S. HRG. 106–405

THE ANTITRUST MERGER REVIEW ACT: ACCELERATING FCC REVIEW OF MERGERS

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 467

A BILL TO RESTATE AND IMPROVE SECTION 7A OF THE CLAYTON ACT, WHICH WOULD IMPOSE TIME LIMITS ON THE FEDERAL COMMUNICATIONS COMMISSION REVIEW OF MERGERS

APRIL 13, 1999

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THE ANTITRUST MERGER REVIEW ACT: ACCELERATING FCC REVIEW OF MERGERS

TUESDAY, APRIL 13, 1999

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

The committee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine (chairman of the subcommittee) presiding.

Also present: Senators Kohl and Hatch (ex officio).

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

Senator DEWINE. Good morning and welcome to the Antitrust Subcommittee hearing on S. 467, the Antitrust Merger Review Act, a bill that will impose time lines on Federal Communications Commission reviews of mergers.

The reason that Senator Kohl and I have introduced this legislation is quite simple. The FCC is taking too long to review telecommunications mergers. Let me just mention one example, SBC and Ameritech. SBC and Ameritech announced their intention to merge in May of 1998 and formally filed their application in July. Two weeks ago, after 8 months of review, the FCC offered to start a "collaborative process" with the parties to examine five major areas of concern. Now, this process is supposed to conclude by the end of this June, more than a full year after the parties announced their merger. Quite frankly, this is just too long.

Let me be very clear. We want the FCC to conduct thorough investigations of these matters. When SBC and Ameritech first announced their proposed merger, Senator Kohl and I sent a letter to the FCC to request that the FCC give special attention to the competitive implications of consolidation in the telephone industry and the impact of the proposed SBC-Ameritech merger in particular. So we think the FCC has a role to play. Furthermore, I like the idea of the "collaborative process". I think it is a good idea to involve the parties and to involve them in an effort to resolve competitive concerns. I am hopeful the process will be a success.

But the FCC simply has to act more rapidly. In an industry that has been as active and vibrant as telecommunications, it is absolutely essential that the regulatory agencies move quickly and efficiently to resolve competitive issues. Merging parties and their competitors cannot be asked to wait in regulatory limbo month

after month after month, not knowing if or when a merger will be allowed, not knowing what conditions may be attached, and not knowing how the market will be structured in the future.

We are not, let me repeat, not trying to influence how the FCC decides the case, but no matter what the FCC decides on a particular issue, individual businesses need certainty. More generally, the industry needs prompt regulatory decisions so they can move more quickly towards full and vigorous competition. The FCC has to promote that competition, not stand in the way of competition by dragging its feet on review of mergers.

Just as important, as I have mentioned before, we must consider the employees of the merging companies. These individuals are often thrown into complete turmoil by the prospect of a merger. They do not know what is going to happen to their company. They do not know if they are going to have to move on or if they are going to lose their jobs. We need to be sensitive to these very understandable human concerns and do everything we can to get these people quick answers so that they can plan for their futures and figure out how they are going to provide for their families.

Before I turn to the ranking member of this subcommittee, Senator Kohl, let me just mention that most of you have probably noticed that S. 467 addresses more than just FCC time limits. In fact, much of the bill deals more generally with the Hart-Scott-Rodino Act. We are currently evaluating ways to amend Hart-Scott. Specifically, we are most focused on the possibility of modifying the $15 million filing threshold, which has not been changed since the law was first passed way back in 1976. Senator Kohl and I are working closely with Chairman Hatch and with the Justice Department on that aspect of the bill.

So we may do some more work on the overall framework of Hart-Scott, but for today and for today's hearing, we would like to focus on the section that specifically deals with FCC time limits. I am looking forward to hearing the testimony of our panel of four witnesses and I am sure that they will provide helpful insights as we prepare for a subcommittee markup at the end of this month.

Senator Kohl.

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

Senator KOHL. Thank you, Mr. Chairman. Our bill, the Antitrust Merger Review Act, is simple, effective, and straightforward. It sets reasonable time limits for the FCC to follow when it is reviewing license transfers. In other words, our bill says to the FCC: approve the deal, reject the deal, or apply conditions, but do not just sit on it.

Let me briefly explain why this measure is necessary. Companies, their employees, and their customers have all too often been at the mercy of a time-consuming merger review process in which the two lead agencies, the DOJ and the FCC, act in sequence and not in tandem, and that just does not make sense. Instead, we ought to place a reasonable limit on reviewing these deals.

The DOJ and the FTC both have deadlines under the Hart-Scott-Rodino laws, and the Federal Energy Regulatory Commission imposes its own 150-day deadline on most deals, and so there is no

compelling reason why the FCC should not have a deadline, as well. To my mind, there is a very good reason why we should place a shot clock on the Commission. They take too long to review these mergers, just as they often take too much time to review other matters.

For example, it took the FCC 16 months to rule on Bell Atlantic/NYNEX, and even on the smaller deals, the FCC also sometimes drags its feet. Take, for example, the attempts of Cumulus Media to acquire a handful of radio stations in South Carolina. It took more than 1 year—1 year—to complete that acquisition, even though the cost was well below the $15 million Hart-Scott-Rodino threshold and nobody opposed it. That is not only wrong, it is unacceptable.

Two weeks ago, the FCC proposed a collaboration with SBC and Ameritech. That is fine, and we agree with the issues the Commission has identified. But the FCC waited until 10 months after this merger was announced to take this step, hardly a self-imposed attempt to act expeditiously.

To be sure, unlike many in Congress, we do not seek to substantively change the FCC's ability to review mergers with a public interest test. From both a public interest and antitrust perspective, some deals ought to be rejected, and the huge wave of telecom and internet mergers clearly creates some concern.

But one thing is also true. There is across-the-board support for bringing more speed and certainty to this process, and we look forward to working with our witnesses, including my good friend, Richard Weening of Milwaukee, to do just that.

Mr. Chairman, let me make just a few additional points. Clearly, it is not our intention to slow down the review of smaller mergers that do not meet the Hart-Scott-Rodino filing thresholds by applying a time line only to the larger ones that do. So my inclination is to amend our bill to ensure that it applies to all FCC mergers, both big and small.

Finally, it is no secret that Congress is in the process of rethinking the Hart-Scott-Rodino thresholds. Senator DeWine and I are committed to working with other interested members, like Chairman Hatch, but we have not yet decided whether to make our measure the vehicle for doing so when we mark it up later this month.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Kohl, thank you very much.

Let me turn to the chairman of the full Judiciary Committee, Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Thank you, Senator DeWine.

I would like to begin by extending my appreciation to both Senators DeWine and Kohl, the chairman and ranking member of the subcommittee, respectively, for their tremendous efforts in bringing today's hearing and making it possible and beginning a meaningful dialogue on the important issue of FCC review of mergers in the communications industry.

In light of the increasingly numerous mergers in the communications industry and the ever-increasing importance of telecommunications services throughout our country and our society, whether it is telephone or internet services, I am pleased that we will have an opportunity to hear today from affected parties on some of the regulatory burdens faced by this industry.

As we see more and more mergers in the communications industry wait longer and longer to obtain approval from the FCC for their mergers, we have to pause and ask what is causing this delay. Unnecessary and unwarranted delays in the approval process could mean delayed competition in certain markets, delayed deployment of new technologies, and delayed delivery of services or improved services to consumers, whether they are in my home State of Utah or Ohio, Wisconsin, Minnesota, or anywhere else. We must determine what is causing this delay and whether it is warranted and we have to address it properly.

I believe that the legislation introduced by Senators DeWine and Kohl, S. 467, is an important step in the right direction in addressing some of the concerns. This legislation, based loosely on the Hart-Scott-Rodino merger review process, would impose time limits on the FCC's review of certain telecommunications transactions. Namely, it affects those transactions required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

The FCC has been increasingly ambitious in interpreting its statutory authority under sections 214 and 310 of the Telecommunications Act to assert jurisdiction over the telecommunications mergers that happen to include transfers of licenses. The Telecommunications Act provides the FCC with the authority to review applications to transfer licenses to ensure that "the public interest, convenience, and necessity" will be served.

Now, these are important functions and the FCC's activities and expertise in this area is very important. However, the Commission's regulatory authority is limited. It does not include review of every aspect of a merger and certainly does not include the review of the merger for its potentially broader competitive impact within the industry. That is a review properly performed and reserved to the antitrust enforcers in the Department of Justice and the FTC. As Commissioner Furchtgott-Roth wrote in his recent concurrence in the AT&T/TCI matter, the FCC's work "often duplicates that of the Department of Justice's Antitrust Division."

I look forward to working with my colleagues in the Senate, the FCC, the Department of Justice, and those in industry to ensure a proper procedure for the review of communications industry mergers that results in a fair and workable system for all Americans. I look forward to working with Senators DeWine and Kohl in addressing some of these issues by imposing certain time limits in the FCC review of the telecommunications mergers as proposed in this bill.

So I am proud of our two Senators in this area and the good work that they do on this subcommittee and the fine way that they work together in the best interest of the country and I look forward to hearing and reviewing the comments of those who are concerned here today, and I welcome all of you to the committee.

Senator DEWINE. Senator Hatch, thank you very much.

Let me now turn to our panel. Roy Neel joined the U.S. Telephone Association as President in January 1994. He is responsible for managing all the association's legal, regulatory, legislative, and technical activity. Prior to joining USTA, Mr. Neel served as President Clinton's Deputy Chief of Staff.

Russell Frisby, Junior, is the President of Competitive Telecommunications Association, CompTel. Immediately prior to joining CompTel, he was Chairman of the Maryland Public Service Commission, which exercises jurisdiction over all utilities, including telecommunications, within the State. Mr. Frisby previously practiced telecommunications law for 20 years.

Richard Weening is the co-founder and Executive Chairman of Cumulus Media, Incorporated. He has founded several other firms involved in publishing, broadcasting, online services, and electronic commerce.

Ronald Binz is the President and Policy Director of CPI, a consumer interest group and think tank he co-founded in March 1996. For 11 years before that, he directed the Colorado Office of Consumer Counsel.

We welcome all of you. Mr. Neel, we will start with you. Let me just state for the record that all the written statements that you have submitted will be made a part of the record and that you can proceed as you wish. Mr. Neel.

PANEL CONSISTING OF ROY NEEL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, U.S. TELEPHONE ASSOCIATION, WASHINGTON, DC; H. RUSSELL FRISBY, JR., PRESIDENT, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, WASHINGTON, DC; RICHARD WEENING, EXECUTIVE CHAIRMAN, CUMULUS MEDIA, INC., MILWAUKEE, WI; AND RONALD J. BINZ, PRESIDENT, COMPETITION POLICY INSTITUTE, WASHINGTON, DC

STATEMENT OF ROY NEEL

Mr. NEEL. Thank you, Mr. Chairman, and thank you and Senator Kohl for introducing this legislation that is much needed and to Chairman Hatch for his strong supporting remarks.

I represent more than 1,000 local telephone companies of all sizes, everything from very large companies like Bell Atlantic, SBC, and GTE down to some very small mom-and-pop operations. This legislation is needed for a variety of reasons and you have hit many of the topics here.

We certainly favor limiting the FCC review period to 180 days or less, and frankly, I think you could make an argument for completely eliminating FCC jurisdiction in this area except for management of spectrum. Basically, what happens is the Commission uses their interpretation of their very narrow mandate in reviewing mergers to extract concessions from these companies in a number of areas, frankly, far exceeding their mandate. It is clear that for smaller companies, this review should even be less time. We think it should be applicable to pending mergers, as well, and that this time line kick in once the applications are filed. So we think you are on the right track there.

Clearly, these delays are harmful. They are harmful both to the companies that are trying to join forces and compete. They hamper

the roll-out of new services because you basically have to put your business on hold until the FCC takes some action. It diminishes product innovation. It creates massive instability in the financial markets associated around these companies. It basically affects their fundamental competitiveness, not only here at home, allowing, say, a company like SBC/Ameritech to compete with a monster company like AT&T and TCI or even MCI WorldCom. It restricts their ability to create jobs. It is simply not fair to the employees who have to put their lives on hold.

A number of these mergers are beneficial, perhaps not all, but clearly the ones that relate to my companies, the Bell companies, the SBC/Ameritech and others, have clearly given additional resources, rolled out new services, and helped consumers, as well. Particularly, residential consumers are helped by this, consumers that are generally ignored by these new so-called competitors, as well as the AT&T/TCI, MCI WorldCom companies. They are simply left out in the cold here. It is these companies, the local telephone companies that continue to serve those customers, roll out new products and services. They keep rates low. They do not raise them capriciously. AT&T just slapped a $3 a month charge on its smallest consumers, probably to help pay for this mega-merger with TCI.

So residential companies are helped by these mergers that we are referring to. They provide one-stop shopping and they basically give them the resources they need to compete globally, as well, and create new jobs.

Let us just look quickly at a couple that have occurred. The Bell Atlantic/NYNEX merger added more than 4,000 service-related jobs, increased capital spending by $600 million, and will up to $6 billion. They invested more than $1 billion to open their local markets, this new joint company. They launched new social programs and improved customer care. The SBC/Pacific merger created 4,000 jobs, as well. Service installation times have improved significantly. Services such as new digital DSL services have been introduced, as well as other major community services.

Let us look at one of the mergers in question here, SBC/Ameritech. It is expected that 8,000 jobs will be created in this merger, new efficiencies. Thirty new out-of-region markets are planned to be entered. That means that this new combined company is going to go into 30 markets outside its area to compete with other Bell phone companies, as well as some of the mega-companies like AT&T, TCI, and so on. They expect to lay 2,900 miles of new fiber and 140 massive new switches and spend $25 billion in capital and operating expenses. The consumer ultimately wins.

Let me quote from a letter, just to really sum up the benefits in these mergers. This is from Morty Bahr, who you all know is the President of the Communication Workers, who certainly is no spokesperson for the Bell companies per se. He is writing to Chairman Kennard and he says,

> It appears that the "good guys," the companies that are creating thousands of jobs, are victims of the FCC's overzealous scrutiny while companies like MCI WorldCom, that are squeezing profits out of laid-off workers, are treated in a more favorable fashion. I fully understand your concern about the public interest, but where is the concern for the 200,000 employees of SBC, Ameritech, Bell Atlantic, and GTE who would like to get on with their lives in a much more secure environment?

So, clearly, we encourage you to move on this legislation, get it into the law. In the FCC's arbitrary use of this very narrow definition, that, by the way, in the 1996 Telecom Act, you took away from the FCC, and they are drawing on a very narrow loophole, a vague interpretation to essentially use this to squeeze concessions out of the very companies that will create jobs, innovate, and introduce new services to your constituents and throughout the country. This is good legislation that you have. We ask you to make some minor changes and we will support you in every way we can. Thank you.

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

[The prepared statement of Mr. Neel follows:]

PREPARED STATEMENT OF ROY NEEL

Mr. Chairman, Senator Kohl, and Members of the Subcommittee, thank you for having this hearing on this important topic and for the opportunity to be here today. I am President and CEO of the United States Telephone Association, which has for 102 years represented the local exchange telephone carriers. Today, USTA has over 1100 members who are extremely interested in the subject matter of this hearing and your merger legislation—S. 467. Mr. Chairman, we believe enactment of S. 467, with some slight modifications, will significantly improve the merger process at the FCC.

INTRODUCTION

The Federal Communications Commission (FCC) merger review process takes far too long, and the roles of the FCC and the Department of Justice (DOJ) continue to be overlapping and duplicative despite the attempted legislative reform on this very point by the authors of Section 601(b) of the Telecommunications Act of 1996 (1996 Act). Mr. Chairman, as you said on the day you introduced your merger bill which calls for an "Expedited Schedule for Review" by the FCC: "These mergers must be evaluated in a timely fashion so that the merging parties move forward. The longer these deals remain under review the longer the market remains in limbo and the longer it will be before we see the vigorous competition that we all want."

USTA believes the FCC merger review process ought to be statutorily shortened dramatically or even quite possibly eliminated altogether, except for spectrum management issues. The review by the FCC has become truly duplicative of the review by the DOJ. In an era of no barriers to entry and competition, FCC review of telecommunications mergers is an anachronism more consistent with the legislation from which the Communications Act was derived—the Interstate Commerce Act written for railroads in 1887—than the 1996 Act.

Moreover, the FCC's tendency to delay reviewing merger applications is shown by some examples from the chart attached to my testimony (see attached Appendix A). The chart catalogs the elapsed time periods associated with the review of several recent major telecommunications mergers. Look, for example, at a couple of the merger review periods for the FCC: the Bell Atlantic/NYNEX merger, for example, is the worst case at 16 months; the SBC/PacTel merger at 12 months; followed by the WorldCom/MCI merger at 10 months.

These delays greatly hamper the competitive rollout of new services, product innovation, and, ultimately, lower prices for consumers. Moreover, as you had mentioned, Mr. Chairman, markets remain in limbo as they wait for the determination of regulators. Unfortunately, fast paced, technologically savvy, and truly global markets—such as those in the telecommunications industry—cannot wait. Quite simply, if companies cannot quickly reorganize in a manner that enhances competition, delays in approval ultimately thwart the American consumer's ability to compete successfully with the world.

S. 467's legislative goal of limiting the time taken by the FCC in reviewing these mergers at a minimum is thus not only warranted, it is desperately needed. USTA favors limiting the FCC's review of telecommunications company mergers to 180 days or less from the time of filing with the FCC to the time of approval—this would include those mergers currently pending. If the FCC does not Act within 180 days of filing with the FCC, the merger should be deemed approved. For smaller telephone companies, USTA believes that the FCC should have an even more limited role with respect to these mergers.

CONSUMER AND COMPETITIVE BENEFITS OF TELECOMMUNICATIONS MERGERS

Mergers benefit both residential and business consumers because the combined resources of the merged companies allow for the development of a whole new range of products and services that are delivered to the consumers more quickly and packaged or bundled to fit their needs. Further, with the increased scale and scope of a merged company, the company is in a better position to compete. This increased competition brings down prices and givers consumers better service.

For business customers, mergers provide new suppliers of voice and data services that they demand. For instance, the merger of Bell Atlantic and GTE combines Bell Atlantic's market presence and GTE's long distance voice and data networking capabilities which provides customers with more choice and competition. Residential customers will also benefit from these mergers because as the scale and scope of the company increases, costs go down, thus allowing the more rapid deployment of such innovative services as broadband local-loop technologies like Digital Subscriber Line (DSL).

When Bell Atlantic merged with NYNEX, the merging parties said that there would be more jobs, more infrastructure investment, better service and open markets. I believe the track record of Bell Atlantic after the merger confirms that commitment. Since the completion of the merger, Bell Atlantic has added more than 4,000 service related jobs; increased capital spending by $600 million to $6 billion; invested $1 billion to open local markets; launched new social programs; and improved customer care.

I also believe that the same can be said for the SBC/PacTel merger. The President of the Communications Workers of America, Morton Bahr, in writing to President Clinton said "in the short time that SBC has had ownership of PacTel, we have seen jobs grow in California, good high tech union jobs * * *" Since the PacTel merger, SBC has added 4,000 new jobs; service installation and repair times have improved significantly; new services such as high-speed Internet access have been introduced; and charitable and community contributions have increased dramatically.

With respect to the SBC/Ameritech merger, I believe that you can expect similar results. SBC estimates that the merged company's entry into out of region markets will alone produce more than 8,000 new jobs. Further, SBC believes that the efficiencies gained through the merger will allow for quicker rollout of new products and services such as DSL. After the merger, they intend to enter the 30 largest markets outside of their combined territory; add an additional 2,900 miles of fiber and 140 new switches; and invest more than $25 billion in capital and operating expenses over the next ten years. Ultimately, the consumer was in this scenario.

The mergers will also spark competition by creating formidable domestic competitors for AT&T/Teleport/TCI and MCI/WorldCom. I might point out that Bell Atlantic, GTE, SBC, and Ameritech will continue to have business plans that include an active effort to serve residential customers with a full panopoly of services. Once merger approval is granted to these companies, and the FCC more fully opens the door for them to offer in-region, long-distance service, including advanced services such as high speed Internet access and data services, these companies will be local, interstate and international providers of services. Such an occurrence will only further compel the competitive zeal of all telecommunications providers, primarily inuring to the benefit of the consumer.

TELECOMMUNICATIONS GLOBALIZATION

The major telecommunications merges that the federal government is currently reviewing, as well as those they have considered over the past two years, are the inevitable consequence of the globalization of telecommunications. There is now a trend towards the formation of a half-dozen or so nationwide and worldwide telecommunications companies that can give customers the telecommunications and information services that they want. This explains the creation of large telecommunications providers like AT&T/Teleport/TCI/British Telecom, Sprint/Deutsche Telekon/France Telecom, WorldCom/MFS/UUNET/MCI, SBC/PacTel/SNET/Ameritech, and Bell Atlantic/NYNEX/GTE.

This globalization of telecommunications has been well publicized and has changed telecommunications markets throughout the world. The United States was one of the leaders in bringing this trend about through the passage of the 1996 Act, which opened the telecommunications service markets to competition. This U.S. action was followed quickly by the World Trade Organization Agreement on Basic Telecommunications Services which committed most of the world to open market concept embodied in the 1996 Act. The telecommunications equipment market in the U.S. had been opened to competition for decades due to the FCC's telephone equipment registration program. To play on this global level requires a massive capital

base—SBC/Ameritech will have annual revenues of $40 billion, but AT&T has $51 billion and Nippon Telephone has $71 billion. If American companies are to maintain world leadership in telecommunications, merges are an important ingredient.

MERGERS TO NOT RE-CREATE THE OLD BELL SYSTEM

I have heard it claimed that these mergers will just put the old Bell system back together, or at least have an old Bell system West and an Old Bell system East. This, of course, is not true. Predivestiture AT&T (the old Bell system) had a monopoly in three areas: long distance, local telephone service, and equipment manufacturing. None of these current companies (e.g., GTE, SBC, etc.) engage in manufacturing, nor do any of the Bell operating companies provide in-region interLATA wirelines long distance service. Also, predivestiture (1984) AT&T had the protection of markets legally to competitors. The 1996 Act swept away all of those legal barriers to entry. Markets are open—competition is thriving and will continue to do so in the future. Consumers will only benefit from merged companies that are better able to meet competition both domestically and internationally.

