment manufacturers have joined in a coalition to support removal of the Bell Company manufacturing restrictions. The two leading unions in the U.S. telecommunications industry, the Communications Workers of America and the International Brotherhood of Electrical Workers, concur. I think we should heed their call.

Certainly, there must be regulatory safeguards ensuring that the Bell Companies will not engage in anti-competitive behavior once they enter the manufacturing industry. Such safeguards to protect independent manufacturers have already been devised and/or implemented. Among these are requirements that the Bell Companies only purchase equipment at open market prices when purchasing internally (and only from separate affiliates), that they grant independent manufacturers comparable opportunities to sell to them, that they grant these manufacturers all the technical information needed to meet specifications, and of course, that they do not cross-subsidize. After the regulations are implemented, all we must do is give the Federal Communications Commission adequate resources for enforcement.

To revive the American telecommunications manufacturing industry, the Bell Companies should be allowed to enter the fray as soon as possible. We cannot afford to wait the many years that will be required for the litigation generated by H.R. 5096 to run its course. We cannot afford to use a standard of review for Bell Company market entry ("no substantial possibility that [a Bell Company] could use monopoly power to impede competition . . .") that has been used ever since divestiture to keep the Bell Companies out of markets. It may very well be necessary to use the scheme envisioned by H.R. 5096 in contemplating Bell Company sale of information services. The Bell Companies generally have bottleneck control over the provision of local phone service, and non-Bell information service providers understandably fear pricing and service discrimination should the Bell Companies become their competitors. In the manufacturing field, however, the regulatory problems are not nearly as knotty, and the need for a reinvigorated American marketplace is paramount. I can see no reason to further delay the supervised entry of the Bell Companies into this industry.

HENRY J. HYDE.

ADDITIONAL VIEWS OF CONGRESSMAN CRAIG T. JAMES

I oppose H.R. 5096 because it violates the Constitution. When I was sworn in as a Member of Congress, I vowed to uphold the Constitution. I cannot in good conscience, vote for a bill which offends the Constitution.

I want to make it clear that I think Congress is responsible to produce legislation that will guide telecommunications policy. Such legislation, however, should encompass the entire telecommunications industry. There is no reason for Congress to embrace a bill that shapes the future of telecommunications, but applies only to seven companies bearing the name "Bell."

This bill violates the Constitution in two respects. First, it violates the principle of separation of powers. Second, it is a bill of attainder.

First, H.R. 5096 offends the fundamental principle of separation of powers. Our Constitution requires that Congress make the laws, not adjudicate or execute them. By attempting to "codify" the Modified Final Judgment (MFJ), the Judiciary Committee has crossed that line and attempts to fill the court's shoes.

The judge in the case involving AT&T and the Bell companies has already made decisions about the Bell's entry into various lines of business. This bill overturns those decisions and usurps the court's authority. It is not our function to intervene in a case the court has adjudicated since the 1984 breakup of AT&T.

Second, H.R. 5096 is a bill of attainder, forbidden by the Constitution. Article I of the Constitution, which established Congress's legislative authority, mandates that "no Bill of Attainder . . . shall be passed." A "bill of attainder" describes any law that legislatively inflicts punishment on named groups or an identifiable entity. Accordingly, legislation that singles out companies by name is an impermissible bill of attainder.

H.R. 5096, by naming the seven Bell companies, clearly violates the Constitution's prohibition of bills of attainder. The bill essentially exempts other similarly situated large local exchange carriers in a way that discriminates against only the Bell operating companies. As a result, while other similarly situated companies may enter into manufacturing, information services, and long distance, the seven Bell companies may not.

When the Judiciary subcommittee held hearings about the need for comprehensive legislation to curb monopoly abuses, I publicly expressed my concern about legislation that named specific corporate entities. I suggested that this was a violation of the Constitution, and recommended language which would apply to all telecommunication companies that could abuse their monopoly powers.

This bill violates the core principle of separation of powers, and is a bill of attainder. I am left with no other alternative than to vote against a bill I believe to be unconstitutional. Instead, I hope that Congress will address this critical public policy issue with legislation that applies fairly to everyone, not just companies bearing the "Bell" name.

CRAIG T. JAMES.

ADDITIONAL VIEWS OF HON. STEVEN SCHIFF

I would like to point out that I reluctantly supported H.R. 5096. I did support H.R. 5096 because there is a legitimate concern raised of cross-subsidization and mutual assistance by the seven regional Bell companies, between their regulated companies and possible future unregulated companies.

But, I use the term "reluctantly" because in my opinion the Brooks Bill goes too far. I strongly supported perfecting amendments during mark-up in full committee which would have eliminated the "waiting periods", eliminated "de novo" review, and changed the standing to file suit. I believe that under appropriate Congressional oversight, the regional bells should have greater latitude to participate in the economy.

I hope that we can improve the bill on the House floor.

STEVEN SCHIFF.

DISSENTING VIEW OF CONGRESSMAN GEORGE ALLEN

I am reluctantly opposed to this legislation as reported from the Judiciary Committee. I am opposed to the bill because it set arbitrary waiting periods, and subsequently, it would invite potentially unwarranted judicial injunctions against the entry of the Bell companies into these lines of business, even if it is clear that no anticompetitive effects would result. Clearly, this legislation goes substantially beyond the intent of the 1982 consent decree, which envisioned the eventual entry of the Bell Companies into these lines of business in a manner which would ensure fair competition.

I say that I opposed this bill with reluctance because I am concerned about the potential for unfair trade practices which could occur if adequate safeguards do not accompany the entry of the Bell Companies into those lines of business in which competitors are dependent upon the phone lines owned by the monopoly telephone companies. In these cases, the so-called "essential facilities" doctrine requiring equal access for competitors should be applied, and federal antitrust laws should be fully enforced. The Bell Companies should be required to maintain separate subsidiaries and cross-subsidization should be prohibited. In other words, the Bell Companies should not be allowed to use the profits from their local telephone companies to subsidize their other businesses. In addition, I have serious concerns about the unfair advantage the Bell Telephone Companies might have advertising and soliciting customers for the new services they are permitted to provide. I am particularly concerned about the potential effect of Judge Greene's 1991 decision regarding information services on the alarm industry. It is with substantial reluctance that I oppose this bill, although it has been somewhat improved by the Committee amendments.

A logical approach could be to prohibit the Regional Bells from soliciting information services, florist services, alarm services, etc. through their existing telephone businesses. Rather, these new services options would be "stand alone" enterprises.

We must promote healthy, fair competition in the telecommunications marketplace. Unfortunately, this legislation overreacts to the potential problems caused by Bell Company competition. And in doing so, it will impair full and fair competition in the domestic marketplace and our ability to compete with other nations in the development and marketing of new telecommunications technology. The bill will restrict consumer access to new products at the lowest possible price. This bill, rather than promoting fair competition, makes new technology and competition virtually impossible because of its impractical legal restrictions.

The Judiciary Committee did not hold hearings on this legislation. I think we ought to take a step back and consider a little more carefully the potential impact of this bill. Perhaps a solid fair competition, consumer oriented consensus can be reached on this important issue.

GEORGE ALLEN.

ADDITIONAL VIEWS OF CONGRESSMAN LAMAR SMITH

While I voted in favor of H.R. 5096, I did so with reservations. I strongly supported perfecting amendments during the full committee mark-up to eliminate the arbitrary waiting periods and "de novo" review. I still think the provisions of the bill are too heavy handed and believe significant changes can and should be made in the bill before it comes to the House floor for a final vote.

LAMAR SMITH.

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