THE TELECOMMUNICATIONS ACT OF 1996

Section 601(b) of the 1996 Act was entitled "Antitrust Laws" and provided as follows:

(b) ANTITRUST LAW.—

(1) SAVINGS CLAUSE.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL.—Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.[1]

(3) CLAYTON ACT.—Section 7 of the *Claytong Act* (15 U.S.C. 18) is amended in the last paragraph by striking "Federal *Communications Commission.*"

Please take particular note of paragraphs *"(2) Repeal" and "(3) Clayton Act."* The 1996 Act specifically sought to limit the antitrust review and immunity of the FCC. So, the FCC's continuing uninterrupted and unchanged, but possibly an even more aggressive, role in the merger review process—even after the passage of these two cited paragraphs—comes as somewhat of a surprise to us. If the FCC's review of mergers was not intended to be in any way altered or diminished, why were these two paragraphs enacted? Just to eliminate the FCC's ability to grant antitrust immunity? We did not think so at the time of passage. Page 201 of the Conference Report for the 1996 Act, H.R. Conf. Rep. 104–458 at 201), reveals that the purpose of these changes was as follows:

> The new language contains a conforming change to clarify that these mergers will now be subject to Hart-Scott-Rodino review. *By returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill—to get both agencies back to their proper roles* and to end government by consent decree. *The Commission should be carrying out the policies of the Communications Act and the DOJ should be carrying out the policies of the antitrust laws.* The repeal would not affect the Commission's ability to conduct any review of a merger for Communications Act purposes, *e.g., transfer of licenses.* Rather, it would simply end the Commission's ability to confer antitrust immunity. [Emphasis added]

Doesn't it seem clear what congressional intent was here? Section 221(a), which was being repealed by Section 601(b)(2) of the 1996 Act, had authorized the FCC to determine whether any * * * *proposed* consolidation, *acquisition or control* will be of advantage to the person whose service is to be rendered and in the public interest * * *" In other words from 1934 to 1996, the FCC had a clearly specified statutory role in reviewing mergers of telephone companies, but the 1996 Act repealed that authority. Section 221(a) *was,* in other words, the FCC's merger authority. As the Conference Report indicates, Congress intended to *return* "* * * review of mergers in a * * * *competitive* industry in the DOJ * * *".

The FCC's role after the repeal of Section 221(a) and the Clayton Act repeal was intended—as we understood it at the time of passage and as the Conference Report seems to indicate—to reduce the FCC merger review role to a review of *"the transfer*

[1] Old Section 221(a), reading in pertinent part: *"* * * If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply * * *"*

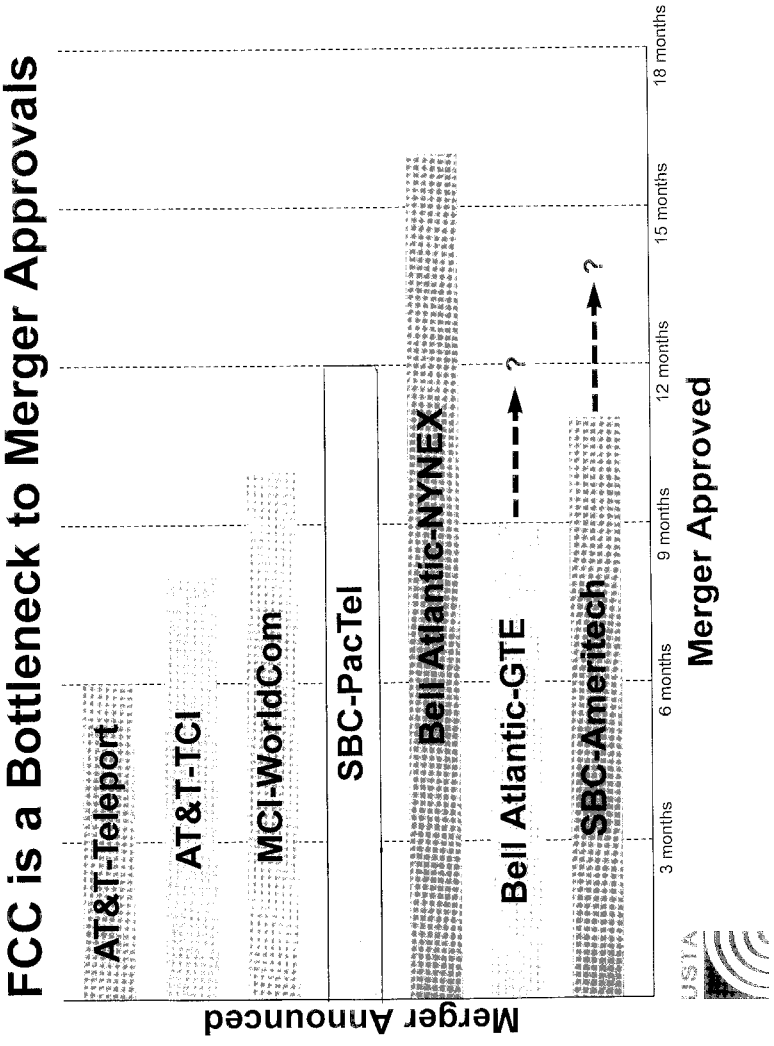
of licenses." The FCC's review, to which any of the companies on my attached chart can attest, surely goes well beyond the review of the *"transfer of radio licenses."* The merger review conducted by the FCC today are not materially different than they were before the passage of the 1996 Act, with the only real substantive difference being that today the FCC does not have the authority to confer antitrust immunity as that was also an aspect of Section 221(a). Despite congressional intent to return merger review authority to the DOJ, the FCC still reviews these mergers, asserting they have jurisdiction under Section 214(a) with respect to the acquisition and operation of lines; Section 310(d) regarding the transfer of radio licenses; and Section 4(i) authorizing the FCC to *"perform any and all acts * * * as may be necessary in the exercise of its functions."* In accord with congressional intent as witnessed in the 1996 Act, the FCC's authority to review mergers must be substantially reduced or eliminated altogether.

CONCLUSION

In speeding up and consolidating the merger review process, companies, markets and consumers benefit. American industries can better respond to and meet both domestic and international competition through more efficient, innovative and cost-conscious companies. Importantly, markets are properly served, with consumers receiving the competitive benefits of increased service quality, new choices, and lower prices.

Mr. Chairman, Senators, thank you for the opportunity to be here today. Should you have any questions, I'd be willing to entertain them at this point.

APPENDIX A


FCC is a Bottleneck to Merger Approvals
AT&T-Teleport
AT&T-TCI
MCI-WorldCom
SBC-PacTel
Bell Atlantic-NYNEX
Bell Atlantic-GTE
SBC-Ameritech
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?
Merger Announced
3 months
6 months
9 months
12 months
15 months
18 months
Merger Approved
USTA

Senator DEWINE. Mr. Frisby.

STATEMENT OF H. RUSSELL FRISBY, JR.

Mr. FRISBY. Thank you very much, members of the committee. As was mentioned, I am President of the Competitive Telecommunications Association, which is also known as CompTel. CompTel is the principal national industry association representing over 330 competitive telecommunications providers and their suppliers, including large nationwide carriers, as well as scores of smaller regional carriers. Our members include competitive local exchange companies, long distance carriers, resellers, fixed wireless, information service, ISP providers, equipment manufacturers, and vendors. We serve all sizes and kinds and types of customers throughout the country and throughout the world.

Thank you for giving me the opportunity to appear here today. Your longstanding commitment to examining the ramifications of mergers in this area is very much appreciated.

I would like to say a few words about telecommunications legislation in general and then give CompTel's perspective on S. 467. At the outset, CompTel strongly supports the Telecommunications Act of 1996 and just as strongly opposes any efforts to reopen the Act. The Act has made the development of local exchange competition possible by breaking monopoly barriers and permitting competitive entry through a variety of business strategies.

Thanks to the Act's market-opening provisions, entry by competitive local exchange carriers is increasing every day. These carriers are successfully winning new local customers and building new local exchange facilities. Unfortunately, competition has not grown as rapidly as anticipated in those areas where monopolies have failed to meet their obligations under the Act, but competition has, in fact, taken root. Given the opportunity, it will flourish.

CompTel is particularly concerned about certain kinds of assaults on the Act: First, efforts to legislate a date certain for RBOC entry into long distance; second, attempts to provide premature LATA boundary relief for RBOC's for inter-LATA data services, for example; and third, proposals to carve out any aspect of the incumbent's networks from the Act's market opening provisions.

It is my understanding that Chairman DeWine and Ranking Member Kohl also oppose efforts to reopen the Act and that S. 467 is intended only to provide some speed and certainty to the merger review process. Given this limited goal, which we support, great care should be taken to prevent the bill from being amended or expanded in any way that would alter the substance of the Telecom Act.

With that said, I would like to share CompTel's perspective on S. 467. We understand and endorse the policy behind the legislation, to speed the FCC process for approving mergers and acquisitions. In fact, CompTel would like to see the FCC move faster in many other areas, as well.

It is a fact of life in our rapidly growing and technology-driven industry that companies will merge and acquire. In the vast majority of cases, new combinations are not only pro-competitive, they are also critical to bringing the best technology and greatest efficiencies to the consumers. A few examples of competition-enhanc-

ing mergers are those of AT&T and TCI, MCI and WorldCom, Airtouch and Vodaphone, WorldCom and Brooks Fiber, Excel and Teleglobe. These mergers represent the combination of complimentary non-duplicative operations of companies to create facilities-based carriers that will compete effectively in many sectors of the economy.

Given the rapid changes we are experiencing in these markets, it is critical that policy makers permit such pro-competitive industry restructuring to move forward with ease and speed. For that reason, CompTel commends your efforts and endorses the goals of S. 467.

Furthermore, S. 467 properly recognizes that the FCC's merger review process is a critical safeguard of the public interest. In addition to determining whether a merger should move forward, the FCC's public interest analysis also provides an opportunity to create a more competitive environment by conditioning merger approval on market-opening actions.

In the vast majority of cases, the FCC's public interest review can and should take place within the time frame set forth by your legislation. It is important, however, to recognize that the telecommunications industry is still in transition from a monopoly model to a competitive model. As a result, some mergers involving the largest monopoly providers may require more time than your bill provides. Even these mergers, however, must be reviewed with speed. Nonetheless, under certain circumstances, forcing an untimely decision could have an adverse effect.

To that end, CompTel proposes a modification to S. 467 that would promote efficiency while ensuring the FCC has adequate time to evaluate new market combinations. We propose adding a mechanism whereby the FCC on a majority vote could extend the bill's 180-day time limit by 90 days. This provision would only be triggered in the rare number of circumstances where a combination is so important and raises such competitive concerns that the FCC cannot fairly consider the issues within 180 days.

In closing, let me reiterate our appreciation for your efforts to stimulate competition in the telecommunications market. We are encouraged to hear that Chairman DeWine and Ranking Member Kohl are developing legislation to ensure that all telecommunications providers have equal and nondiscriminatory access to buildings. Your commitment to ensuring that new entrants have a fair shot at winning customers and buildings is much appreciated.

Again, thank you for the opportunity to appear here today.

Senator DEWINE. Thank you very much.

[The prepared statement of Mr. Frisby follows:]

PREPARED STATEMENT OF H. RUSSELL FRISBY, JR.

Good morning. My name is H. Russell Frisby, Jr., and I am President of the Competitive Telecommunications Association (CompTel). Thank you for giving me this opportunity to speak to you about how changes in merger review policies would affect competition in telecommunications. Your longstanding commitment to examining the ramifications of mergers in this area is much appreciated. CompTel is the principal national industry association representing over 330 competitive telecommunications providers and their suppliers, including large nationwide carriers as well as scores of smaller regional carriers. Our members include competitive local exchange carriers (CLEC's), long distance carriers and resellers, fixed wireless, information service and Internet providers, equipment manufacturers and vendors.

I. OUTLOOK ON PROSPECT OF LEGISLATION GENERALLY

I'll say a few words about telecommunications legislation in general, then give CompTel's perspective on S. 467. At the outset, CompTel strongly supports the Telecommunications Act of 1996, and just as strongly opposes any efforts to reopen the Act.

The Act has made the development of local exchange competition possible by breaking monopoly barriers and permitting competitive entry through a variety of business strategies. Thanks to the Act's market-opening provisions, entry by competitive local exchange carriers is increasing every day,and these carriers continue to be successful in winning new local customers and in building new local exchange facilities. Although competition has not grown as rapidly as anticipated in those areas where the monopolies are not living up to their obligations under the Act, competition has, in fact, taken root. Given the opportunity, it will flourish.

This hearing is timely because we are at a critical juncture on the road to competition. One path leads to competition via the roadmap drawn out in the Telecom Act. The other path is an anticompetitive detour that is marked by proposals to circumvent the market-opening provisions of the Act. CompTel is pleased that the Supreme Court has upheld the FCC's local competition rules. We are hopeful that the Regional Bell Operating Companies (RBOC's) will finally commit themselves to complying with the Act and opening their local markets to competition, instead of circumventing Congress' intent through litigation and lobbying for legislation that would overturn the Act. The Act is working and it should be allowed to continue to do so. Any attempt to weaken the Act will leave local markets bottled up, destabilize competitive carriers, and deprive consumers of the benefits of local competition.

CompTel is particularly concerned, for example, about any efforts to legislate a date certain for RBOC entry into long distance, to provide premature LATA boundary relief for RBOC's (e.g., for interLATA data services), or to alter the law by carving out any aspect of the incumbent networks from the Telecom Act's market-opening provisions. It is my understanding that Chairman DeWine and Ranking Member Kohl also oppose efforts to reopen the Act, and that S. 467 is only intended to provide some speed and certainty to the merger review process. Given this limited goal, great care should be taken to prevent the bill from being amended or expanded in any way that would alter the substance of the Telecom Act.

II. OUTLOOK ON S. 467

With that said, I'd like to share CompTel's perspective on S. 467. We understand and endorse the policy behind this legislation—to speed the FCC process for approving mergers and acquisitions. In fact, CompTel would like to see the FCC move faster in many other areas as well. S. 467's goal is laudable: to get competitive combinations to market as soon as possible. It is a fact of life in our rapidly-growing and technology-driven industry that companies will merge and acquire. In the vast majority of cases, new combinations are not only pro-competitive but critical to bringing the best technology and greatest efficiencies to consumers. Many recent mergers have benefited consumers by bringing new services to the market, increasing the number of consumers who can access competitive services, creating new market capital, stimulating the development of new technologies, and increasing competition. Examples of such mergers include AT&T/TCI, MCI/WorldCom, Airtouch/Vodaphone, WorldCom/Brooks Fiber, and Excel/Teleglobe, just to name a few. Soon, the FCC will consider another pro-competitive merger, that of Frontier and Global Crossing. The combination of the complementary, non-duplicative operations of these two companies will create a facilities-based carrier that will compete effectively in many sectors of the U.S. and global telecommunications market.

Given the rapid changes we are experiencing in the telecommunications market, it is critical that policy makers permit such pro-competitive industry restructuring to move forward with ease and speed. An efficient merger review process helps stabilize the market, and it allows consumers, shareholders and even employees to make adjustments and move forward with new plans. For that reason, CompTel commends your effort and endorses the goals of S. 467.

Furthermore, S. 467 properly recognizes that the FCC's merger review process is a critical safeguard of the public interest. CompTel shares this view. In addition to determining whether a merger should or should not proceed, the FCC's public interest analysis provides an opportunity to create a more competitive environment by conditioning merger approval on market-opening actions.

In the vast majority of cases, the FCC's public interest review can and should take place within the time frames set forth in your proposed legislation. It is important, however, to recognize that the telecommunications industry is still in transi-

tion from a monopoly model to a competitive model. As a result, some mergers involving the largest monopoly providers may require more time than is provided in your bill. Even these must be reviewed with speed and be fairly resolved. Nonetheless, under certain circumstances, forcing an untimely decision could deny the FCC the proper opportunity to weigh all relevant factors, and to tailor a decision based on the individual merits of the merger request.

To that end, CompTel proposes a modification to S. 467 that would promote efficiency while ensuring that the FCC has the time it legitimately needs to evaluate the ramifications of approving a new market combination. We propose adding to the bill a mechanism whereby the FCC, on a majority vote, could extend the bill's 180-day time limit by 90 days. This provision would be triggered in the rare number of circumstances where a combination is so important and raises such competitive concerns that the FCC cannot fairly air the issues within the proposed 180-day limit. Creating such a release valve would accomplish the administrative efficiency goals of the bill, while still protecting the public interest.

Let me give you a few examples that demonstrate why such an amendment may be necessary. The proposed Bell Atlantic/GTE merger is one that presents serious, complex issues for the FCC to resolve through its public interest analysis. This merger almost certainly would impede, and potentially even eliminate, competition in the markets for local exchange, exchange access, long distance and Internet access services, for many reasons. First, by proposing to merge, Bell Atlantic and GTE have effectively agreed not to compete against each other and, as a result, their merger will severely diminish the potential for local competition in their respective territories. Second, the merger raises serious issues of compliance with section 271, the market-opening provision of the Telecom Act, because GTE provides interLATA services in Bell Atlantic's region. Bell Atlantic does not have section 271 approval to provide in-region, interLATA services in any state, and combining with GTE should not serve to relieve Bell Atlantic of any of its market-opening obligations. Third, even assuming that Bell Atlantic receives section 271 authority in even part of its region, the danger that the new entity would increase the cost of access in order to disadvantage its competitors is significant. Finally, CompTel has argued that the Bell Atlantic/GTE merger should be denied because of Bell Atlantic's lack of compliance with the conditions imposed in the Bell Atlantic/NYNEX Order.

Another example of a large RBOC that may raise public interest issues requiring more than 180 days to resolve is the proposed SBC/Ameritech merger. In this case, merger conditions can be a critical tool for precipitating competition—particularly local competition in those RBOCs' territories. RBOC's in general have been reticent to comply with the market-opening conditions of the Telecom Act—some more so than others. Where a more cooperative RBOC, such as Ameritech, attempts to merge with a less cooperative RBOC, such as SBC, much can be gained through conditions that prevent obstructionist behavior from contaminating the entire new enterprise.

SBC has been particularly slow to appreciate the need to open its local market to competition. An SBC/Ameritech merger could have an anticompetitive effect by spreading SBC's litigious corporate culture to Ameritech. Instead of working to comply with the market-opening elements of the Telecom Act in order to gain entry into the long distance market, SBC has challenged the very constitutionality of those provisions and others in court. SBC's antagonism toward the Act has been well noted. Last year, in response to an SBC request regarding its entry into long distance, a Texas PUC commissioner remarked that evidence demonstrated numerous instances of SBC's "lack of cooperation with [CLEC] customers and evidence of behavior which obstructs competitive entry." A second commissioner said that SBC needed to "change its attitude" and suggested that it drop some of its numerous lawsuits challenging its interconnection with competitors. Furthermore, when SBC took over PacTel, PacTel's competitive record changed for the worse. The prospect of SBC's management dominating the combined company, and bringing with it a hardened attitude toward competition in the region, is daunting.

In such a case, the FCC should be able to use its public interest authority to seek greater compliance with the Telecom Act in order to provide some assurance that competition—not concentration—is the result of the combination. If this can be worked out within the time frames of S. 467, all the better. But given the complexity and what is at stake, we would like to see the FCC given the flexibility of our proposal.

It has been suggested that the FCC needs little time to consider mergers because the bulk of the work is done at the Department of Justice. DOJ's analysis and its role in approving mergers, however, differs from the FCC's and thus one cannot substitute for the other. DOJ's role is primarily one of assessing antitrust concerns, while the FCC should make a broader public interest determination, generally con-

sidering the pro-competitive and deregulatory goals of the Telecom Act. Among other things, the FCC must consider whether a proposed transaction will open all telecommunications markets to competition and enhance access to advanced telecommunications and information services in all regions of the nation. Also, the FCC must consider whether the merger will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers. The legislation you are considering today correctly gives weight to the FCC's important and legitimate role to conduct merger reviews under the public interest standard. It is also important, however, to recognize that this mandate is broad and complex, and the FCC's ability to fulfill it should not be short-circuited.

In closing, let me reiterate our appreciation for your efforts to stimulate competition in telecommunications markets. We are encouraged to hear that Chairman DeWine and Ranking Member Kohl are developing legislation to ensure that all telecommunications providers have equal and non-discriminatory access to buildings. it goes without saying that competition cannot exist where only one market player can reach the consumer. In most cases, only the incumbent telephone companies are allowed access to consumers in apartment and office buildings at no charge. Building owners often demand steep fees from competitors for the same access. While we are committed to preserving building owners' rights to protect the integrity of their structures, granting preferential access to incumbents seriously impedes the ability of new market entrants to win customers. Negotiating access in a building-by-building fashion is costly and time consuming, and at best it leaves the new entrant at a competitive disadvantage vis-a-vis the incumbent. Thus, a national solution is needed to speed competition to these market segments. Your commitment to ensuring that new entrants have a "fair shot" at winning customers in buildings is much appreciated.

Again, thank you for the opportunity to appear here today.

Senator DEWINE. Mr. Weening.

STATEMENT OF RICHARD WEENING

Mr. WEENING. Good morning. Mr. Chairman, my own Senator Kohl, thanks very much for inviting me. I am here this morning to represent the views of Cumulus Media, upon which my testimony is based, and also the views of the National Association of Broadcasters. If I may, I would like to take the committee into the world of broadcasting and out of the world of telecom for just a moment because it is a little different for reasons that we will discuss.

First of all, let me say that Cumulus's mission really is to restore live, local, relevant, successful broadcasting in mid-size and smaller cities throughout the United States. We are, at the moment, the third largest radio broadcasting company in terms of number of stations owned. We serve 44 smaller cities across the country.

We like to think of ourselves as the poster child for the Telecommunications Act and the pro-competitive benefits that were promised by it. Our process is to acquire largely independent radio stations which in smaller markets have historically struggled to be relevant to their community for economic reasons. We assemble them into a shared infrastructure. We brand them as independent entities and develop them into vital parts of their community.

Over the year and a half to 2 years now that we have been acquiring radio stations in these markets, the FCC has processed for us over 60 transactions, and by and large, very efficiently. So I am not here to criticize the mass media bureau.

The delays started, really, a year ago when a couple of commissioners began to develop or express concern over the potential impact of consolidation generally, and as a consequence began to look for ways that the Commission could scrutinize more deeply or delay or possibly suspend approval of broadcast license transfers.

The beginning of the process was simple delay, and Senator Kohl has cited one of our more dramatic examples in South Carolina. I will give you another. In Grand Junction, CO, over a year ago, we filed for the one FM station, one small FM station and two AM stations to add to our existing cluster in Grand Junction of three radio stations. That application is still pending at the FCC and there is a collateral Department of Justice investigation going on.

Senator DEWINE. Excuse me. You filed it how long ago?

Mr. WEENING. In February of 1998, over a year ago.

Radio stations are delicate entities. Once the staff of a radio station understands that it is not going to be working for the seller, and FCC rules prohibit pre-control, so the buyer cannot go in and really control it or change the staff or make any determinations that are final with regard to staff, their heads turn elsewhere. It must be like the process that goes on in a lame duck Senator or Congressman's office. The work of that office turns to determining the next step in the staff's career, and it happens with radio stations, as well. It is very hard on the sellers because the value of their station deteriorates over this time and the buyers in these transactions often want to go in and renegotiate the transaction because the station has lost value during the delay period. So it wreaks a terrible hardship.

The question is, what is the source of the problem, and in broadcasting, possibly unlike telecommunications, the Congress very specifically laid out in section 202(b) of the Telecommunications Act how many radio stations an operator can own in a particular market, and it is based upon the number of signals that serve that market. The FCC's role under the Act is not to diminish it but it is largely ministerial. So we have concerns about whether or not the FCC even has the authority to do something here.

We have further concerns over the duplication of effort between the Commission and the Department of Justice. The Commission, as you know, is an administrative agency, and as such, it has unique processes, including the fact that if there is an in-market objection to a license transfer, the proceeding becomes restricted, meaning that members of the Commission cannot speak to the parties involved or to each other without very elaborate, difficult to follow notice requirements. So it is really impossible for them to investigate a transaction.

So we would say that if commissioners have a concern over the impact of consolidation, the most efficient and effective way for that investigation to take place is with the Department of Justice, which is staffed with very talented young lawyers who are capable of completing this investigation, although that really turns me to the third problem.

You have addressed it in part and have hinted that you may address it further with S. 467, and that is the fact that the process as I have described it really turns the Hart-Scott-Rodino Act on its head because Hart-Scott-Rodino intended to take small transactions that did not meet certain thresholds and did not really have an antitrust impact of significance and let them go through. What happens here is because our transactions are smaller than the Hart-Scott-Rodino threshold, there is no time deadline for the Department of Justice, and yet on the other hand, the FCC will not

approve a transaction until Justice has cleared it. That is their policy.

So, in effect, the agencies are interlocked in this effort. The bottom line is that in the absence of a clear deadline, the well-meaning, sincere staffers at the Department of Justice, who all have too much work to do, will continue with their process for very long periods of time and the FCC says, well, we are not going to act until then.

We would strongly endorse the spirit behind S. 467. We would ask you to amend it or clarify it in two ways. The clarification, we believe, should be that section 202(b) of the Telecommunications Act makes it very clear that the FCC's role here is to count stations and administer the work of the Act. In fact, their role in reviewing mergers was specifically removed from the conference version of the Telecommunications Act, so the clear will of Congress is known here.

So in making any change, we certainly do not want you to signal to the FCC that somehow the Telecommunications Act is changed and they now have an opportunity to review mergers in radio and television broadcasting. We do not believe that they do and we think that the Congress's work is pretty clear on that.

We would also ask you to do what I believe you intend to do, and that is to ensure that even small transactions are subject to the same time deadlines as the larger Hart-Scott-Rodino qualified transactions.

Thank you very much for hearing me out this morning.

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

[The prepared statement of Mr. Weening follows:]

PREPARED STATEMENT OF RICHARD WEENING

Good Morning, Mr. Chairman and Members of the Subcommittee. I am Richard Weening, Executive Chairman of Cumulus Media Inc. of Milwaukee, Wisconsin. Thank you for inviting my testimony. In addition to Cumulus whose experience forms the basis of my testimony, I am also here to represent the views of the National Association of Broadcasters which is also interested in the overall matters addressed by S. 467, the "Antitrust Merger Review Act", and the subject of today's hearing concerning the review of acquisitions and the transfer of licenses subject to Federal Communications Commission ("FCC") approval.

Cumulus Media Inc. is a radio broadcasting company focused on the acquisition, operation and development of radio stations in mid-sized U.S. cities. Arbitron ranks markets by size from 1 to 275. We generally focus on markets ranked 75 or smaller. Including acquisitions somewhere in the FCC approval and DOJ review process, we own 232 radio stations serving 44 cities across the United States. By number of stations, Cumulus is now the third largest radio station owner in the U.S.

This morning I would like to describe for the Subcommittee the experiences of my own Company and how those experiences illustrate the need for the type of legislative action you are considering.

THE TELECOMMUNICATIONS ACT OF 1996 AND ITS RESULTS

In Section 202(b) of the Telecommunications Act of 1996, Congress changed the rules as to the number of radio stations that one person or company could own or control in a city of a given size. The two-station "duopoly" limit was replaced with a new rule that allows ownership of 5 to 8 stations depending on the total number of stations providing service to the city. In making the new rules, Congress attempted to balance the urgent economic and competitive realities that dictated multiple-station ownership with the avoidance of undue concentration of control. To achieve this balance, the revised ownership limits were designed to help owners create "clusters" of multiple radio stations that could operate for less while delivering more to listeners and advertisers within their service areas and at the same time become or remain viable businesses. Subsequent experience has shown that five or

more stations operated as a cluster is not only critical to achieving operating economies of scale but essential to making radio competitive with other media. These multiple radio station clusters can afford to operate live and local programming on each station while sharing facilities and support personnel to reduce operating costs up to 20 percent. More importantly, multiple radio clusters can offer advertisers a range of choice and flexibility in demographic targeting which was previously only available from newspaper and television.

Competing with newspaper and television is a major change for radio. Here's why. Radio has always had a disproportionately small, 10 percent share of the total advertising pie. I say "disproportionately" because radio actually commands over 40 percent of the total time consumers spend with media. The conventional wisdom is that this anomaly is due in part to the fact that any single radio station format is targeted to reach only a single demographic target, while the sections of a newspaper and different television programs offer advertisers the choice of many targets. In short, for many advertisers television and newspaper offered more flexibility and was simply easier to buy. The multiple-station clusters can offer different stations like the sections of a newspaper, putting radio on a level playing field with entrenched newspaper monopolies and broadcast television. And to the extent that these new multiple-station clusters can access a share of the relatively much larger budgets historically allocated to newspaper and television, the radio business model becomes viable and everyone wins. The advertiser gets a real alternative to newspaper and TV. The listener gets a better programming product with live and local on-air personalities. the community gets a viable business.

In the mid-size markets we serve, the economic problems of radio are more severe and the positive impact of the Telecommunications Act is even more plainly evident. In the mid-size markets, multiple-station ownership is driving a renaissance for local radio giving small communities greater choice and diversity in music and sources of information. Local advertisers also stand to benefit from the diverse formats and broad reach of the stations, and the ability to negotiate competitively priced advertising buys.

I did a little research into whether the members of Congress who framed the Telecommunications Act understood the unique economics of radio in the mid-size and smaller markets. In fact, they did. They appreciated the special challenges facing radio in the smaller markets and created tiers in the statutory ownership limits to permit consolidation of station ownership in both smaller and larger markets. As Senator Burns observed when considering that legislation, radio ownership restrictions in mid-size and smaller markets "handcuff broadcasters and prevent them from providing the best possible service to listeners in all of our States." 144 Cong. Rec. 92, S7904 (June 7, 1995). Similarly, Senator Pressler noted that, following earlier FCC liberalization of radio ownership restrictions, "economies of scale kicked in, stations gained financial strength in consolidation and competition for advertising improved." 141 Cong. Rec. 94, S.8076 (June 9, 1995). The legislation's proponents accurately foresaw an "immense resurgence and burst of energy from new companies" following the further ownership deregulation in the Telecommunications Act. 141 Cong. Rec. 95, S.8198 (June 12, 1995) (statement of Senator Pressler).

The Telecommunications Act has had exactly the effect intended by Congress. In all markets, but particularly where help is needed the most—the smaller markets—radio is undergoing a renaissance characterized by more live and local programming, more advertisers, more revenue and more service to the community. This has resulted in intense new competition for newspaper and television.

Our Company, Cumulus Media Inc., is the poster child for the procompetitive benefits of the Telecommunications Act. Our rapid development of radio station clusters in 44 mid-sized markets over the past two years aptly illustrates the "immense resurgence" and "burst of energy" envisioned by that Act.

The Cumulus strategy is exactly with the Act envisions. We acquire independently owned radio stations and combine them into a cluster to share infrastructure resources like engineering, accounting, physical facilities and the like. This allows us to cut operating costs anywhere from 10 percent to 20 percent. We then shift a significant portion of the cost savings into improving programming with live on-air talent and substantially upgrading and expanding the sales organization. We employ sophisticated research techniques to ensure that each station is delivering the product the listeners want. We brand each station as a separate entity. Each station has its own programming director to manage the product and its own sales manager to coordinate the sales team. Because of economies of scale, we have the ability to access the public capital markets to pay for these improvements. The result is a revitalized group of stations capable of increasing market share against newspaper, television and other media by delivering more choice to advertisers and a better product to listeners.

We also know that, contrary to the understandable fears and expectations expressed by some FCC Commissioners, consolidation in radio means more, not less, localism and more, not less, diversity in programming. I am pleased to say that we are making this happen every day in 44 cities across the nation.

THE FCC AND DOJ REGULATORY REVIEW PROCESS

In the initial period following passage of the Telecom Act, most radio consolidation activity was occurring in the larger markets, and the FCC did not play a significant role in reviewing market concentration. The Department of Justice ("DOJ") reviewed many of these transactions under the Hart-Scott-Rodino ("HSR") Act because they were generally large mergers involving multiple markets that met the HSR size thresholds. The HSR statute required advance notice to the DOJ, but also required the DOJ to conduct its review promptly, within the specified statutory time periods.

In a number of these larger merger cases where DOJ had competitive concerns, the parties agreed to spin-off several stations in one or more cities to satisfy those concerns. At the same time, the FCC would generally grant the license transfer applications in a timely manner.

As the Telecom Act moved into its second and third years (1997 and 1998), radio consolidation moved to mid-size markets, with Cumulus and several other companies leading the way. Cumulus began making its acquisitions in mid-1997, and we accelerated our activity rapidly over the next year.

Initially, the DOJ was not active in investigating mid-size market transactions, as most were not reportable under the HSR Act. The FCC also was acting fairly promptly on license transfer applications. In fact, Cumulus alone has completed over 62 radio acquisition transactions, and by and large the FCC's Mass Media Bureau staff has processed these very efficiently and promptly. I believe the FCC staff should be commended for its diligent efforts to keep up with a sharply increased workload in this area.

However, beginning about a year ago, FCC applications for a number of transactions, including some filed by Cumulus, began to slow down considerably due to some internal debate regarding the proper role of the FCC in reviewing these transactions for market concentration concerns. The Mass Media Bureau Staff and the FCC Commissioners appeared to be considering adoption of policies or processing guidelines based on levels of radio advertising revenue shares—even where the license transfer applications fully complied with the numerical station limits set forth in the Telecom Act.

What eventually developed is the current FCC practice of issuing "special" public notices regarding license transfer applications. As we understand it, these notices invite public comment on market concentration issues whenever a license transfer application would result in the buyer's acquiring 50 percent or more, or the buyer and another radio owner acquiring 70 percent or more, of the radio advertising revenues in a local Arbitron Metro (as measured by the standard industry revenue estimates compiled by BIA Research, Inc.). To date, however, the FCC has not issued any rule or formal policy statement on this practice, and the FCC has not articulated exactly what policy objective it is trying to achieve.

At the same time, the DOJ has become much more active in investigating radio acquisitions in the mid-size and smaller markets. Cumulus alone has pending acquisitions in at least five markets currently under review by the DOJ. None of these transactions was reportable under the HSR Act, and some of these transactions involve purchases as small as $1.5 million in radio advertising markets as small as $5 million in total revenues.

We understand that, in general, it is the FCC's policy not to act on license transfer applications while a DOJ investigation is pending. The DOJ also files comments in response to some of the FCC's "special" public notices, while continuing to investigate the same transactions. The current administrative process thus effectively postpones action on any license transfer application until the DOJ completes its review, and the DOJ is able to proceed at its own pace since HSR timetables generally do not apply.

THE PROBLEMS WITH THE PROCESS

Cumulus has three primary concerns with the way in which our and others' applications for transfer of licenses are currently being handled by regulatory authorities. *First,* we and other firms believe that the Act already specifies the number of radio stations that could be owned in any one market, and thus that the FCC does not have a proper role to play in formulating a different policy. When the FCC begins to decide, on a case-by-case basis, that particular applications will not be approved on the grounds that the number of stations results in too much market concentra-

tion, the FCC is second guessing the policy judgment that Congress has already made. We do not think the FCC's authority to implement the "public interest" standard allows the Commission to substitute its judgment for that of Congress on a subject specifically dealt with in the statute. Nor has the Commission offered any criteria for deciding how, when or under what circumstances the public interest should dictate that approval for a particular acquisition should not be granted because of undue market concentration, even if it is within the numerical limits specified by Congress.

Second, it is simply not a sensible use of government resources for the FCC to review acquisitions based on the same market concentration and antitrust concerns that the DOJ already considers. As an administrative agency, the FCC has unique procedures which are not designed to accommodate the give-and-take nature of the factual investigation and discussion which characterize an antitrust investigation and which the DOJ typically undertakes. For example, if a petition to deny has been filed against a transfer application before the FCC, the action becomes a restricted proceeding. No one connected with the case can discuss it with the FCC staff or the Commissioners, and the Commissioners cannot discuss it with the affected parties or among themselves without complying with burdensome notice requirements. There is no opportunity, as there is with the DOJ, to provide the FCC with pertinent information, to interpret it for the staff and to debate with the staff the issues relevant to the acquisition. The only way to circumvent these restrictions is either for the Commission to deny the petition outright or for the Commission to designate the matter for hearing, a costly proceeding which will almost invariably result in a scuttling of the transaction to be investigated.

Third, the unusual combination of the small size of the typical Cumulus acquisition and the need to obtain FCC approval for the acquisition means that the Hart-Scott-Rodino Act has been turned on its head: not only does the government now investigate small radio acquisitions, but it faces no time deadline in doing so. Let me explain what I mean. The Hart-Scott-Rodino Act suggested that acquisitions below the "radar screen" of the statute, by virtue of their size, were not of sufficient antitrust concern to warrant pre-merger notification. The HSR Act imposes time limits for large acquisitions by which the DOJ or the FTC must take certain steps or request additional information if either agency intends to challenge a merger before it is consummated. But no acquisition of a radio station, no matter how small, can be consummated without the approval of the FCC. And no time limits constrain the DOJ in radio acquisitions that are not subject to the HSR limits. The peculiar arrangement between the FCC and DOJ that I outlined above means that either agency can take as long as it chooses to investigate whatever it wants regarding a pending transaction. The result is that the parties to these relatively small transactions often must endure very lengthy and costly regulatory reviews that are not applicable to much larger transactions, without clear standards or certainty of outcome. Cumulus strongly believes that service to radio listeners—which should be the primary concern of the FCC—is adversely affected by the blocking or delay of efficient consolidation transactions.

THE CUMULUS EXPERIENCE

A few examples of Cumulus transactions that have been caught up in this uncertain regulatory process for over a year may help illustrate the problem to this Subcommittee.

One case involved the consolidation of several radio stations in Florence, South Carolina and surrounding areas which has not been viable on their own. Cumulus filed license transfer applications with the FCC beginning in February 1998 to require the stations. None of these applications were contested before the FCC by any listener, advertiser, or competing station, and the grant of these applications did not require a waiver of any rule or published policy of the FCC. Nevertheless, the FCC staff informed us that action upon the license transfer applications was being deferred due to potential concerns relating to the percentage of radio advertising revenues involved, and because the DOJ had opened an investigation into the proposed acquisitions. Persistent efforts to obtain FCC action on the applications were unsuccessful.

We were not contacted by the DOJ until July 1998. At that time we voluntarily provided various requested information to assist the DOJ in reviewing the transactions. Several months later in October 1998, the DOJ subsequently issued civil investigative demands to Cumulus and the various sellers seeking additional information. During this period, in response to repeated requests by the applicants and even by a member of this Subcommittee, the FCC Staff indicated that it would con-

tinue to defer action on the license transfer applications pending completion of the DOJ's investigation.

While working hard with the sellers to keep these deals together, we continued to cooperate with the DOJ in its review, submitting considerable information and documents and meeting with the DOJ Staff. After approximately seven months of inquiry, the DOJ closed its investigation and informed the FCC that it had done so in February 1999. Approximately six weeks later, on March 24, 1999, the FCC finally granted the license transfer applications. This was over 13 months after the first application had been filed (on February 26, 1998), and nearly ten months after the last of the three applications had been filed (on June 2, 1998).

In another case, Cumulus is proposing to acquire one small FM station and two small AM stations to combine with its existing group of three stations in the city. The FCC license transfer application was filed in February 1998 and remains pending. The DOJ first asked the parties for information about the transaction in September 1998, six months after the application was filed. The DOJ investigation remains open, while FCC action on the license transfer application is deferred. There appears to be no clear end in sight, some 14 months after the parties agreed to this transaction.

More recently, the FCC has flagged the acquisition of a small AM station with negligible revenues, merely because the revenue shares (as reported by BIA Research Inc.) cross a certain threshold for the entire cluster, giving no regard to the fact that the flagged acquisition has no impact on the share of the cluster in the market. This station is very poorly operated, out of dilapidated facilities and is fought with technical problems, including a collapsed tower. By preventing Cumulus from using its resources to upgrade, promote and effectively program the station, the Commission is going against its objective of enhancing service to listeners by leading the station to further deterioration.

Delays of this sort inevitably disrupt these transactions and cause serious financial hardship to the parties, especially to the small independent operators who are trying to sell their stations and realize a return on their many years of hard work and investment. In addition, the delays often end up causing further deterioration of the radio stations due to the extended period of uncertainty regarding who will own the stations and employ the professionals working in these stations, and due to FCC rules prohibiting buyers from prematurely acquiring control of the stations.

Radio stations are delicate businesses that must be very carefully managed if they are to be completely viable and provide the services that listeners and advertisers demand. This cannot be accomplished where ownership changes are accompanied by long and uncertain regulatory delays.

S. 467 AND ITS OBJECTIVES

S. 467 appears to be designed to correct these problems by constructing an orderly administrative process and timetable. However, as presently written, it does not appear to address Cumulus' particular situation since our relatively small transactions fall outside the HSR process. Neither the HSR Act nor the Telecom Act requires that the FCC or the DOJ act in any particular timeframe in reviewing and approving these transactions. Further, the Telecom Act already places limits on the number of stations a person or company can own in a particular market, yet the FCC continues to adopt an unwritten, informal policy of its own of blocking acquisitions for market concentration issues. The result is a process that appears to frustrate the overall goal of enabling radio broadcasting in mid-size and smaller markets to consolidate and become more competitively viable.

In solving the problem by mandating use of an orderly process with a timetable, we hope the Committee will avoid signaling the FCC that it has the authority to duplicate the role of the DOJ in conducting reviews of market concentration. This would further frustrate the intent of the Telecommunications Act by giving to the FCC an authority that Congress very specifically decided not to grant. Some FCC Commissioners believe that the FCC has an obligation to review concentration pursuant to its mandate to ensure license transfers are in the public interest. Since the DOJ and not the FCC possesses the professional skills, experience and process necessary to conduct a full investigation of market concentration, it is only appropriate for the DOJ to conduct such reviews.

I therefore urge the Subcommittee to consider appropriate modifications to the bill to include smaller transactions and to write the bill to ensure that the FCC does not continue to duplicate the proper role of the DOJ. As the process currently operates, it is not "good government" and threatens to undermine what the Congress wanted to achieve in the Telecommunications Act of 1996.

I thank you again for the opportunity to testify at today's hearing.

Senator DEWINE. Mr. Binz.

STATEMENT OF RONALD J. BINZ

Mr. BINZ. Thank you, Mr. Chairman. Mr. Chairman, members of the committee, my name is Ron Binz. I am President of the Competition Policy Institute. We are a nonprofit organization that advocates State and Federal regulatory policies to bring competition to consumers in energy and telecommunication markets. We are funded by grants from a variety of telecommunications providers, mainly new entrants, and advised by a board of consumer advocates from across the country.

I would like to begin by thanking the chairman for holding this hearing to examine the process by which the FCC considers mergers of telecommunications providers. This is a most important topic. In my written testimony, I describe how significant mergers between telecommunications companies may affect the health of local exchange competition. Our conclusion is that mergers can either hold great promise for consumers or threaten great harm to their interest.

On the one hand, some mergers can actually assist competition by putting together industry players with complimentary resources needed to break into markets dominated by an incumbent or by a small group of service providers. On the other hand, some mergers can hurt consumers by retarding the development of competition in telecommunications markets. This happens when mergers strengthen the existing fortresses of some dominant incumbent providers and remove would-be competitors from the field.

It is no exaggeration to say that the FCC's decisions about mergers will determine whether consumers see the promise of the Telecommunications Act of 1996. But whether the FCC approves or denies a merger, we must agree that both consumers and the companies proposing to merge deserve an answer, and hopefully the correct answer, in a timely fashion from the FCC.

State and Federal telecommunications regulations must change to accommodate a dynamic marketplace that no longer resembles the industry organization that existed when these agencies were created. But let me be clear. I am not advocating less FCC scrutiny of mergers, only that the agency focus on getting the job done quickly and efficiently. The result of this legislation should not be that the standards for merger review are lowered. Indeed, we are deeply concerned about the rapid consolidation of major players in the telecommunications marketplace.

We strongly support the FCC's continued public interest review of telecommunications mergers. In cases where a merger will hinder the development of competition, we hope passage of this legislation will mean that the FCC says no quickly to such mergers.

The FCC's jurisdiction in mergers is distinct from the Department of Justice, both in the standards they apply and in the authority that they have. There is a rich history of court decisions interpreting the public interest test and we believe that the FCC properly should continue that review.

With regard to the legislation, we have made three points in the testimony. First, that it is reasonable to apply workable time lines on the FCC's review. Second, that the legislation should preserve

the flexibility needed by the FCC to conduct thorough merger reviews. And third, by modifying the process by which mergers are reviewed by the FCC, the legislation should not have the unintended effect of limiting the FCC's ability to obtain information necessary to render its public interest determination. In my written testimony, I suggest areas in which the bill could be improved to accommodate these three points.

Of course, this discussion about the FCC's merger review authority and the appropriateness of time frames does not occur in the abstract. In particular, there are pending applications before the FCC right now between large incumbent local exchange companies that cause us some concerns. We have filed comments at the FCC to the effect that the mergers in some cases eliminate potential competitors, and in the case of SBC/Ameritech, an actual competitor in each of their regions.

We are concerned that those proposed mergers will strengthen the ability and the incentives of the incumbents to drag their feet in opening up their markets. They also will reduce the number of companies that can be used for benchmarks to compare companies against each other.

To conclude, Mr. Chairman, regulatory delay is a blunt instrument. While it might, arguably, sometimes delay the effect of bad things, it also delays the implementation of beneficial effects and creates uncertainty in markets. Ultimately, it is difficult for regulators to be creative by using regulatory delay. It is far preferable for consumers and telecommunications providers alike if regulators make the hard choices and make them expeditiously.

We appreciate the opportunity to testify today in support of S. 467. We believe that it is good regulatory practice and good law for regulators to perform their functions as quickly and efficiently as possible. While this has always been true, it is especially true now as we move from an era of regulated industries into one in which market forces will be relied upon to constrain prices and provide consumers with choice. We hope our suggestions for improving S. 467 are helpful to the committee and look forward to working with you and your staff as this legislation moves forward.

[The prepared statement of Mr. Binz follows:]

PREPARED STATEMENT OF RONALD J. BINZ

Mr. Chairman and Members of the Committee, my name is Ronald Binz. I am President of the Competition Policy Institute (CPI). CPI is a non-profit organization that advocates state and federal policies to bring competition to telecommunications and energy markets in ways that benefit consumers. CPI was created in 1996 and participates in numerous matters before the Federal Communications Commission (FCC), state regulatory commissions and the courts. In our first three years, we have made nearly one hundred filings at the FCC in sixty different cases. For eleven years until 1995, I was the state utility consumer advocate in Colorado, representing consumers before state regulators and the courts. I have served on the Northwest Reliability Council to the FCC and I currently serve as co-chair of the North American Numbering Council, which advises the Commission on telephone numbering policies. With this background, I am very familiar with regulatory processes and how they affect consumers and the competitive marketplace. Thank you for the opportunity to testify today on S. 467, The Antitrust Merger Review Act.

I. INTRODUCTION

I wish to begin by congratulating the Committee for holding this hearing to examine the process by which the FCC considers mergers of telecommunications pro-

viders. This is a most important issue. In this testimony I describe the state of local telephone competition and explain how significant mergers between telecommunications companies may affect the health of local competition. Our conclusion is that such mergers can either hold great promise for consumers or threaten great harm to their interest. On the one hand, some mergers can actually assist competition by putting together industry players with the complementary resources needed to break into markets dominated by an incumbent or small group of service providers. Some mergers can also benefit consumers if companies are able to spread fixed costs over more unit sales, reducing costs to consumers. Such cost advantages are the root of competitive pressure on prices. On the other hand, some mergers can hurt consumers by retarding the development of competition in telecommunication markets. This happens when mergers strengthen the existing fortresses of some dominant incumbent providers and remove would-be competitors from the field. It is no exaggeration to say that the FCC's decisions about mergers will determine whether consumers see the promise of the Telecommunications Act of 1996.

But whether the FCC approves or denies a merger, we must agree that both consumers and the companies proposing to merge deserve an answer (and hopefully the correct answer) in a timely fashion from the FCC. As I will discuss later, state and federal telecommunications regulation must change to accommodate a dynamic marketplace that no longer resembles the industry organization that existed when these regulatory agencies were created. In short, regulators must put themselves under pressure to speed up the decision process so that it assists and does not hinder, the progress of competition.

But let me be clear: I am not advocating less FCC scrutiny of mergers, only that the agency focus on getting the job done quickly and efficiently. The result of this legislation should not be that the standards for merger review are lowered. Indeed, we are deeply concerned about the rapid consolidation of major players in the telecommunications marketplace and strongly support the FCC's continued "public interest" review of telecommunications mergers. In cases where a merger will hinder the development of competition, we hope passage of this legislation will mean that the FCC says "no" quickly to such mergers.

With this important caveat, CPI supports the thrust of this legislation. It is appropriate to ask the FCC to act on mergers within reasonable time frames. Ultimately this will benefit both the industry and its consumers.

In his statement when introducing S. 467, Chairman DeWine recognized the importance of the FCC's role in evaluating mergers and stated that this bill does not limit the scope of FCC review. He also made the point that the FCC's review of mergers should be timely and cited the significant effect that mergers can have on competition. In his statement at bill introduction, Senator Kohl made the point that the FCC's review is distinct from the review of the Department of Justice and cited the positive effects on competition that can be achieved under the FCC's "public interest" review. We agree with these sentiments of both of the bill's sponsors.

My testimony begins with a review of the state of local exchange competition and the effect that mergers might have on that progress. Next, I will make three points about S. 467:

- It is reasonable to create workable time lines to ensure prompt consideration and resolution of merger applications by the FCC.
- This legislation should preserve the flexibility needed by the FCC to conduct thorough merger reviews and to adopt conditions that serve the public interest.
- By modifying the process through which mergers are reviewed by the FCC, the legislation should not have the unintended effect of limiting the Commission's ability to request and receive information necessary to render its public interest determination.

Next, I suggest some ways in which the legislation can be improved. Finally, I comment on the competitive and consumer issues raised by the two pending mergers of large local exchange companies, SBC/Ameritech and Bell Atlantic/GTE.

II. THE STATUS OF LOCAL TELECOMMUNICATIONS COMPETITION

Before turning to the legislation, I would like to review the status of development of local exchange competition. Our review of the marketplace demonstrates that local telephone competition is growing steadily, and will continue to expand in the next few years. This means that the local competition goals of the Telecommunications Act of 1996 are beginning to be met, albeit slowly.

- *Number of CLEC's:* The number of CLEC's entering the market has also grown significantly since passage of the 1996 Act. As an example, the FCC reports that there are now 146 CLEC's holding telephone numbering codes, compared with only 13 at the end of 1995.

• *Access Lines Served by CLEC's:* Merrill Lynch estimates that the number of access lines served by CLEC's has grown from 2.1 million at the end of 1997 to 4.7 million at the end of 1998. The FCC's industry analysis estimates CLEC's serve between 4 and 5 million switched access lines, or about 3 percent of nationwide switched access lines. A recent report by Solomon Smith Barney Holdings Inc. (New York) notes that competitive service providers have surpassed the Bell Companies in growth of business access lines. The report notes the Bell Companies added 461,000 new lines in the first quarter of 1998, while competitors gained 498,000. The competitors' gains were more than triple the number of business lines they added in the first quarter of 1997.

• *CLEC Revenues:* The CLEC's took in approximately $5.4 billion (annualized) revenue in the 4th quarter of 1998, compared to $2.8 billion in the 4th quarter of 1997.[1] This information is confirmed by a recent report issued by the FCC that estimates the revenues of the CLEC's doubled from 1996 to 1997 to about $3 billion.

• *Capital Investment by CLEC's:* As reported in a telecommunications trade magazine, local competitors attracted more than $8 billion in high-yield and equity financing, according to brokerage house Bear, Stearns & Co. Inc. (New York) in 1997 alone. That is almost a sixfold increase from the CLEC capital raised in 1995 and nearly a 30 percent jump from 1996's level.[2]

Despite these encouraging statistics, it will be several years before the local telephone market can be said to be competitive: collectively the CLEC's still serve a small percentage of the local telephone market, primarily business customers. Local competition has a long way to go. One way to illustrate the pace of its development is to consider how many access lines competitors will have to gain in order to make significant inroads into the incumbents' market share. CPI estimates that CLEC's will need to win 42,000 new customer lines every business day for the next five years simply to capture just 30 percent of the nation's access lines. This is a tall order. According to Merrill Lynch, CLEC's gained an estimated 670,000 lines in the third quarter of 1998, or about 10,300 lines per business day. This means the CLEC's are far behind the 42,000/day pace needed to secure just 30 percent of the local market within five years.

III. THE FCC'S ROLE IN PROMOTING LOCAL COMPETITION

For the most part, the FCC has maintained a pro-consumer and pro-competition approach when implementing the Telecommunications Act of 1996. Although CPI disagrees with some of the agency's decisions, we think the Commission has attempted faithfully to implement Congress's vision of a competitive telecommunications industry. I would like to review the FCC's actions in three areas: local competition rules, section 271 compliance and merger consideration.

Local competition rules

Of the regulatory initiatives that have stimulated local exchange competition, the importance of the FCC's Local Competition Order issued on August 8, 1996 cannot be overstated. This landmark decision interpreted sections 251 and 252 and established the basic ground rules for opening up the local telephone network to competition. Of course, the appeals brought by state regulators and incumbent local exchange companies and the decision of the Eighth Circuit Court of Appeals delayed implementation of the FCC's rules, but the Supreme Court's recent decision puts much of that back on track. In the meantime, the FCC's decision effectively provided the blueprint that was used by many states to implement the local competition provisions of the 1996 Act.

Of the numerous provisions in the Local Competition Order, here are some of most critical elements of the order:

a. That the incumbent local exchange company must make its operations support system available to competitors for nondiscriminatory access to its network;

b. That competitors should be able to purchase and assemble network elements without providing their own facilities;

c. That network elements should be priced at their forward-looking economic costs;

d. That competitors should be able to "pick and choose" among elements of an arbitrated agreement.

The 1996 Act and the Local Competition Order allows new competitors to experiment with a variety of different business models for entering the local market. As

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[1] Merrill Lynch In-Depth Report, Telecom Services—Local, Nov. 18, 1998.

[2] "Local Wheels of Fortune: New competitors are winning some hefty backing from investors", Gail Lawyer, Teledotcom Magazine, January, 1998.

a result, some new entrants are providing service by resale, others by assembling unbundled network elements, and others by constructing their own facilities and interconnecting with the ILEC network. Some CLEC's are deploying switches and reselling the ILEC loop, others are deploying fixed wireless services and interconnecting with the ILEC network to terminate calls, while others seek to lease the ILEC loop solely to provide competitive data services.

In other words, the FCC's order has spawned exactly the kind of diversity and entrepreneurship as should be found in a competitive market. It is not clear at this time which of these various business and technological approaches to competitive entry will prove most successful in the marketplace. The ultimate victors will be decided by the marketplace, not by regulators trying to predetermine winners and losers. This diversity and competition among technologies would not have been possible without the FCC's Local Competition Order.

Section 271 compliance

Another area in which the FCC has served consumers well by promoting competition is the agency's commitment to enforcing its interconnection and unbundling rules when considering the BOC's applications to enter the long distance market under section 271 of the Act. In fashioning the 1996 Act, Congress sought to provide the BOC's with an incentive to open their local networks fully to competition: section 271 allows the Bell Operating Companies to enter the long distance market, but only after fully implementing the terms of the 14-point checklist and only after the FCC has found that such entry is in the public interest. The requirements of section 271 are almost identical to the requirements of sections 251 and 252. Thus, if the FCC weakens the section 271 requirements and allows the BOC's to enter the interLATA market under section 271 prematurely, the BOC's may never fully implement the market-opening requirements of section 251 and 252.

Although the FCC has denied each of the section 271 applications filed to date, the agency is on firm grounds for its denial in each case. CPI agrees that the applicants have not met the checklist requirements, although substantial progress has been made in some states. The efforts of some of the BOC's to work through state commission requirements on network-opening requirements, such as non-discriminatory access to operating support systems, shows that the proper enforcement of section 271 can be effective in promoting full compliance with the Act.

The ability of the BOC's to enter the long distance market in competition with companies who do not possess a local exchange monopoly is properly conditioned on fully opening local networks to competition. It is critical that the FCC maintain this balance by insisting on full compliance with the checklist before this important incentive to open local markets is relieved.

Mergers of large ILEC's

The statistics quoted earlier paint a picture of nascent competition in the local telecommunications market. At this early stage, competition in the local market is still relatively fragile and depends upon the actions of regulators to keep markets open. New entrants must grow in order to survive and they must have continued non-discriminatory access to many features of the incumbents' network in order to attract customers.

But mergers among large incumbent telecommunications carriers can affect the ability and the incentive of merged companies to discriminate against their new competitors. Further, mergers affect the ability of state and local regulators to effectively enforce market-opening conditions. For these reasons, such mergers must be closely examined to determine their effect on the growth of telecommunications competition. It is entirely appropriate that the FCC and state commissions use the occasion of a proposed merger to ensure that the competitive conditions are strengthened, and not threatened, by a merger of incumbent carriers.

Since passage of the 1996 Act, the FCC has been presented with four major mergers among large incumbent local telecommunications providers: SBC/Pacific Telesis, Bell Atlantic/NYNEX, SBC/Ameritech and Bell Atlantic/GTE. The last two mergers are now pending; the FCC approved the first two mergers with only a few conditions attached. There is now considerable controversy whether the merger partners have met the conditions attached to their merger approval.

CPI and others disagreed with the FCC's decision to approve the earlier large ILEC mergers without attaching more substantive conditions. In particular, CPI asked the Commission to approve the mergers only after the merger partners had complied with the market-opening requirements of the 1996 Act:

> CPI suggests that imposing conditions to require the opening of the companies' local exchange networks as a pre-condition to the mergers will act to mitigate, to some extent, the threat to competition posed by the increase

> in scale and scope of these companies. In particular, CPI believes that approval of the mergers should be conditioned upon, at a minimum, the companies' compliance with the "competitive checklist" requirements of Section 271 of the Communications Act of 1934 in every state in which they are the incumbent provider of local exchange service. Requiring the carriers to satisfy the unbundling and interconnection requirements of Section 271 in every state, requirements that the carriers have already indicated they would implement, would give competitors the opportunity to compete in much of the region served by the RBOC. While this condition does not guarantee that competition will develop for local telephone service in every state, it does help to reduce the risks posed by the mergers by making it less likely that the RBOC's could act to delay competition in one market while continuing to take advantage of its monopoly status in other markets.[3]

Unfortunately for consumers, the FCC chose not to require this suggested pre-condition to approval of the Bell Atlantic/NYNEX and SBC/Pacific Telesis mergers. In our view, the Commission missed a substantial opportunity to pry open local markets, bringing more competitive choices to consumers. In a different context, the efforts of the New York Public Service Commission to achieve market-opening results with Bell Atlantic in New York illustrates how regulatory leverage can be applied. As I discuss later, the two pending mergers again offer the FCC the ability to require full compliance with the 1996 Act.

IV. THE ANTITRUST MERGER REVIEW ACT

As stated earlier, CPI supports the thrust of S. 467. The changing telecommunications marketplace argues strongly for regulation that is as efficient and effective as possible. Here are three observations about the proposed legislation, followed by recommendations for amendments to improve the legislation.

1. It is reasonable to create workable time lines to ensure prompt consideration and resolution of merger applications by the FCC

For the first time, S. 467 creates time lines within which the FCC must act to approve or reject the transfer of licenses necessary to complete a merger. The legislation sets up a process somewhat similar to that required of the Department of Justice and the Federal Trade Commission is conducting their merger reviews. Under the bill's scheme, the FCC will perform an initial review of a merger application in which it decides whether to seek more information from the companies proposing to merge. If more information is requested, the clock stops until the applicants certify that they have substantially complied with the requests for information. At that point the clock restarts, leaving the agency 180 days in which to make its decision whether to approve, approve with conditions, or reject the merger. If disputes arise about the sufficiency of the response to the request for information, the FCC or the applicants may appeal to the courts to resolve the dispute. Importantly, the clock stops during such appeals.

State regulatory agencies typically operate under similar time lines for cases that approach or exceed the complexity of large telecommunications merger cases. Although state commissions now consider cost-of-service cases less frequently than before, it is common to find requirements that they act in such cases within fixed time lines. For example, the Colorado Public Utilities Commission is permitted 210 days to conduct investigative hearings on a utility's request to change rates. While I have not conducted a recent study, I know that similar requirements apply to many state regulatory commissions. In multi-party litigation before state PUCs, these time lines have the effect of sharply focusing the parties' attention on the rate application, shortening discovery timeframes, making hearings very efficient and requiring counsel to file briefs on expedited schedules. In general, I do not think that such timeframes have prejudiced either applicants or respondents. After making any necessary adjustments for any special requirements of the FCC, I think the same will be true here.

While many state regulators conduct some of their processes under time lines, competition requires state regulators to move even more quickly to resolve issues that are central to the development of telecommunications competition. In many cases, the old deadlines are not sufficient for the realities of the competitive marketplace. Competition can be damaged substantially, for example, if new competitors must wait extended periods of time for resolution of complaints alleging discrimina-

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[3] *Petition to Impose Conditions,* filed by the Competition Policy Institute, September 23, 1996, FCC Tracking No. 960221.

tion in access to essential systems. Recently the Telecommunications Committee of the National Association of Regulatory Utility Commissions solicited recommendations for regulatory "best practices." CPI submitted the following recommendation:

> The role of telecommunications regulators is changing from an arbiter of rates to that of an umpire on the field of competition. Because successful inter-carrier transactions are so important to competition, regulators should modify their practices of handling complaints among telecommunications providers. Communications should modify traditional procedures to try to limit litigation and produce a decision in such cases much more rapidly.
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> This suggestion entails several possible elements, including: (1) a "quick look" process in which a complainant and respondent are revised by a settlement judge of the unlikely outcome of their case; (2) *sharply expedited procedures to arrive at a decision;* (3) mandatory mediation for complaints; (4) the ability of a commission to award litigation costs to a prevailing party; and (5) the ability of a commission to sanction parties if it determines that a complaint or response constitutes harassment.
>
> The basic suggestion is that commissions "think different" about their process of these complaints. While regulatory lag might have provided some correct incentives during cost-of-service regulation of a monopoly, it is injurious to competition. *Incumbents and new entrants alike prefer the certainty of a quick decision, since competitive market conditions change rapidly.*
>
> The practice would likely unburden state commissions' dockets, speed up the resolution of certain carrier-to-carrier complaints, reduce legal costs and sharpen the incentives of regulated companies to comply with contracts arbitrated agreements, and commission rules. *Most importantly, it would provide competing companies with a timely outcome of a complaint, reducing risk and uncertainty for carriers and their customers*.[4]

Regulatory delay is a blunt instrument. While it might arguably sometimes delay the effect of bad things, it also delays the implementation of beneficial effects and creates uncertainty in markets. Ultimately, it is difficult for regulators to be creative by using regulatory delay. It is far preferable for consumers and telecommunications providers alike if regulators make the hard choices and make them expeditiously.

2. This legislation should preserve the flexibility needed by the FCC to conduct thorough merger reviews and to adopt conditions that serve the public interest

To protect consumers and competition, time frames on the FCC merger review process must not have the theoretic or practical effect of lessening the FCC's ability to scrutinize mergers. The sponsors are correct to include language reserving the Commission's existing authority to review mergers for their effect on the public interest. It is also clear from reading the legislation that the sponsors have attempted to strike a balance, providing the FCC with leverage to compel the applicants to cooperate with the agency's analysis, while maintaining time frames that require the FCC to complete its review in a reasonable time.

Even so, no set of timetables can anticipate every eventuality. We urge the Committee to continue to examine the legislation for instances in which the bill's mechanics might affect substance. In other words, we agree with Senator Kohl's statement that the legislation should be considered a "work in progress."

FCC Chairman Kennard recently announced his intention to conduct a public discussion about the conditions that should be considered for the SBC/Ameritech merger to ensure that the merger serves the public interest. The Chairman has indicated his intention to complete this discussion and negotiation process by late June. If we assume FCC action on the merger would follow within a month of the end of discussions, it will have taken almost 15 months for the FCC to act on this merger. This is considerably longer than the timeframe for FCC action envisioned in the legislation.

It is not clear at this point how productive this new process outlined by Chairman Kennard will be and whether it will be applicable to other mergers.[5] Similarly, it is not clear whether this "negotiation" (together with the FCC's standard merger re-

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[4] Presentation of Ronald Binz to the Telecommunications Committee of the National Association of Regulatory Utility Commissioners, Washington, D.C., February 23, 1999. (Emphasis supplied.)

[5] CPI has recommended that the FCC deny the SBC/Ameritech merger until the merging companies have opened their networks to competition by complying fully with sections 251 and 252 of the Communications Act. CPI believes that such a requirement should precede approval and not be attached as a post-approval condition.

view process) could be completed within the time frames in the legislation. However, it is clear that the Committee should factor such questions into its analysis. Later in the testimony, we suggest a modification to the bill that addresses this issue.

3. By modifying the process through which mergers are reviewed, the legislation should not have the unintended effect of limiting the Commission's ability to request and receive information necessary to render its public interest determination

We suspect this legislation will be supported by any telecommunications company that thinks it may come before the FCC for merger approval. Congress must ensure that these companies support the legislation for the right reason: the bill should speed up actions on mergers, not make approval more likely or give applicants the ability to escape careful scrutiny.

One of the keys to effective merger review is that companies are motivated to answer the questions posed by the regulators. This legislation takes away the FCC's ability to delay action on the merger until the applicant produces requested information. Instead, the legislation arms the Commission with the ability to go to court over its information requests. In order for this new mechanism to produce the right incentives for applicants, they must know that the courts will accord the FCC substantial discretion about its need for information. The broad authority to request and receive needed information should be underscored in the legislation.

4. Amendments should be considered to improve S. 467 in several areas

As this legislation progresses, we recommend that the Committee consider certain changes to the bill language designed to improve the legislation.

First, the legislation should permit the FCC and the applicants jointly to agree to modest extension of the deadline for action on a merger to conduct a negotiation process similar to that recently announced by Chairman Kennard in the SBC/Ameritech merger. Such a provision would provide both the Commission and the applicants with desired flexibility without sacrificing the essential structure of the legislation.

Second, the legislation should state explicitly that it does not limit the ability of the FCC to request and receive information necessary to conduct its analysis of a merger. The process proposed in this legislation may alter the relative power of the Commission to obtain information and, because of the deadlines, raise the stakes if a carrier delays in its response. If the legislation states clearly that this amendment does not limit the FCC's access to such information, Congress will have sent a message to the courts that the FCC's direction is to be considered in case the FCC must apply to the courts to obtain requested information.

Third, CPI recommends an amendment to paragraph (k)(5)(A) of the Act. This paragraph provides that, in cases where the Commission has not requested additional information from the applicants, it must act on an application within 30 days of receiving and application. We suggest, instead that the FCC be given a reasonable amount of time of act on the merger following its decision not to require additional information. Since the Commission has 30 days to decide whether to ask for information, our suggestion would mean that the Commission would have, for example, a total of sixty days to approve or deny an application for which it has not required additional information. Without this modification, the legislation may give the Commission the wrong incentive: to seek information from the merging companies merely to extend the time in which the Commission must act.

V. CONCERNS ABOUT PENDING ILEC MERGERS

Of course, this discussion about the FCC's merger review authority and the appropriateness of time frames does not occur in the abstract. There are two pending applications before the Commission that propose mergers between large incumbent local exchange companies: SBC/Ameritech and Bell Atlantic/GTE. For reasons discussed below, CPI believes these two mergers will not, on balance, benefit consumers because of the harm to the course of competition in local telecommunications markets. CPI has asked the FCC to deny these two mergers until the applicants have fully complied with the market opening conditions set by Congress in sections 251 and 252 of the Telecommunications Act of the 1996.

Before turning to the evidence specific to these mergers, we should recognize that these mergers occur against the backdrop of significant legislation and a fundamental shift in the nation's telecommunications policy. While Congress did not specifically indicate that mergers such as the pending ILEC mergers were contrary to its intent, it is clear that the pending mergers upset the careful balance Congress

fashioned in passing the Act. In particular, Congress assumed that the BOC's would remain independent competitors.[6]

Unfortunately, the mergers of several key industry players has upset this balance to the detriment of competition and consumers. Since passage of the Telecommunications Act, the concentration of ownership in the communications industry has developed much faster than the growth of local exchange competition. If this industry consolidation continues unchecked, the pro-competitive goals that Congress endorsed in the 1996 Act may be impossible to achieve, with the result that consumers end up paying higher rates for lower quality service.

For this reason alone, the FCC should deny the mergers of large incumbent local exchange carriers until competitors have had an opportunity to obtain a significant presence in the marketplace. We recognize that, at this stage, the Commission cannot "unring the bell" by undoing its prior merger approvals. It can, however, keep the balance from becoming further out of kilter by denying the pending applications until such time as these large incumbent local exchange companies make significant progress in opening their networks to competitors.

Besides this general concern about the effect of concentration on the development of competition, there are several reasons why these two mergers are likely to harm the public interest. These factors include:

- The proposed mergers will eliminate significant potential competitors and, in the case of the SBC/Ameritech merger, an actual competitor in the SBC and Ameritech regions.
- The proposed mergers will strengthen the incumbents' ability to thwart the growth of local competition.
- The proposed mergers will reduce the number of companies whose performance can be used to benchmark or compare one company against another.
- The proposed mergers will increase the opportunity for the merged companies to leverage their market power into other markets.

The applicants claim that these mergers will result in substantial efficiency gains. Even if we assume this claim is accurate, the important question for policymakers is not whether the mergers will benefit the companies, but whether the mergers will benefit consumers. In CPI's view, it is doubtful that these efficiency gains will be passed through to consumers under current marketplace conditions. The applicants face very limited competition today; they have little marketplace incentive to reduce rates, improve service quality, or otherwise flow the rewards of their merger to consumers. For the most part, these companies are regulated under price cap, price freeze, or other similar regulatory schemes that will not require them to reduce rates as a result of their lower costs. Thus, the applicants may keep these efficiency gains for themselves.

At most, the applicants argue that the mergers will put them in a stronger financial position as they face increasing competition. But this is actually little comfort to consumers and, in some sense, validates the concerns about the effect of these mergers on the development of competition. Even if this effect is counted as a benefit of the merger, CPI does not believe that this benefit alone can compensate for the risks of harm to competition detailed above.

Although the applicants maintain that they face significant competition in their home markets, it is impossible to predict today that sufficient competition will develop in the near future to counterbalance the influence the merged companies will have over telecommunications markets. To date, competition for local telephone services has not yet developed anywhere near the levels that can serve as a competitive restraint on the dominance of the incumbent local exchange carriers. As I described above, the competitive local exchange carriers (CLEC's) have captured less than 5 percent of local telephone revenues and less than 3 percent of the nation's access lines.

For these reasons, CPI suggests that the FCC say "no" to the proposed mergers unless and until the merging companies have complied fully with the requirements of the Telecommunications Act of 1996 to open their network to competition. Over three years ago, Congress directed all large incumbent local exchange carriers to provide interconnection on a nondiscriminatory basis to other competing LEC's. To our knowledge, none of the merger partners has successfully complied with these requirements in a single state. Under these circumstances, CPI recommends that the FCC decline to approve the merger with "post-approval" conditions attached. In-

[6] See, for example, section 273(a) of the 1996 Act relating to Joint ventures among Bell companies for manufacturing telecommunications equipment: "A Bell operating company may manufacture and provide telecommunications equipment, * * * except that neither a Bell operating company nor any of its affiliates may engage in such manufacturing in conjunction with a Bell operating company not so affiliated or any of its affiliates."

stead, we think the FCC should deny the mergers with clear language setting out the terms under which approval might be considered: i.e., after all necessary market-opening steps have been taken.

Many of the problems associated with the mergers could be significantly ameliorated if the applicants complied with the 1996 Act's requirements to open their networks to competition. There are two reasons why the FCC should link the proposed mergers with companies' compliance with these market-opening requirements. First, the proposed mergers diminish the prospects for vibrant local telephone competition. These mergers will strengthen companies with significant market power over local exchange service, enhancing their ability to compete unfairly against new entrants in the local telephone market. Requiring the companies to open their networks before allowing them to merge will make it less likely that the merged company could engage in discriminatory and anticompetitive behavior against new entrants. These market-opening requirements are essential to the prospects that new entrants will become viable local competitors. Once the new entrants become a fixture in the competitive landscape, their presence in the marketplace will go a long way towards mitigating the potential economic and political power of a merged company.

Second, denial of the proposed mergers will give the companies a greater incentive to open their markets to competition. The theory of the 1996 Act was that interLATA relief would be the "carrot" that would induce the RBOC's to open their markets to competition. After three years in which the BOC's have made limited progress toward this goal, it now appears that the prospect of long distance entry may not be a strong enough motive for the BOC's to open their markets. If withholding long distance entry is not enough to induce them to open their networks, perhaps denying their mergers will be.

Several parties commenting in the FCC proceeding have alleged that the applicants are deliberately slow-rolling the process of opening their markets to competition. We do not think the FCC has to decide whether these companies are acting in bad faith; the Commission need only focus on the actual experience of competitors in the marketplace and decide how the mergers will affect the process of opening markets fully to competition. Not a single ILEC has implemented a non-discriminatory operations support system and demonstrated that its network is fully open to competitors.

Without a doubt, opening the local network to competitors is not easy and demonstrably takes a lot of time. But the complexity of this task is exactly why the FCC should keep the pressure on the ILEC's to comply with the Act's requirements. Policy makers can be certain that the BOC's will reduce their level of commitment to this task as soon as they receive the regulatory relief that they are seeking. We are also convinced that the mergers will increase the incentives and abilities of the merged companies to resist the process of opening markets. For these reasons, we have asked the FCC to find that the proposed mergers of SBC/Ameritech and Bell Atlantic/GTE are contrary to the public interest.

VI. CONCLUSION

CPI appreciates the opportunity to testify in support of S. 467. We believe that it is good regulatory practice and good law for regulators to perform their functions as quickly and as efficiently as possible. While this has always been true, it is especially important now, as we move from an era of regulated industries into one in which market forces will be relied upon to constrain prices and provide consumers with choice. We hope our suggestions for improving S. 467 are helpful to the Committee and look forward to working with you and your staff as this legislation moves forward.

Senator DEWINE. Let me thank all the members of the panel. Your testimony has been very helpful as we move towards a mark-up on this piece of legislation. What we were trying to do today with this panel, I think we have already accomplished, and that is to get specific suggestions as far as the specific piece of legislation that is in front of us.

I just have a couple questions before I turn to Senator Kohl. Mr. Neel, I understand that you believe the FCC should not be reviewing mergers at all, but for the purpose of this discussion, let us assume that the FCC is going to continue to review these mergers in roughly the same manner as they do now. Your testimony suggests that 180 days be the maximum time allowed for the review in total,

so it would seem that you are suggesting that we modify our bill to remove the process of document request and submission.

First, is that accurate, and if so, do you believe that the FCC already has sufficient authority to obtain information without this specific statutory language?

Mr. NEEL. I think on the latter question, yes. On the first question——

Senator DEWINE. They do have it?

Mr. NEEL. Yes, I think so. On the first question, clearly, they are going to seek documents, but with the trigger date of the date of the application, then perhaps they will do it in a more timely manner. Maybe they will go ahead and request those documents and put out the notice immediately, as opposed to waiting many months into the process before they actually go out and start the reviews, like they have just announced with SBC/Ameritech. I think if you set the trigger at the date of application, it will force them to plan their work a little more efficiently and not slow down these mergers in kind of an arbitrary way.

Senator DEWINE. Mr. Frisby, you have suggested that the FCC be allowed to extend the time limit by 90 days in the case of complex mergers among major phone companies. Under S. 467 as currently drafted, the FCC will have 30 days to examine a proposed merger before asking for additional information from the parties, time to analyze the merger while waiting for the additional information to arrive, and then an additional 180 days to review the merger once all the information is provided.

When you add all this up, the FCC will have at least 7 months to review proposed mergers. Given the expertise the FCC has and the knowledge the FCC already has of the various players in the industry, do you really think that more than 7 months is required, and if so, why?

Mr. FRISBY. I would agree that, in most cases, 7 months should be sufficient. But we are concerned that these very complex mergers, and even in a 30-day period, we are talking about hundreds of thousands of pages of documents. We are talking about very complicated cost studies, networks. If you look at, for instance, the Bell Atlantic/GTE merger, as we proceed, different things keep coming up, for instance, with regard to internet presence. It is very complicated.

We would agree that, in most cases, the FCC should be able to complete the matter in 7 months and should be held to a very high standard. However, given the complexity, given that it is really our economy which is at stake, we think that there should be at least some failsafe, but a very high, high standard.

Senator DEWINE. Senator Kohl.

Senator KOHL. I would like to thank the witnesses for their candid comments on how to improve this bill. We sincerely want to do that.

I also want to say how pleased I am that such a broad cross-section of folks basically approve this legislation. You know, consumer advocates, RBOC's, long distance companies, and broadcasters do not always get along. So when all of you support this proposal, it must make some sense.

With that, I have just a few questions for all of you. There are some who would do away with the FCC's role in reviewing mergers altogether. They claim that the DOJ should be the sole analyst of whether these deals meet general antitrust standards.

Mr. Weening, you are a businessman and you have had occasional problems with the time lines or lack thereof at the Commission. What is your take? Should the FCC be reviewing these mergers at all?

Mr. WEENING. It is hard for me to comment on the FCC's role with respect to telecommunications mergers. My experience is in broadcasting and the rules around that. The Telecommunications Act of 1996, as I said in my testimony, was pretty explicit that radio broadcasters can own this number of stations based upon an objective count of the number of signals which are serving a particular market. That tells me that the further role of investigating concentration really does not belong with the FCC. In fact, it was specifically removed in conference.

Now, I am sympathetic with the concerns of a couple of the commissioners about the potential impact of concentration and I think that to the extent that those concerns are sincere, and I believe they are, that in their own interests and in furtherance of those concerns, they should really rely upon the Department of Justice to do the work because the Department of Justice has the process and the skill and the experience to do the investigation.

So even if the Commission believes that in furtherance or in the implementation of its public interest mandate, they think that consolidation should be reviewed in particular markets, I still believe they should rely on the Department of Justice to actually do it because they are equipped to do so.

Senator KOHL. Mr. Neel, do you think the FCC should have a role in reviewing mergers?

Mr. NEEL. Senator, let me just refer you to page seven of my prepared statement. I will just refer to one aspect and I will just read one brief item, and this relates to the 1996 Act that Mr. Frisby made a lot of references to, aspects of the Act which I did not think were really under consideration today with this bill, but here is one that is.

Page 201 of the conference report of the 1996 Act reveals that the purpose of the changes—this relates to merger review, and I will quote. "The new language contains a conforming change to clarify that these mergers will now be subject to Hart-Scott-Rodino review. By returning review of mergers in a competitive industry to the Department of Justice, this repeal would be consistent with one of the underlying themes of the bill, to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act and the DOJ should be carrying out the policies of antitrust laws. The appeal would not affect the Commission's ability to conduct any review of a merger for Communications Act purposes, that is, the transfer of licenses."

That is the very narrow purpose for the Commission's involvement in merger review, the transfer of licenses, the management of spectrum, not to use them to generate some kind of mischief from some competitor who would like to use the merger review

process to extract some kind of competitive advantage from the competitor that is seeking to merge to be more competitive. It just does not make any sense.

Frankly, when we talk about scarce resources at the Commission, perhaps they should turn some of those scarce resources away from this sort of arbitrary involvement toward getting the 1996 Act to work as it really was supposed to, opening up long distance markets, for example.

Senator KOHL. Mr. Binz, would you agree that the FCC's merger review authority is valuable and needed?

Mr. BINZ. Yes, Senator, I do. I think with respect to mergers, if we understand the close relationship between some of these mergers and the development of local competition, it would be a mistake to pull the FCC out of the merger review.

The problem with the premise that Mr. Neel just announced is that local exchange markets are not yet a competitive industry. We certainly would agree that when these industries are fully competitive, that the tenor of the FCC's review of mergers should considerably decrease. However, at this point, the merger of very large, very near monopolies is an issue for the FCC appropriately.

The courts have recognized over time that the FCC as an expert agency should be able to use the public interest test for purposes of helping carry out the legislative policy the Congress adopted. That is certainly true in the case of the Telecommunications Act of 1996.

I guess I would want to close on this topic by saying I think the FCC has been timid in the conditions that it has applied to mergers such as the previous Bell Atlantic/NYNEX merger and the SBC/PacTel merger. We have asked the FCC in the case of the two large mergers that are pending to say to those companies, you may merge but only after you open your markets fully to competition, only after you have fully implemented sections 251 and 252. I think that is exactly the role the FCC should play. It should use the merger process to ensure that Congress's intention in the Telecommunications Act is carried forward.

Senator KOHL. Mr. Frisby, when the FCC adds its own antitrust analysis, is it not redundant from what the Antitrust Division now does?

Mr. FRISBY. I would think not. As a former State regulator who had to deal with our State's antitrust officials, I think a utility regulator brings a somewhat different perspective and a healthy perspective. If you refer to page seven of our testimony, we believe that it is in the—the FCC should be able to use its public interest authority to assure compliance with the Act so that we have competition.

The two things that the FCC should consider, which are not necessarily considered by Justice or not in the same way, would be, first, whether a proposed transaction would open all of the telecommunications markets to competition and enhance access to advanced telecommunications, which I think is not necessarily a Justice concern. Second, whether the merger will affect the quality of telecommunications services provided to all consumers and would result in the provision of new and additional services. I think those

issues are uniquely within the FCC's purview and should fall within a consideration of the public interest.

Senator KOHL. All right. As I mentioned in my opening remarks, we should probably amend our bill to include mergers below the Hart-Scott-Rodino thresholds because we do not want to have the perverse effect of speeding up bigger mergers but not the smaller ones with fewer competitive issues. Do you all agree with that?

Mr. WEENING. Yes.

[Panel nodded in agreement.]

Senator KOHL. Mr. Weening, we have heard your account of the FCC dragging its feet on small deals, deals that pose little or no threat to competition, and to be sure, we have heard many similar stories, for example, in a recent Wall Street Journal article that we will put in the record.

[The information of Senator Kohl follows:]

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Broadcasters Blast New Scrutiny of Radio Deals

By KATHY CHEN
Staff Reporter of THE WALL STREET JOURNAL

The rush to consolidation in the radio industry has run into a speed trap set by the Federal Communications Commission.

The commission must sign off on all radio-license transactions and in the recent past processed routine cases within two

RADIO

months, on average. But starting last August, the commission began to single out, scrutinize and flag to the public any proposed deal that would result in one broadcaster controlling at least half of all advertising revenue in a market, or in two broadcasters together controlling 70% or more of the market.

Robert Ratcliffe, deputy chief of the FCC's Mass Media Bureau, says the commission set up this system after "we began to see cases where there is a very substantial aggregation of market power." Indeed, while radio companies could own only four stations in one market and 40 stations nationwide before the Telecommunications Act eased ownership rules in 1996, one company now can own as many as eight stations in one market and hundreds across the country.

The commission so far has flagged only 25 proposed transactions and already has given the green light to nine of them. But the time-consuming new policy is under attack by broadcasters, communications lawyers, lawmakers and media brokers like Michael Bergner of Boca Raton, Fla., who helps buyers and sellers of stations close their deals.

Mr. Bergner says the FCC recently took four months to give the go-ahead to one sale he brokered and has been sitting on two other deals of his since last autumn. "Anything remotely related to concentration, the FCC is studying with a magnifying glass," Mr. Bergner complains. "The logjam is getting a lot of people angry."

Another FCC critic is Gregg Skall, a partner at the Pepper & Corazzini law firm. Mr. Skall had one case involving the sale of seven radio stations in Blacksburg, Va., languish at the FCC for months. "It's very difficult to keep clients calm, because there's money at stake," he says with a sigh.

Adding to the problem is confusion among broadcasters and lawyers over details of the revised system, which the FCC never formally announced. Howard Liberman, a communications lawyer at Arter & Hadden, says that until he attended a panel discussion sponsored by the Federal Communications Bar Association on the topic last month, "I didn't know what the formula was, and I do this all the time."

The changes at the FCC have had a direct effect on Sunburst Media, a Dallas company that operates two dozen radio stations, mostly in Texas. Sunburst's chief financial officer, Don Turner, says the FCC took six months to reach a decision on the company's application to buy six radio stations in the Texas city of Abilene. Accord-

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Static Over Radio Mergers

Some cases currently under scrutiny:

■ **TRIATHLON BROADCASTING CO./CAPSTAR RADIO BROADCASTING CO.**
Filed August 1998-Application to transfer control of 29 radio stations.
Status: Justice Department investigating.

■ **GREAT SCOTT BROADCASTING/ NASSAU BROADCASTING PARTNERS, LP**
Filed September 1998-Application to sell two radio stations in Trenton, N.J.
Status: Rival broadcaster has argued that deal would be anticompetitive.

■ **TALLAHASSEE BROADCASTING CO./CUMULUS LICENSING CORP.**
Filed September 1998-Application to transfer radio-station license in Tallahassee, Fla.
Status: Justice Department investigating.

■ **JACOR COMMUNICATIONS INC./CLEAR CHANNEL COMMUNICATIONS INC.**
Filed October 1998-Application to transfer control of some 234 radio stations.
Status: Justice Department investigating; two competitors challenge deal.

Source: FCC

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Broadcasters Pan FCC's Radio-Deal Policy

Continued From Page B1

ing to Mr. Turner, one factor FCC officials cited for the delay was their worry that Sunburst would command about half of the radio ad revenue in the Abilene market.

Although the commission ultimately approved the deal after intense lobbying by Sunburst, the company decided not to push ahead with another plan to buy out a radio operator in a different market. Such a merger would have given Sunburst a big share of the ad revenue in that market, too, so "why go to all that trouble when we're likely to be shot down by the FCC?" asks Mr. Turner.

So far, the new scrutiny hasn't caused the FCC to reject any deals. But critics raise a broader concern: Should the commission even be reviewing radio deals based on ad-revenue concentration when that very yardstick is traditionally employed by the Justice Department in considering antitrust ramifications of the same deals?

Republican Rep. Billy Tauzin of Louisiana, chairman of the House Telecommunications Subcommittee, doesn't think so. "It's another example of the abusive way in which mergers and applications are being handled by the FCC," he says.

Even FCC officials disagree over whether the commission is overstepping the limits of its power. Some believe the FCC needs to step up scrutiny of radio deals to protect the public interest, especially as the Justice Department lacks the manpower to look at many of the smaller cases now cropping up. But at least one commissioner, Republican Harold Furchtgott-Roth, has argued that the FCC hasn't the authority to consider antitrust issues. The commission's other Republican, Michael Powell, says the FCC shouldn't duplicate the Justice Department's work.

Meantime, Richard Weening, executive chairman of Cumulus Media Inc., says the FCC's involvement, on top of the Justice Department's, has added another layer of bureaucracy—and delay—to several of Cumulus's deals. When the Milwaukee broadcasting company proposed buying five radio stations in Florence, S.C., in three separate deals in the first half of 1998, for example, the Justice Department approved the cases after a lengthy review, only to have them sit at the FCC for another two months, Mr. Weening says. The commission approved the deals last month.

In another change, the FCC is reviewing its limits on owning both radio and television stations in one market, and has stopped routinely granting waivers from those restrictions. Although the commission approved two such cases last week, Mr. Ratcliffe says it will continue to "take a hard look" at waiver applications. That could mean more delays for Mr. Bergner, the radio broker.

Among Mr. Bergner's deals pending before the FCC is one involving a broadcaster who owns a TV station and three radio stations in one market and wants to buy a fourth radio station in the same market. Mr. Bergner says FCC staff wrote up an approval for a waiver in December. But they have yet to act on it, he says, because "they're under orders not to rule on any cases until the commissioners review them - and we've been told one commissioner is against them all."

Senator KOHL. So to you, Mr. Weening, I ask, first, do you think others in the broadcasting industry share your frustrating experiences? Second, why do you think the FCC has taken so much time on these deals? And third, do you think our bill, if amended to include smaller acquisitions, will provide some help?

Mr. WEENING. Thank you. Yes, I think that there is a uniformity in the broadcasting industry in terms of the concern about the FCC being involved in reviewing these transactions. Taking a comment from Mr. Binz's remarks, sometimes delay can be used to postpone the impact of bad things, and very often it can also be used to postpone the impact of good things, and I think that is what has happened here.

There are a couple of commissioners I think are legitimately concerned that consolidation may not be doing good things in these markets. I say legitimately concerned because the natural reaction about consolidation is that what consolidators do is come in and automate everything, fire the staff, and make more money. Actually, the experience in radio is quite the opposite. I mean, our employment statistics are up 40 percent in a consolidated radio market. Our radio stations are actually live and local when before they were automated and irrelevant. So the concern is not warranted, but the fact that they have it is what has really caused the delay and they are searching for a way to get deeper into the issue.

I mean, my point, Senator, is really very simple. If they are so concerned, the Department of Justice is best equipped, and unlike—actually, I will not say unlike. I do not know how it works on the telecommunications side, but on the broadcasting side, Congress was very explicit. The FCC does not have a role in reviewing concentration issues. And if you talk to the staff over there, they will all say that they do not have the staff to do it, either, or the experience to do it, that the Department of Justice does. So that is our position on it.

Senator KOHL. A few people have suggested that if we in Congress force the FCC to get these deals reviewed in a shorter time period, the agency will shift resources away from other responsibilities, for example, universal service or spectrum management.

Mr. Neel, you have worked with the FCC in the past. Do you buy this argument, and if you do, should we have no time lines for the FCC or lots of time lines for different FCC activities?

Mr. NEEL. I respectfully need to correct you. I have never worked for the FCC, thank God.

Senator KOHL. I said you have worked with the FCC.

Mr. NEEL. With the FCC. I am sorry. I thought I heard for.

Senator KOHL. I am sorry.

Mr. NEEL. I think that the Commission, first of all, should get out of the merger business except for the narrow scope of reviewing license transfers for spectrum. It simply opens up opportunities for mischief.

My own view is that their role in mergers should be limited to that and that alone. Now, if there must be review of the type they now conduct, then this is a very healthy process to constrain the amount of time they take. The SBC/Ameritech merger is an excellent example of this and arbitrariness of this coming in so late in the process.

Whether or not you need different time tables for different kinds of transactions, you would have to decide, and perhaps the Commission would decide. Our view is simply that it ought to be limited so that you do not have endless processes, and in the case of SBC/Ameritech, these companies do not even know what the Commission wants or what their concerns are. It is very vague and arbitrary.

So I would hesitate to sort of micromanage the amount of time for different kinds of mergers. We would like to see that involvement limited to only the most narrow areas and some limit on the amount of time so these companies have some predictability to work with investors and with consumers and employees.

Senator KOHL. All right. Mr. Binz, will the FCC need or deserve more staff for merger reviews or is it just a matter of the FCC rolling up its sleeves and getting to work and doing its job more efficiently?

Mr. BINZ. Senator Kohl, when I was a State official in Colorado sitting before the Joint Budget Committee, I was asked this question over and over again. If we adopt time lines, do you need more resources? My answer was, in general, no. This bill does not add to the work that the FCC has to do, merely asks them to concentrate in a shorter period of time.

I think as a practical matter, this bill will probably have the effect of them starting earlier. Instead of waiting for the Department of Justice to render its opinion on this and then coming forward, I think the FCC could start earlier.

So I do not know that it should cause any particular difficulties with scheduling. It certainly will require some reordering of work. But if you think about it, if you shorten it from a practice that may result in a one year to a half year, then that second half year is available for something else. So I think it is just a matter of reorganizing the workload.

And I think, again, as long as the period permitted—your bill has 180 days in it—as long as that is enough to get it done, then I think you are on firm footing. We suggest, similar to the amendment that Mr. Frisby described, that when an agency needs to negotiate an implementation, as they are apparently doing with SBC/Ameritech, that the parties, namely the applicant and the FCC, should be able jointly to agree to a modest extension of time within which to do that. But that might be an appropriate relief valve in the timeframe.

But as a general matter, I think as long as you are not adding to what the FCC is doing, the effect of the time frame will probably be they start earlier and do the same review. And again, I think as long as your time frames are workable, that should not create a problem.

Senator KOHL. Mr. Frisby, obviously, you have got concerns about big telephone company mergers, but would you not agree that the Commission could have engaged SBC/Ameritech sooner than 10 months after the deal was first announced?

Mr. FRISBY. Senator, I am somewhat at a disadvantage. Not being at the FCC, I have no idea why they waited 10 months. I would agree that speed and certainty in either the merger process or local market entry is critical. I think the advantage of your bill

is it does set forth a time frame and in the future we can avoid these situations by having a trigger and starting a process. But with regard to what caused the FCC to wait 10 months, I have no idea.

Senator KOHL. Thank you, Mr. Chairman.

Senator DEWINE. Mr. Binz, your testimony suggests allowing the parties and the FCC to agree to extend their time limits. If we would allow such a provision, would that put pressure on the parties to agree to an extension?

Mr. BINZ. Senator, of course, that occurred to me, as well. I think there is always going to be some give and take among the regulators and regulated on things like this. I raise that issue because I am sure it would not be your intention to prohibit the FCC from coming up with creative methods to get to a solution. I think the jury is out on whether this one will work with SBC/Ameritech. I have no idea. We are meeting with the staff of the FCC this week to discuss our take on these issues. I think, again, as long as the standard is relatively high, the loophole, if you will, is relatively narrow, I think it could be workable.

Senator DEWINE. Mr. Weening, you have been very clear in your testimony, and I do not want to go through it again, about how you believe the FCC should be very, very limited and should not be doing some of the things they are doing in regard to anything beyond counting the stations.

But I wonder if we could kind of step back from that a minute and just talk to me a little bit about the broad public policy of what we are seeing in Ohio and what we are seeing across the country as far as consolidation. You gave me a little glimpse of that a moment ago when you indicated that—you did not say contrary, but I will—contrary to popular belief or the belief of some people, that the consolidation, I guess you would argue, brings about more diversity and more creativity and more local reporting of the news, more local sports and maybe more local programming. Talk to me about that.

Mr. WEENING. OK.

Senator DEWINE. How is this consolidation, where we are seeing companies such as yours basically dominating markets—maybe you do not like the term "dominating," but certainly being very, very huge players—why does that not lead to more uniformity instead of less?

Mr. WEENING. Well, first of all, let us start with the mid-sized and smaller markets where we operate and then zoom up to the overall picture. In mid-sized and smaller markets, the independent radio operators, the——

Senator DEWINE. Excuse me, but in Ohio, that would be where, Toledo, Bowling Green?

Mr. WEENING. Toledo.

Senator DEWINE. Toledo?

Mr. WEENING. We are broadcasters in Toledo. We have five FM radio stations in Toledo. But in mid-sized and smaller markets, the recent history of independent broadcasting is that broadcasters are sort of saving their way to prosperity. If you have just one radio station, you can really only deliver one demographic format to an advertiser, and so as a consequence, it is impossible to compete

with television and newspapers, who are the dominant media organizations in the town.

Let me give you some statistics. Radio has historically been really the underdog in the media industry. It gets about 10 percent of the local advertising dollar. You add in a little bit from outdoor, a few percentage points there, and, really, television and newspapers split the rest. Interestingly, even though radio only gets 10 percent of the advertising dollar, it gets about 45 percent of the time that people spend with all media.

Now, that disconnect is pretty hard to deal with and it has had a number of effects. The conventional wisdom about why it occurs is because you can only deliver a single demographic format. And so the wisdom, intended or not, I do not know, of the Telecommunications Act was that it allowed a single operator to own five, six, or seven, or up to eight radio stations in a market, depending on how big the market was, and that meant that that operator could suddenly offer an advertiser a range of formatting flexibility, meaning an advertiser could pick a station that was targeted to you or an advertiser could pick a station that was targeted to Mr. Binz, depending on the demographic makeup or the demographic targeting of the format.

So all of a sudden, radio, as a result of consolidation, is on an approximately level playing field with newspaper and television, meaning the advertiser can pick and choose the format that they want to use to target their advertisers. That means that, suddenly, the market can become very much more competitive, and that is what is really going on and it is going on in Toledo, where we compete with J Corps, Clear Channel, very capable broadcasters, and together, we are taking shares away from the Toledo Blade, which has for years been entrenched as a near monopoly in that market over a lot of display advertising.

So it has increased competition in the market. It has also in mid-sized and smaller markets served to increase the quality of radio, meaning that we go into these markets and pick independent broadcasters who have been taking their programming off of satellite or automating and we put live and local personalities on, and live and local personalities are the source of the diversity. They are the source of the localism on radio systems. If it is automated and it is being programmed from Austin, TX, it is not particularly relevant to Toledo, OH.

So that is a big difference, and we have done this in 44 markets, just as I have described, and so radio becomes more relevant, but more importantly to the competitive concern, it becomes genuinely competitive with newspaper and television.

Lastly, let me say, the concept of dominance is hard to assess if you are assessing a radio station or a group of radio stations just on the revenue in the radio market, because, as I have said, post-consolidation, we are all competing with newspaper and television. So the largest cluster we have probably has 6 percent of the total media market. That is hardly a dominant position.

Senator DEWINE. Senator Kohl.

Senator KOHL. Thank you, Senator DeWine. I would like to ask a question about a slightly different topic but one that relates to telecom competition. Right now, for both video and telephone, not

all companies have the same cost or opportunity to wire new residential apartment buildings or place dishes on rooftops that could benefit consumers by creating more competition. So it seems that the playing field is skewed somewhat against new entrants. Some say that this has proven to be a sizeable barrier, and Senator DeWine and I have come to the conclusion that some legislation preventing discriminatory access to multi-dwelling units might make some sense.

Mr. Frisby, we know from your testimony that you support this proposal, but Mr. Neel, what is your take?

Mr. NEEL. Senator Kohl, this is not an area that traditional telecom companies have been much involved in. As I understand it, your concern mostly deals with video, is that correct?

Senator KOHL. Yes.

Mr. NEEL. I can just speak from personal experience, having been involved in earlier battles in this arena to get access for satellite dish owners into apartment buildings, and in rural areas, as well. The cable companies engaged in massive discrimination against these other technologies, MMDS, backyard satellite dishes, for years. In fact, even now, they appear to be continuing that.

I think it is a smart move in order to make sure that you cannot have a cable company, such as TCI, which has engaged in a anti-competitive behavior through the years, to allow a company like that, now AT&T/TCI, to basically shut out competition through some other technology to come to an apartment building or wherever.

I have not seen any language. It is not something that USTA is involved in. But I would personally encourage you to pursue that because we see very little competition in the video arena now. One area that the 1996 Telecommunications Act has not worked and the Commission has done virtually nothing to advance this is in video competition. We see massive consolidation among cable companies, which, by the way, also own most of the programming interests, and so nothing has happened in that area. The FCC does not seem to be concerned. So I would encourage you to pursue that.

Senator KOHL. OK. For the rest of you, do you have any sense on this? That is, do you think that the market is skewed against new entrants because the law does not allow fair building access? Mr. Binz.

Mr. BINZ. Senator Kohl, I have spoken with a number of new entrants whose technologies—this is for telephone service, now—are dependent upon getting into buildings, both wire-line and wireless, and one example I am very familiar with is the company Telegent, who puts essentially a radio receiver on a roof and then, using the conduits in the building, gets to customers and provides a variety of services, one of which is telephone service. Of course, these are residential customers and we are very interested in seeing them served by competitors.

It is obviously the case that since these customers in these buildings now have telephone service, the previous incumbent telephone company, the monopoly telephone company, was in there. So the question is, how do new entrants get in there? Well, if you are reselling the loops of the local company, you are there because you are reselling their loops. That is one way to get competition. But

if you are a facilities-based provider and you are doing something different, like Telegent, then you have got to have the building be able to give you access to the conduits in the building on the same terms that the existing incumbent, whether it is a U.S. West or somebody reselling U.S. West, has.

So I think it would be very helpful for you to take a look at this. We hear from new entrants that this is a barrier, along with discriminatory local regulation. That is one of the, I think, emerging bottlenecks for local exchange competition and I know it will be a very politically charged discussion. We have had it in our State in Colorado when we tried to get non-discriminatory access to buildings at a State level. But I would encourage you and appreciate your efforts in this area.

Mr. NEEL. Senator Kohl, if I may address this, since Mr. Binz raised the telecom aspect of this, there is massive technological redlining now underway not by the local telephone companies but by these so-called new competitors. MCI and AT&T are among the worst. They will pass a large apartment complex or a low-income development and they will have a fiber running right down the street next to it and they will not go in and serve it because they do not want that business. They do not want it. It is not high-volume, it is not—I mean, MCI's top executives have said, we do not want that business, so they go to Wall Street and say, we do not care about the residential consumer.

There is massive redlining going on right now by these so-called new competitors. The local phone companies have to serve those folks. They serve them. They are out there in every apartment building. They provide universal phone service. These new competitors, many of them have largely ignored that. There is any number of documentation and maps that show just that, and in the State of Ohio and Wisconsin, as well, where they will bypass residential apartments, low-income customers, rural customers, to serve high-volume business customers.

I would be happy to make sure to provide the both of you the maps that show just this phenomenon, and it is really worth taking a look at. It does not address your issue of access to the buildings, and I am sure somebody can look into that. But since Mr. Binz has raised it, I think we would like to give you that information to show just how these companies like AT&T/TCI, MCI WorldCom, and others are bypassing residential consumers, low-income and rural, and others just to get at the high-volume affluent customers. Thank you.

Senator KOHL. Mr. Frisby.

Mr. FRISBY. Senator, obviously, I cannot let that go without a response. I would strongly disagree. If you look at the data that we supplied to Chairman Bliley with regard to information he asked for, 40 percent of the access lines served by competitors are, in fact, residential access lines.

I would like to focus particularly on RCN, which is here in the District. It is providing a full range of service. In fact, one of the first places it served was a low-income housing complex in Southeast Washington. It has a 30 percent pass rate, in terms of 30 percent of the people it passes actually take service. It serves a wide range of customers.

The problem it has, and that is why we really applaud your bill, is that the incumbents are in these buildings based on very ancient rights-of-way. Our companies would like to serve these buildings, but they come in there and then all of a sudden, the landlord wants an arm and a leg and both children and it becomes financially impossible to serve these buildings. Then, when you combine that with the fact that—and I will not go into all the local market entry problems we have got going on, but if you cannot connect to the landlord and you cannot get the unbundled network element, it makes it very hard to serve residential customers.

So we support your bill because we think it really opens the doors for a lot of facilities-based competition. Thank you.

Senator KOHL. Thank you, Mr. Chairman.

Senator DEWINE. Senator Kohl, thank you.

Mr. Weening, one last question. I want to follow up on the previous question I had and your answer. Are you aware of any independent analysis that supports what you have told us about the diversity? Has anybody looked at that from an independent point of view?

Mr. WEENING. Gosh, I am glad you asked me that, Senator. The answer is yes.

Senator DEWINE. Is that a soft pitch or a hard one or what?

Mr. WEENING. Well, I think probably unwittingly——

Senator DEWINE. Do you have a study right there for me?

Mr. WEENING. The answer is, yes. Senator, a professor by the name of Joel Waldvogel at the Wharton School has on his own published or is about to publish some pretty interesting stuff on this subject. It basically makes the point that there is no evidence that consolidation has reduced diversity in formats. There is no evidence that consolidation has increased prices, which is very interesting, both very contrary to the intuitive expectation.

So the answer is yes, and we have evidence of it in 44 markets, but it is our evidence and it is more anecdotal. I would say that Professor Waldvogel's recent study, some of which—one, I know, is about to be published in an academic journal—will shed a lot of light on this.

Senator DEWINE. We will look for that.

Mr. WEENING. OK.

Senator DEWINE. Thank you very much.

I have statements from Senator Hatch, Senator Leahy, and Senator Thurmond that we will make, without objection, a part of the record.

[The prepared statements of Chairman Hatch, Senator Leahy, and Senator Thurmond follow:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

I would like to begin by extending my appreciation to Senators DeWine and Kohl, the Chairman and Ranking Member of this Subcommittee, respectively, for their tremendous efforts in making today's hearing possible, and beginning a meaningful dialogue on the important issue of FCC's review of mergers in the communications industry.

In light of the increasingly numerous mergers in the communications industry, and the ever increasing importance of telecommunications services in our society, whether it is telephone or Internet services, I am pleased that we will have an opportunity to hear today from affected parties on some of the regulatory burdens faced by this industry.

As we see more and more mergers in the communications industry wait longer and longer to obtain approval from the FCC for their mergers, we must pause to see what is causing this delay. Unnecessary and unwarranted delays in the approval process could mean delayed delivery of improved services to consumers, whether they are in my home State of Utah or anywhere else across the nation. We must determine what is causing this delay and whether it is warranted and address it properly.

I believe that the legislation introduced by Senators DeWine and Kohl, S. 467, is an important step in the right direction in addressing some of the concerns. This legislation, loosely based on the Hart-Scott-Rodino merger review process, would impose time limits on FCC's review of certain telecommunications transactions. Namely, it affects those transactions required to be reported under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

The FCC has been increasingly ambitious in interpreting its statutory authority, under sections 214 and 310 of the Telecommunications Act, to assert jurisdiction over telecommunications mergers that happen to include transfers of licenses. The Telecommunications Act provides the FCC with the authority to review applications to transfer licenses to ensure that "the public interest, convenience and necessity" will be served. These are important functions, and the FCC's activities and expertise in this area is important. However, the Commission's regulatory authority is limited. It does not include review of every aspect of a merger, and certainly does not include the review of the merger for its potentially broader competitive impact within the industry.

That is a review properly performed and reserved to the antitrust enforcers at the Department of Justice and the FTC. As Commissioner Furchtgott-Roth wrote in his recent concurrence in the AT&T–TCI matter, the FCC's work "often duplicates that of the Department of Justice's Antitrust Division."

I look forward to working with my colleagues in the Senate, the FCC, the Department of Justice and those in industry to ensure a proper procedure for the review of communications industry mergers that results in a fair and workable system for all Americans. I look forward to working with Senators DeWine and Kohl in addressing some of these issues by imposing certain time limits in the FCC review of telecommunications mergers, as proposed in S. 467.

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

Mr. Chairman: I appreciate that you are holding this hearing on accelerating FCC review of mergers and acquisitions. As a member of this subcommittee I look forward to working with you and with Senator Kohl on your bill. As I read it, this bill is neutral in that it simply requires an answer—yes or no—more quickly than would normally happen under current law.

Your bill focuses on the problem of companies not knowing for many months whether a proposed merger will be approved by the FCC. While I appreciate the importance of this issue we should not be distracted from the very significant question of the standards employed to conduct the reviews.

My major concern has been in the area of the lack of enough local competition in the telecommunications industry and the lack of tougher merger review standards for both the FCC and the Department of Justice.

I think we need to raise the bar before the FCC and the DOJ should be able to approve these mergers. I am concerned about rapid consolidation because the current standards are not tough enough to protect residential consumers and robust competition.

I have been especially concerned about the mergers among Regional Bell Operating Companies which continue to have a virtual strangle-hold on the local telephone loop and thus pose a threat to healthy competition in the telecommunications industry.

Indeed, outside of the Bell Companies and GTE, the independent phone companies still account for a paltry percentage of the total market for local phone service.

As I said last Congress, the Telecommunications Act's promise of competition has not materialized to benefit American consumers. Instead of competition, we see entrenchment, mega-mergers, consolidation and the divvying up of markets. Even Edward Whitacre, Jr., the Chairman of SBC Communications, testified that "The Act promised competition that has not come."

I have said many times that I voted against the Telecommunications Act in part because I did not believe it was sufficiently procompetitive. I said in my floor statement on the day the new law passed:

> Mega-mergers between telecommunications giants, such as the rumored merger between NYNEX and Bell Atlantic, or the gigantic network mergers now underway, raise obvious concerns about concentrating control in a few gigantic companies of both the content and means of distributing the information and entertainment American consumers receive. Competition, not concentration, is the surest way to assure lower prices and greater choices for consumers. Rigorous oversight and enforcement by our antitrust agencies is more important than ever to insure that such mega-mergers do not harm consumers.

We are seeing old monopolies getting bigger and expanding their reach. Upon completion of all the proposed mergers among the Bell companies, most of the local telephone lines in the country will be concentrated in the hands of three to four companies.

This will affect not only the millions of people who depend on the companies involved for both basic telephone service and increasing for an array of advanced telecommunications services, but also competition in the entire industry.

I know personally that at my farm in Vermont and here at my office in the District of Columbia and at my home in Virginia, I still have only one choice for dial-tone and local telephone service. That "choice" is the Bell operating company or no service at all. The current mantra of the industry seems to be "one-stop shopping." The advent of broadband technologies is going to raise a whole array of competition issues.

For example, some cable systems are offering broadband service to the home so that consumers can get integrated access to voice, high-speed data, video and Internet access all over the same wire. The cost of $500 per year for cable modern service remains high but is expected to go down.

There is increasing media concentration among cable and phone companies—just look at the AT&T–TCI and the Comcast-MediaOne mergers. Concerns that the owner of the broadband wire could favor certain online services and restrict access to others are very real. Policy makers will have to take a hard look at this issue and figure out a way to ensure that the cable monopoly does not become the online service monopoly as well.

If the "one-stop" is at a monopoly that is not competing on price and service, I do not think it is the kind of "one-stop shopping" consumers want.

We should ensure that Bell Operating Companies do not gain more concentrated control over huge percentages of the telephone access lines of this country through mergers, but only through robust competition. As the Consumers Union testified in the past: "If Congress really wants to bring broad-based competition to telecommunications markets, it must rewrite the Telecommunications Act, giving antitrust and regulatory authorities more tools to eliminate the most persistent pockets of telephone and cable monopoly power."

I plan to again introduce legislation—as I did last Congress—that will bar future mergers between Bell Operating Companies or GTE, unless the federal requirement for opening the local loop to competition have been satisfied in at least half of the access lines in each State. Also, the Attorney General should be required to determine that any such proposed merger is procompetitive before it could be approved.

In terms of S. 467 I will be very interested in whether the FCC believes that it will respond to the bill by simply taking staff off other important tasks to reassign them to meet these deadlines. Also, in some cases extra time could be needed to work out new arrangements that would assure more competition or extra time could be needed to meet Administrative Procedure Act or other requirements.

Having said that, I intend to work with my colleagues Senators DeWine and Kohl and the rest of the subcommittee on this effort.

PREPARED STATEMENT OF SENATOR STROM THURMOND

Mr. Chairman: I am pleased that you are holding this hearing today on S. 467, the Antitrust Merger Review Act. I appreciate your leadership, Mr. Chairman, on this important issue.

Although the FCC does not have specific authority to review mergers, it essentially has this power through its responsibility to grant and transfer licenses. I recognize that the duties of the FCC in this regard are complex and difficult, and we cannot place unreasonable burdens on it. However, I believe it is important to place a deadline on the amount of time the FCC has to complete its review, and I believe an appropriate general model is the Hart-Scott-Rodino process, which is used routinely in the Antitrust Division of the Justice Department.

It is very important to bring finality to proposed mergers as quickly as possible. Companies invest a great deal of time and resources into mergers, and they need

a decision on their proposals one way or the other. Clear rules and certainty are very important in business. It is not good for companies or the marketplace for mergers to remain pending for long periods of time.

I welcome our witnesses today and look forward to the insights that they will bring to this important issue.

Senator DEWINE. I want to thank our witnesses for their testimony this morning. It is always important that we on this subcommittee receive input from those who will be affected by our legislation. Any input that we receive this morning will certainly be given strong consideration as we continue to move this legislation forward.

I think Senator Kohl has made a very good point on the point of amending our bill to include smaller transactions. Let me just say that I am inclined to agree with him. I think he is right. It certainly would be an odd result to impose time limits on large, complex transactions and allow smaller transactions to languish, which would be the result. So we are going to work together to modify the bill to take care of that issue.

We currently plan to mark up this bill, S. 467, in this subcommittee at the end of this month. We will continue to work with interested parties, with the FCC, to make sure that this legislation speeds up the FCC review process without limiting the ability of the FCC to conduct thorough examinations of these important mergers.

Fast and efficient merger review is in the best interest of everyone, of the industry, consumers, and certainly in the best interest of competition. This subcommittee is going to keep working towards that goal.

Again, let me thank our four panel members. Your testimony has been very helpful.

The hearing is adjourned.

[Whereupon, at 11:18 a.m., the subcommittee was adjourned.]

APPENDIX

PROPOSED LEGISLATION II

106TH CONGRESS
1ST SESSION

S. 467

To restate and improve section 7A of the Clayton Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 25, 1999

Mr. DEWINE (for himself and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To restate and improve section 7A of the Clayton Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Antitrust Merger Review Act".

SEC. 2. RESTATEMENT AND IMPROVEMENT OF SECTION 7A OF THE CLAYTON ACT.

(a) IN GENERAL.—Section 7A of the Clayton Act (15 U.S.C. 18a) is amended to read as follows:

"SEC. 7A. (a) Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly,

any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

"(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce;

"(2)(A) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more;

"(B) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10,000,000 or more are being acquired by any person which has total assets or annual net sales of $100,000,000 or more; or

"(C) any voting securities or assets of a person with annual net sales or total assets of $100,000,000 or more are being acquired by any person with total assets or annual net sales of $10,000,000 or more; and

"(3) as a result of such acquisition, the acquiring person would hold—

"(A) 15 per centum or more of the voting securities or assets of the acquired person, or

"(B) an aggregate total amount of the voting securities and assets of the acquired person in excess of $15,000,000.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

"(b)(1) The waiting period required under subsection (a) shall—

"(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the 'Assistant Attorney General') of—

"(i) the completed notification required under subsection (a), or

"(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

"(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

"(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

"(3) As used in this section—

"(A) The term 'voting securities' means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

"(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

"(c) The following classes of transactions are exempt from the requirements of this section—

"(1) acquisitions of goods or realty transferred in the ordinary course of business;

"(2) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

"(3) acquisitions of voting securities of an issuer at least 50 per centum of the voting securities of which are owned by the acquiring person prior to such acquisition;

"(4) transfers to or from a Federal agency or a State or political subdivision thereof;

"(5) transactions specifically exempted from the antitrust laws by Federal statute;

"(6) transactions specifically exempted from the antitrust laws by Federal statute if approved by a Federal agency, if copies of all information and documentary material filed with such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(7) transactions which require agency approval under section 10(e) of the Home Owners' Loan Act (12 U.S.C. 1467a), section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), or section

3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842);

"(8) transactions which require agency approval under section 4 of the Bank Holding Company Act of 1956 (12 U.S.C. 1843) or section 5 of the Home Owners' Loan Act (12 U.S.C. 1464), if copies of all information and documentary material filed with any such agency are contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General at least 30 days prior to consummation of the proposed transaction;

"(9) acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer;

"(10) acquisitions of voting securities, if, as a result of such acquisition, the voting securities acquired do not increase, directly or indirectly, the acquiring person's per centum share of outstanding voting securities of the issuer;

"(11) acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of

reorganization or dissolution; or (B) assets in the ordinary course of its business; and

"(12) such other acquisitions, transfers, or transactions, as may be exempted under subsection (d)(2)(B).

"(d) The Federal Trade Commission, with the concurrence of the Assistant Attorney General and by rule in accordance with section 553 of title 5, United States Code, consistent with the purposes of this section—

"(1) shall require that the notification required under subsection (a) be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws; and

"(2) may—

"(A) define the terms used in this section;

"(B) exempt, from the requirements of this section, classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws; and

"(C) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.

"(e)(1) The Federal Trade Commission or the Assistant Attorney General may, prior to the expiration of the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1), require the submission of additional information or documentary material relevant to the proposed acquisition, from a person required to file notification with respect to such acquisition under subsection (a) prior to the expiration of the waiting period specified in subsection (b)(1), or from any officer, director, partner, agent, or employee of such person.

"(2) The Federal Trade Commission or the Assistant Attorney General, in its or his discretion, may extend the 30-day waiting period (or in the case of a cash tender offer, the 15-day waiting period) specified in subsection (b)(1) for an additional period of not more than 20 days (or in the case of a cash tender offer, 10 days) after the date on which the Federal Trade Commission or the Assistant Attorney General, as the case may be, receives from any person to whom a request is made under paragraph (1), or in the case of tender offers, the acquiring person, (A) all the information and documentary material

required to be submitted pursuant to such a request, or (B) if such request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance. Such additional period may be further extended only by the United States district court, upon an application by the Federal Trade Commission or the Assistant Attorney General pursuant to subsection (g)(2).

"(f) If a proceeding is instituted or an action is filed by the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act or section 5 of the Federal Trade Commission Act, or an action is filed by the United States, alleging that a proposed acquisition violates such section 7 or section 1 or 2 of the Sherman Act, and the Federal Trade Commission or the Assistant Attorney General (1) files a motion for a preliminary injunction against consummation of such acquisition pendente lite, and (2) certifies the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for

the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.

"(g)(1) Any person, or any officer, director, or partner thereof, who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section. Such penalty may be recovered in a civil action brought by the United States.

"(2) If any person, or any officer, director, partner, agent, or employee thereof, fails substantially to comply with the notification requirement under subsection (a) or any request for the submission of additional information or documentary material under subsection (e)(1) within the waiting period specified in subsection (b)(1) and as may be extended under subsection (e)(2), the United States district court—

"(A) may order compliance;

"(B) shall extend the waiting period specified in subsection (b)(1) and as may have been extended under subsection (e)(2) until there has been substantial compliance, except that, in the case of a tender offer, the court may not extend such waiting period on the basis of a failure, by the person whose

stock is sought to be acquired, to comply substantially with such notification requirement or any such request; and

"(C) may grant such other equitable relief as the court in its discretion determines necessary or appropriate,

upon application of the Federal Trade Commission or the Assistant Attorney General.

"(h) Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of Congress.

"(i)(1) Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.

"(2) Nothing contained in this section shall limit the authority of the Assistant Attorney General or the Federal Trade Commission to secure at any time from any person documentary material, oral testimony, or other information under the Antitrust Civil Process Act, the Federal Trade Commission Act, or any other provision of law.

"(j) Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to Congress on the operation of this section. Such report shall include an assessment of the effects of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.

"(k)(1) The consideration by the Federal Communications Commission of any application for a transfer of license, or the acquisition and operation of lines, that is associated with an acquisition subject to this section shall be governed by the procedures set forth in this subsection.

"(2)(A) Upon receipt of an application referred to in paragraph (1), the Federal Communications Commission may submit to the party or parties covered by the application a request for any documents and information necessary for consideration of the transfer of license, or ac-

quisition and operation of lines, addressed in the application.

"(B) The Federal Communications Commission shall submit a request under subparagraph (A), if at all, not later than 30 days after receipt of the application in question.

"(3)(A) A party subject to a request from the Federal Communications Commission under paragraph (2) shall submit to the Federal Communications Commission the documents and information identified in the request.

"(B) At the completion of the submission to the Federal Communications Commission of documents and information pursuant to a request under subparagraph (A), the party submitting such documents and information shall certify to the Federal Communications Commission whether or not such party has complied substantially with the request.

"(4) Whenever consideration of an application referred to in paragraph (1) includes one or more requests for documents and information under paragraph (2), the Federal Communications Commission shall complete the consideration of the application not later than 180 days after the date on which all parties covered by such requests have certified to the Federal Communications Com-

mission under paragraph (3)(B) that such parties have complied substantially with such requests.

"(5)(A) In any case in which the Federal Communications Commission does not request under paragraph (2) any documents and information for the consideration of an application referred to in paragraph (1), the Federal Communications Commission shall approve or deny the transfer of license, or the acquisition and operation of lines, covered by the application not later than 30 days after the date of the submittal of the application to the Federal Communications Commission.

"(B) In any case in which the Federal Communications Commission requests under paragraph (2) documents and information for the consideration of an application referred to in paragraph (1), the Federal Communications Commission shall approve or deny the transfer of license, or the acquisition and operation of lines, covered by the application on the date of the completion of consideration of the application under paragraph (4).

"(C) If the Federal Communications Commission does not approve or deny an application for a transfer of license, or for the acquisition and operation of lines, by the date set forth in subparagraph (A) or (B), whichever applies, the application shall be deemed approved by the Federal Communications Commission as of such date. Ap-

proval under this subparagraph shall be without conditions.

"(6)(A) Any party seeking to challenge the reasonableness of a request of the Federal Communications Commission under paragraph (2) shall bring an action in the United States District Court of the District of Columbia seeking a declaratory judgment or injunctive relief with respect to that challenge.

"(B) In seeking to challenge the compliance under paragraph (3) of a party with a request under paragraph (2), the Federal Communications Commission shall bring an action in the United States District Court of the District of Columbia seeking a declaratory judgment or injunctive relief with respect to that challenge.

"(C) The period of an action under this paragraph may not be taken into account in determining the passage of time under a deadline under this subsection.

"(7) No provision of this subsection may be construed to limit or modify—

"(A) the standards utilized by the Federal Communications Commission under the Communications Act of 1934 (47 U.S.C. 151 et seq.) in considering or approving transfers of licenses, or the acquisition and operation of lines, covered by an application referred to in paragraph (1); or

"(2) the authority of the Federal Communications Commission under that Act to impose conditions upon the transfer of licenses, or the acquisition and operation of lines, pursuant to such consideration or approval.

"(8) Subsection (g)(1) shall not apply with respect to the activities of a party under this subsection.".

(b) EFFECTIVE DATE.—(1) Except as provided in paragraph (2), the amendment made by subsection (a) shall take effect on the date of the enactment of this Act.

(2) Subsection (k) of section 7A of the Clayton Act, as amended by subsection (a) of this section, shall take effect 30 days after the date of the enactment of this Act, and shall apply with respect to applications referred to in such subsection (k) that are submitted to the Federal Communications Commission on or after that date.

Post-Hearing Questions Submitted by Senator Kohl, Ranking Minority Member, to the Honorable William E. Kennard, Chairman, Federal Communications Commission

1. **TIMING OF FCC MERGER REVIEW PROCESS**

The FCC has been criticized by many for "sitting back" on merger applications -- waiting until others rule on a deal before the Commission makes up its mind. Our sense is that you should have the power to approve these deals, reject them, or apply conditions -- but even on the big mergers like SBC/Ameritech, you should do it more quickly. But we also recognize that it is sometimes difficult to separate legitimate arguments from subjective rhetoric.

Question: Mr. Kennard, we understand that your office has been collecting information on the process and timing of the Commission's review of mergers, and we ask you to share that information with the Subcommittee.

Answer: In the rapidly changing communication marketplace, it is incumbent upon the FCC and other agencies of government to move quickly when presented with requests for approval of planned transactions. The information we have gathered reveals the Commission's commitment to acting expeditiously on applications for transfer of licenses and lines. I am happy to supply you with specific information which we have gathered on the general receipt and processing of applications to transfer licenses and lines. As the summary below reflects, we have received and processed more than 117,000 license transfers since the passage of the 1996 Act, and also reviewed over 60 mergers or major acquisitions involving license or line transfers. On average, these mergers or major acquisitions have been reviewed in less than six months, and the other license transfers have routinely been reviewed in less time. The summary reflects requests received from the passage of the 1996 Act through June 1999, and is divided between mergers or acquisitions reviewed, and license transfers. It also indicates the time spent in processing, depending on whether the transactions were considered to be routine, complex or extraordinary. I have also provided as appendices A - E, information from each of the Bureau's reflecting the specific transactions summarized.

Summary Information on Mergers/Acquisitions
Since the Passage of the 1996 Act

	Mergers/Acq. Reviewed	Average Time in Months		
		Routine	Complex	Extraordinary
Cable	1		5	
Wireless Bureau	12		3.5	8
Common Carrier	5	2.5	6.5	11.5
International	10		4.1	
MMB-Radio	12		5.6	
MMB-TV	21		4.9	

Total	61		2.5	4.93	9.75
			Routine	Non-routine	
Radio Applications Processed		7,960	45 days	90 days	
Television Applications Processed		686	36 days	180 days	
Wireless Transfers/Assignments		107,077			
International Apps Processed		1,381	100 days overall average speed disposal		
		117,104			

2. UNBUNDLED NETWORK ELEMENTS (UNEs)

The goal of Congress in enacting the 1996 Telecom Act was to promote the development of advanced services. On January 25, the Supreme Court, in the case of *AT&T v. Iowa Utilities Board*, reaffirmed the FCC's broad authority to implement the 1996 Act so as to foster competition and hasten the development of such services.

At the same time, however, the Court required that the FCC develop a more rigorous test to determine which network elements are "necessary" to be made accessible to competitors. This sent the FCC back to the proverbial drawing board to determine with greater specificity which elements are "necessary."

Last month you stated in a speech that, out of "good faith," you believe the Regional Bell Companies would continue to provide network elements in this interim period.

Question: Will you take any additional steps to ensure that the progress of competition, especially in broadband data transmission, does not grind to a halt during this interim period?

Answer: As a direct result of our concern regarding this interim period, we contacted each of the Bell Operating Companies. I am pleased to report that each of these companies provided a commitment to the Commission that they will continue to provide unbundled network elements under their existing interconnection agreements and will negotiate new agreements in good faith. In this way, we have ensured the status quo during this interim period. We are currently reviewing the section 251(d)(2) standard consistent with the Supreme Court remand in *Iowa Utilities Board*, and have released a *Further Notice of Proposed Rulemaking* seeking comment on how the Commission should interpret section 251(d)(2) and which specific network elements the Commission should require incumbent local exchange carriers (LECs) to unbundle.

Regarding the deployment of broadband services, the Commission is committed to removing barriers to competition so that new providers are able to compete effectively with

incumbent LECs to provide advanced services. We are also committed to ensuring that incumbent LECs are able to make their decisions to invest in, and deploy, advanced telecommunications services based on market demand and their own business plans, rather than on regulatory requirements. To this end, we have taken and intend to take deregulatory steps towards meeting these goals.

The Commission recently adopted several measures, described below, that we believe will promote competition in the advanced services markets. We fully expect that these measures will create incentives for providers of advanced services to innovate and to develop and deploy new technologies and services on a more efficient and expeditious basis. As a result, consumers will ultimately benefit through lower prices and increased choices in advanced services.

In our March 31, 1999 order on advanced services, we strengthened our collocation rules to reduce the costs and delays faced by competitors that seek to collocate equipment in an incumbent LEC's central office. For example, we adopted rules requiring incumbent LECs to make available to requesting competitive LECs shared cage and cageless collocation arrangements. Moreover, when collocation space is exhausted at a particular incumbent LEC location, our rules require incumbent LECs to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible. We also adopted certain spectrum compatibility rules and a Further Notice of Proposed Rulemaking (*Further NPRM*) to explore issues related to developing long-term standards and practices for spectrum compatibility and management. Finally, in the Further NPRM, we consider whether we should require incumbent LECs to allow competitors to offer advanced services to end users over the same line on which the incumbent LEC is offering voice service.

Moreover, in the following proceedings, the Commission has addressed or is still addressing many additional issues relating to broadband deployment in an effort to foster timely, cost-effective, competitive deployment of advanced services:

DSL Tariff Orders -- Concluded that DSL service is interstate, and thus within Federal jurisdiction, which heightens regulatory certainty for DSL service providers.

56 Kilobyte Modem NPRM -- Proceeding opened to explore the power limitations on customer premises equipment to allow ISPs to deploy higher speed modems.

Part 68 Waivers -- Granted waivers to allow companies to manufacture and end users to purchase higher speed modems.

Digital Television Proceeding -- Permitted DTV licensees to offer innovative data services over their digital television spectrum.

CMRS/PCS Flexible Spectrum Usage Proceeding -- Allowed CMRS and PCS providers

to use their spectrum to offer data services.

International Proceedings – Granted satellite providers blanket ground station licenses in order to provide satellite-based data services.

Competitive Networks NPRM- Examining building access and rights of way issues that are critical to the deployment of broadband services by telecommunications providers such as Winstar, Teligent, and Nextlink, sometimes referred to as getting access to "the last 100 feet" into such multiple dwelling units or "MDUs" as apartment and office buildings.

Proceedings in the Common Carrier Bureau and Wireless Telecommunications Bureau- Exploring universal service and other issues designed to further access to broadband services on Native American and tribal lands, as well as in rural areas.

Deployment by the Wireless Telecommunications Bureau of additional spectrum for broadband fixed services such as LMDS, 24GHz, and 39 GHz, to generate new competition and consumer services.

Unbundled Network Element ("UNE") Remand Proceeding- Examining the unbundling rules for network elements used to provide advanced, broadband services.

Federal-State Joint Conference on Advanced Services- Considering to convene a Federal-State Joint Conference to facilitate the development of Federal, State, regional, and local mechanisms and policies to promote the widespread deployment of advanced telecommunications services.

Follow-up: How long will it now take to complete the Section 706 proceeding -- are you considering expediting it?

Answer: The Commission is committed to taking actions expeditiously to stimulate investment and deployment of advanced services by incumbents or new entrants. For example, in the *Advanced Services Order and NPRM*, we proposed an option under which incumbent LECs would be free to establish separate affiliates to provide advanced services that would not be subject to section 251(c) obligations, if those affiliates were structured in a fashion so as not to be deemed a successor or assignee of the incumbent. We also sought comment on the applicability of section 251(c)(4) resale obligations to advanced services to the extent such services are exchange access services. In addition, the NPRM proposed limited modifications of LATA boundaries. We also had set forth proposals in the *Advanced Services Order and NPRM* relating to incumbent LEC loop unbundling obligations. Because we have also released the *Further Notice* regarding the Supreme Court's remand in the *Iowa Utilities Board* case, the issues raised in that proceeding will directly affect our advanced services proceeding. Therefore, we intend to address these issues and whether other changes to the Commission's

local competition rules may facilitate deployment of advanced services by competing carriers in one or more future orders.

3. ENFORCEMENT OF THE TELECOM ACT

The Telecom Act was supposed to open up local markets to competitive carriers, and the FCC was charged with implementing this. Three years after the fact, there's a considerable amount of disagreement on how much the FCC is doing to enforce the Act. Competitive carriers claim the FCC is making it too easy for incumbents to get away with anticompetitive behavior, but incumbents think the FCC has been unfairly over-regulatory and preventing the RBOCs from getting into the long-distance market.

Question: What steps has the FCC taken to enforce the Act and punish violators, and how do you respond to critics who claim you should be handling this differently?

Answer: The Commission has long had a variety of mechanisms through which it enforces the provisions of the Communications Act relating to common carriers, including those added by the Telecommunications Act of 1996. The two primary vehicles for enforcing the Act's statutory requirements and prohibitions are the adjudication of formal complaints filed against common carriers and the agency's independent investigation and prosecution of entities that appear to be violating the law or regulations.

Adjudications

The way in which the Commission most often enforces the strictures of the Act is through the adjudication of formal complaints filed against common carriers. These complaints frequently involve disputes between competing carriers or disagreements between carriers and their customers over the terms and conditions of service. In deciding the formal complaints before it, the Commission can and does issue both damages awards and injunctive or declaratory relief. A prime example is the recent complaint alleging that Ameritech and US West were violating section 271 of the Act by providing inter-LATA service in conjunction with Qwest. *AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 21438 (1998). The Commission's decision in that action will play an important role in giving meaning to section 271 by ensuring that the BOCs are not permitted to offer long distance service before they have taken the congressionally mandated steps to open their local markets to competition. Other pending complaints raise a broad variety of competitive issues including: (1) whether a BOC's withdrawal of Centrex is an inappropriate restriction on resale in violation of section 251(b)(1); (2) whether section 251(c)(3) requires a BOC to offer a particular combination of unbundled network elements; and (3) whether section 251(b)(5) requires that BOCs pay reciprocal compensation to paging carriers. The Commission continues to handle many different complaints in which carriers are alleged to be violating the Act's pro-competitive provisions.

The timely decision of formal complaints is likely the single most effective way for the Commission to enforce the pro-competitive provisions of the Act and promptly ensure consumers the benefits that Congress envisioned in the 1996 Telecommunications Act. This is true because the formal complaint process allows the Commission to respond to specific instances of anticompetitive conduct that are actually occurring in the marketplace. In contrast to the somewhat cumbersome and time-consuming process of notice-and-comment rulemaking, the complaint process allows the Commission to quickly decide the legality of a particular carrier practice. Once such a decision is released, it gains precedential effect and often will affect the conduct of many carriers that were not parties to the case. Furthermore, in order to ensure the timely decision of qualifying complaints, the Commission recently established an accelerated procedure under which complaints will be decided within 60 days of their filing date. I am pleased to report that the very existence of a "fast-track" adjudication process has promoted the settlement disputes before a formal complaint is ever filed.

Independent Enforcement Action

With increasing frequency, the Commission also is enforcing the Act and its regulations through enforcement actions initiated by the Commission. This places the Commission in the role of investigator and prosecutor, rather than adjudicator. Typically, the Commission pursues this enforcement avenue when it appears that no single party is willing or able to prosecute a complaint for a violation of the Communications Act or the Commission's regulations. These proceedings often result in the imposition of a substantial forfeiture for the subject violation. Examples of recent enforcement action of this type include the Commission's ongoing investigation into carriers' marketing practices for dial-around (*i.e.*, 10-10-XXX) services and the pursuit of a wide variety of carriers that are seriously delinquent on their universal service contributions. Each of these practices also may permit carriers to obtain an unfair competitive advantage over others in the marketplace. Accordingly, the Commission's pursuit of them spurs the development of competition in all facets of the telecommunications market. To date, the Commission has not initiated independent enforcement action against a BOC in order to enforce the pro-competitive portions of the 1996 Act.

Response to Critics

Since the enactment of the 1996 Act, a variety of parties have stated publicly that the Commission should take different steps in its enforcement of the pro-competitive portions of the statute. Thus, as the preamble to the question recognizes, BOCs often have accused the Commission of acting in an overly regulatory manner and of improperly delaying their entry into the long distance market. On the other hand, those carriers seeking to enter and compete in the local service market have accused the Commission of being too lax in requiring that the BOCs meet their obligations under the statute.

First, we note that these criticisms appear to focus primarily on the substance of the Commission's decisions, not with the procedures available for enforcing the BOCs' obligations under the pro-competitive portions of the 1996 Act. It thus appears that both adjudications and the independent enforcement activity discussed above are, as a procedural matter, well suited to the industry's enforcement needs. Furthermore, it appears that a substantial measure of the criticism leveled at the Commission's enforcement of these sections is attributable to the relatively limited resources that the Commission can devote exclusively to this type of enforcement. The Commission recognizes that enforcement of sections 251, 252 and 271 is a vitally important part of the Commission's mission and will continue to be a core function of the agency even as we take a less presumptive approach to regulations in the future. At the same time, we must devote its personnel and resources to other enforcement initiatives, including those relating to important consumer-protection issues. I look forward to working with Congress as we shape the future of the agency and ensure that there are sufficient resources to allow us to pursue our responsibilities. In any event, the Commission is dedicated to ensuring that the pro-competitive goals of the Communications Act are met. For this reason, the Commission tends to pursue actions which require the least resources but which provide the greatest benefit to the consumer. Actions which meet this criteria are discussed more fully below in response to your follow-up question.

Finally, the relative equipoise of the Commission's critics serves, to a great degree, to validate the Commission's enforcement of the pro-competitive provisions of the 1996 Act. The development of local competition (and, relatedly, the BOCs' admission into the long-distance market) affects substantial financial interests for many carriers. Accordingly, it is often impossible for the Commission to take any enforcement step that will please all parties involved. However, the presence of such financially motivated criticism will not deter the Commission from continuing to pursue a fully competitive market within the bounds of the law. Attaining a fully competitive market has proved to be substantially more difficult than either Congress or the Commission envisioned when the 1996 Act was first passed. In spite of the difficulties and the setbacks it has encountered, the Commission is diligently moving toward this goal by charting a path between the often extreme and directly competing positions of the parties before it. The periodic dissatisfaction of each of the financially opposed camps -- the BOCs and the CLECs -- likely indicates that the Commission is succeeding in finding an appropriate middle ground as it moves the market toward free competition.

Follow up: Mr. Kennard, you said at the hearing that the proper focus for the Commission as it evaluates the Bell Atlantic/GTE and SBC/Ameritech mergers is on what is happening within those companies' service territories, rather than on their announced plans to compete outside of their respective regions. You also said that you were concerned that these companies have not yet fully complied with the requirements of Sections 271, 251 and 252. If any of these companies have yet to fully comply with the requirements imposed by the Act, at what point will the Commission commence enforcement action to compel compliance with all of the Act's provisions and the regulations issued pursuant to the Act?

Answer: The Commission can most effectively enforce section 271 (and derivatively sections 251 and 252) by continuing stringently to examine the BOCs' applications to enter the long distance market on a state-by-state basis. This process is discussed in detail in response to other questions. It is sufficient for the current purpose to note the substantial incentive for compliance with sections 251, 252 and 271 that is created by the exclusion of non-complying carriers from the market for in-region interLATA services. Every month that a BOC is prohibited from offering in-region interLATA service represents substantial foregone revenues that the carrier must suffer. Accordingly, by continuing to require full compliance with the section 271 checklist, the Commission likely imposes the most meaningful penalty possible for violation of these sections. Although we do not have precise figures for this penalty arising from foregone long-distance revenues, we note that the Communications Act restricts the Commission to imposing forfeitures of no more than $1.1 million for a single violation of the Communications Act or Commission rules, even when that violation is continuing or willful.

As noted above, the Commission has taken the additional step of deciding whether particular services offered by certain BOCs run afoul of section 271's prohibition against BOC provision of in-region, interLATA service before its local markets are fully open to competition. Thus, the Commission recently invalidated, as a violation of section 271, a combined local and long-distance offering from both Ameritech and US West. We expect that additional disputes of this variety will continue to come before the Commission. Indeed, the Common Carrier Bureau recently decided a second complaint that raised the issue of whether BellSouth violated section 271 by issuing a prepaid calling card. (As noted above, a variety of other complaints under the other pro-competitive portions of the 1996 Act are currently pending.) The Commission will be able to use similar issues that arise in the complaint process as an additional and ongoing means of enforcing the prohibitions that Congress enacted in section 271 and the other provisions of the 1996 Act.

4. RBOC COMPETITION OUTSIDE THEIR REGIONS

One of the concerns about pending RBOC mergers is that their consolidation will allow them to enter other regional markets and compete powerfully.

Question: As the FCC considers the SBC/Ameritech and Bell Atlantic/GTE deals, will the Commission ask companies to share their detailed plans about competing outside of their traditional service regions? And are you considering imposing "conditions" on the companies that would require them to implement some or all of their out-of-region business plans if you approve their mergers?

Answer: As requested by Bell Atlantic/GTE, the Commission has effectively stayed its pending review of their application. The Commission will re-commence such review at the request of the parties. In reviewing the SBC/Ameritech application, the Commission has asked the companies to provide detailed information about their plans to compete outside their

traditional service regions. These companies identified such out-of-region expansion plans in their applications as the primary public interest benefits of their mergers and asserted that they cannot accomplish such expansion absent the merger. The companies bear the burden of proving the existence and scope of their asserted benefits.

As stated in their ex parte notices of discussions with the Commission regarding possible conditions, SBC/Ameritech have raised the possibility of commitments by the merged firm to ensure the rapid and full execution of their out-of-region business plans, including the provision of service to residential customers. They also discussed possible market-opening conditions to promote competitors' provision of services to residential customers in SBC/Ameritech's regions. On May 6, 1999, the Commission held a public forum to allow interested parties to discuss their concerns with the Commission. There was substantial participation in this forum, with an extensive record produced as a result. Subsequently, SBC/Ameritech have continued their discussions with Commission staff regarding pro-competitive conditions relating to their proposed merger.

Follow-up: In general terms, what steps are you taking to ensure that these mergers would benefit residential customers? And how would these companies, by competing in new markets, benefit consumers?

Answer: The parties seeking the Commission's approval of a proposed application to transfer lines or licenses bear the burden of showing, by a preponderance of the evidence, that the requested transfers are in the public interest. Parties seeking such approval may propose actions or conditions that they believe will provide benefits that may outweigh any potential harm from their proposed transaction. In evaluating possible public benefits, the Commission recognizes that, if the mergers enable these companies to offer service to residential consumers on a significant and timely basis, consumers in those markets will benefit from acquiring an additional choice of communications services provider. This new competition may result in better service and/or rates for all consumers in the relevant markets. Conversely, in evaluating possible competitive harms, the Commission seeks to determine whether the proposed mergers will increase these companies' incentives and abilities to thwart competition in their traditional service territories, to the detriment of both residential and business customers. Finally, the Commission is responsible for ensuring that in making a conditional approval, that sufficient enforcement mechanisms and/or penalties are available in the event the newly merged entity fails to live up to the agreed upon conditions.

SBC and Ameritech have proposed a set of conditions that are intended to open up their in-region markets to competition, and to set benchmarks for the merged entity's entry into out-of-region markets. Under the terms of the proposal failure to satisfy these conditions would result in significant penalties. We have sought public comment on these proposals and are currently assessing their likely impact on consumers to ensure that the public interest would be served by the consummation of the proposed merger.

5. COMPETITION IN RURAL AREAS

Mr. Kennard, you recently expressed concern about the disparity between telecommunications services available in urban versus rural areas. Some people believe that one of the factors that could exacerbate this trend is the growing number of state barriers that prevent municipal electric utilities from entering into the telecommunications market.

Question: Does the FCC have plans to examine whether state restrictions on municipal utilities' provision of telecommunications services are in conflict with the Telecom Act? Why or why not?

Answer: The question of whether a state restriction on the provision of telecommunications services by municipal utilities should be preempted under Section 253 of the Act is currently before the Commission in the *Missouri Preemption* proceeding. I strongly support the competitive provision of telecommunications services and believe that the Commission must work to ensure that rural as well as urban areas benefit from the new competitive communications environment. In many rural areas, municipal utilities may be the most likely source of effective competitive entry. As a result, I generally oppose, on policy grounds, the enactment of state statutes prohibiting the provision of competitive telecommunications services or facilities by municipalities or municipal utilities.

I believe that the Commission must tread very carefully in exercising its preemption authority. In the *Texas Preemption* proceeding, the Commission declined to exercise its Section 253 authority to preempt a Texas statute generally prohibiting municipalities from providing telecommunications services or facilities. In light of the relevant judicial precedent, the Commission concluded that it was not clear that Congress wanted the Commission to intrude into the relationship between a state and its municipalities. This decision was upheld by the U.S. Court of Appeals for the D.C. Circuit.

The *Texas Preemption* proceeding dealt specifically with restrictions on municipalities, and reserved the question of restrictions on municipally owned utilities. As previously indicated, that issue is pending before the Commission in the *Missouri Preemption* proceeding.

6. COLLOCATION RULES

The FCC has yet to release rules on national collocation standards, in part due to the timing of the Supreme Court Decision.

Question: When will the FCC move forward on national collocation rules to address this issue? And can this be done prior to the resolution of the Section 706 proceeding?

Answer: As discussed in Question 2 above, the Commission released a Report and Order announcing its new collocation rules on March 31, 1999, in which we strengthened our

collocation rules to reduce the costs and delays faced by competitors that seek to collocate equipment in an incumbent LEC's central office. For example, we adopted rules requiring incumbent LECs to make available to requesting competitive LECs shared cage and cageless collocation arrangements. Moreover, when collocation space is exhausted at a particular incumbent LEC location, our rules require incumbent LECs to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible.

7. ADVANCED DATA SERVICES

Clearly, the widespread availability of advanced data services is an exciting prospect just on the horizon, but it is also a very new regulatory area that must be navigated carefully.

Question: What are the pros and cons of offering some kind of "regulatory relief" to both incumbent and competitive carriers who want to offer advanced data services? How would this affect competition and consumer choice?

Answer: The Commission is committed to a deregulatory approach to encourage the local telephone industry to provide advanced telecommunications services. We want to do everything we can to encourage the deployment of advanced services over these lines in all areas -- rural and urban alike. If regulatory flexibility furthers that goal, we should consider it -- but we should provide such flexibility in a way that minimizes the ability of incumbent LECs to leverage their market power over the last mile and in turn dominate the nascent advanced services market. To this end, in a *Notice of Proposed Rulemaking* adopted last August, the Commission proposed a separate affiliate as an option under which an incumbent LEC may choose to establish an affiliate for the provision of advanced services that would not be regulated as an incumbent LEC under the Act. The Commission understands the problems inherent with granting regulatory relief to an incumbent LEC that continues to control access to the local loop. Therefore, the Commission proposed criteria that separate affiliates must meet for deregulation, and encouraged the creation of separate affiliates. The Commission made clear, however, that the LEC would have the unfettered discretion to decide whether to offer advanced services through a separate affiliate or on an integrated basis.

The proposals in the *Notice of Proposed Rulemaking* were intended to create more competition, more services, more choices, and to allow for more expeditious deployment of advanced services offered by a variety of carriers. As the Commission stated in its recent Section 706 Report, entry by many competitors is the best paradigm by which to bring broadband capabilities to all Americans. The proposals in the *Notice of Proposed Rulemaking* recognize the need to both open markets to competition and preserve economic incentives for innovation and investment in new services by incumbents and new entrants alike. The proposals were based on the ultimate goal of fulfilling Congress' overriding purpose of ensuring that consumers reap the benefits of broad-based and long-lasting competition as quickly as possible.

Follow-up: What should the government do to ensure an equitable marketplace for all providers of advanced data services?

Answer: Although the Commission concluded in the Section 706 Report that it appears that advanced telecommunications capability is being deployed in a reasonable and timely fashion, the Commission will continue to look for ways, such as the recent order on collocation and spectrum management, to reduce barriers to infrastructure investment and to promote competition so that companies in all segments of the communications industry have the incentive to innovate and invest in broadband technologies and facilities.

8. THE COMPETITIVE LANDSCAPE

Recently, both the DOJ and the FCC gave their stamp of approval to the AT&T/TCI deal. This deal could have significant consequences on competition in the local and long distance markets, as well as in the provision of data services.

Question: How do you think this deal will change the competitive landscape in telecommunications, if at all? Does this new environment affect the chances of approval for other pending mergers?

Answer: In approving the AT&T/TCI merger, we envisioned that the merger would create an entity that has incentives and capabilities to expand its operations and, in particular, to provide facilities-based competition in the residential market for local and exchange access services, and to do so more quickly than either party alone could. We also found that the merger offers the potential, at least in those areas where TCI has enough subscribers to warrant the expense of two-way upgrade, to create greater customer choice among video-and content-enriched high-speed Internet access services.

It is difficult to assess the import of the AT&T/TCI merger on other merger applications given the substantial variation in the markets and parties involved. The Commission has the duty to evaluate each merger on its own merits, based on the specific facts and evolving conditions of the markets at issue. The Commission will continue to monitor the impact of the combined AT&T/TCI entity and will consider that import when evaluating other merger applications.

9. BROADBAND SERVICES

The FCC has begun to look at how telephone companies deliver broadband services in its Section 706 proceeding. But as the AT&T/TCI merger reminds us, there is another pipe to the home that can deliver broadband services such as high-speed Internet.

Question: Does Congress need to do some long-term thinking about whether the same broadband services should be treated under the same regulatory "regime" depending on

whether they come through the cable modem or the telephone wire – or can we leave this matter to the FCC and the Administration?

Answer: I believe it would be useful for Congress, as well as the Commission and the Administration, to do some long-term thinking about the appropriate regulatory structure to govern the provision of broadband services utilizing different technologies. We need to assess whether the language and structure of the Communications Act provides sufficient flexibility to address the regulatory issues that are arising in today's rapidly evolving marketplace.

Follow-up: And where do you think we ought to come out – that is, should the same broadband services be treated or regulated in a similar or different fashion?

Answer: As technologies converge, it makes sense to regulate similar services in a similar manner. Yet rather than pursuing a goal of "regulatory party," I believe our goal should be "deregulatory party." That is, we should experience regulatory restraint in the case of competitive entrants and new services, while also moving to ease existing regulations on incumbents as marketplace developments warrant. The Commission is closely monitoring the deployment of broadband services, including delivery through cable modems and the telephone wire. We will, to the extent necessary, harmonize our regulations to ensure that no particular technology is favored over another.

10. SECTION 271 APPROVAL

During the final debate of the Telecom Act, Mr. Pressler said that this law was not about "more regulation" -- local telephone companies would simply have to comply with a checklist and meet the FCC's public interest test before they would be granted Section 271 approval to offer long distance services. Yet, three years later, not a single Section 271 application has been approved.

Question: Is this a case of over-implementation – using standards that are much more stringent than those set forth in the Telecom Act – or are the RBOCs simply not reaching the competitive standard they need to show before entering the long distance market?

Answer: The BOCs are simply not reaching the competitive standard that they need to show, pursuant to Congress' very own checklist, before entering the long distance market. The Commission has faithfully applied the checklist to each application that has been filed and, to date, no BOC has succeeded in satisfying the statutory requirements in the checklist established by Congress. We note that each Commission decision has been unanimous and that the Department of Justice has agreed with us in every case.

11. TESTING OPERATIONAL SUPPORT SYSTEMS

To consumers, one of the most important indicators of competition is whether they can switch their service from one carrier to another. To accomplish this, the carriers' operational support systems must work with one another. Our sense is that objective, third-party testing of these systems will aid both the competitors (by validating that consumers can switch carriers) and incumbents (by demonstrating that they have taken the necessary steps to open their systems).

Question: What are you doing to ensure that these systems work at commercially significant volumes? And doesn't it make sense for either the DOJ or FCC to require that these systems work at commercially significant volumes – as proven by an objective test – before the government grants long distance relief?

Answer: Under Section 271, as detailed in our orders, a BOC must prove that their operations support system can support reasonably foreseeable demand. The BOC must also show that it provides nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement dialing parity. Our inquiry is whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competitive carriers to understand how to implement and use all of the OSS functions available to them. We then consider whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter. Finally, we examine performance measurements and other evidence of commercial readiness.

We agree that it does make sense that a BOC's operations support systems should work at commercially significant volumes. We also agree that objective, third-party testing is an excellent means to determine commercial readiness.

Appendix A

Common Carrier Bureau **May 1999**

Companies	Date Filed	Merger Appr. Date	Months
AT&T/Teleport	February 3, 1998	July 23, 1998	5 1/2 (C)
SBC/SNET	February 20, 1998	October 23, 1998	8 (C)
WorldCom/MCI	October 1, 1997		
Amended Application	November 21, 1997	September 14, 1998	10 (E)
Bourbeuse Telephone/ Fidelity Telephone	October 2, 1998	December 21, 1998	2 1/2 (R)
Bell Atlantic/NYNEX	July 2, 1996	August 14, 1997	13 (E)

Average Tally:
(R) Routine: 2 1/2 months
(C) Complex: 6 1/2 months
(E) Extraordinary: 11 1/2 months.

Pending Mergers:	Filed:
SBC/Ameritech	July 24, 1998
Bell Atlantic/GTE	October 2, 1998
Aliant/AllTel	January 15, 1999

Appendix B

IB May 1996

Major Mergers Granted in IB Since the 1996 Telecom Act

Merging Companies	Application filed Date	Merger Approval Date	Months to Grant
WorldCom/MFS	Sept. 13, 1996	Dec. 5, 1996	3
At&T/Loral	Oct. 9, 1996	Jan. 17, 1997	3 1/2
Hughes/PanAmSat	Oct. 8, 1996	April 4, 1997	6
BT/MCI	Dec. 2, 1996	Sept. 24, 1997	10
Loral/Orion	Oct. 16, 1997	Feb. 26, 1998	4 1/2
LCI/Quest	April 6, 1998	May 20, 1998	1 1/2
Teleglobe/Excel	July 17, 1998	Sept. 9, 1998	2
DirecTV/USSB DBS	Dec. 17, 1998	April 1, 1999	3 1/2
Esprit Tel/Global	Jan. 20, 1999	April 2, 1999	2 1/4
EchoStar/MCI DBS	Dec. 2, 1998	May 19, 1999	4 3/4
		Average number of months to review:	4.1 months

Appendix C

International Bureau Merger Application Processing Statistics*

Application Type	Total Number of Actions Between January 1, 1996 and February 24, 1999	Average Speed of Disposal (days)	Longest Disposal/Shortest Disposal Time (days)
Non-Routine Satellite Space Station Assignment of License Applications	5	236	418/100
Routine Satellite Space Station Assignment of License Applications	11	38	98/2
Non-Routine Satellite Space Station Transfer of Control Applications	6	196	417/134
Routine Satellite Space Station Transfer of Control Applications	8	29	79/4
Non-Routine Satellite Earth Station Assignment of License Applications	67	176	960/102
Routine Satellite Earth Station Assignment of License Applications	632	39	100/3
Non-Routine Satellite Earth Station Transfer of Control Applications	40	203	798/114
Non-Routine Satellite Earth Station Transfer of Control Applications	305	47	112/2
Section 214 Assignment of License Applications	65	32	94/1
Section 214 Transfer of Control Applications	236	45	178/1
Submarine Cable Landing License Assignment of License Applications	4	84	268/14
Submarine Cable Landing License Transfer of Control Applications	2	78	113/42

*Figures derived from data extracted from the IBFS licensing system. Items not entered into this system will not be reflected in the figures above.

Appendix D - 1

MASS MEDIA BUREAU

Radio Transfer/Assignment Applications Granted
since the Telecommunications Act of 1996the Telecommunications Act of 1996

Number of applications granted:		Average grant time:	
		Nonroutine	90 days
		Routine	45 days
TOTAL	7,960	TOTAL	7,960

Major Radio Mergers Reviewed and CompletedRadio Mergers Reviewed and Completed
since 1996 Telecommunications Act[1]since 1996 Telecommunications Act[1]

Merging Parties	Filed	Granted	Mnths To Grant
US Radio/Clear Channel	March 6, 1996	May 17, 1996	2.3
Infinity/Westinghoul mon., 13 days			
AT&T/Teleport	2/3/98	7/23/98	5 mon., 20 days
ALLTEL/360	3/26/98	6/22/98	2 mon., 27 days
AMSC/Ardis	12/31/97	3/16/98	2 mon., 16 days
Blackstone/Commnet	6/19/97	2/3/98	7 mon., 15 days
1999			
GTE/PRTC	7/24/98	2/12/99	6 mon., 19 days
AT&T/TCI	9/14/98	2/18/99	5 mon., 4 days
Arch Communications/ MobileMedia	9/2/98	2/5/99	5 mon., 3 days
AT&T/Vanguard	10/26/98	3/11/99	4 mon., 13 days

[Note that average elapsed time for this group of transactions is **just under six months**. Of the proceedings on this list that might be considered extraordinary (Worldcom/MCI, GTE/PRTC, AT&T/TCI, and Arch Comm./MobileMedia), the average elapsed time was **roughly seven months**. Of the proceedings that might be considered complex but not extraordinary, the average elapsed time was **roughly five months**.]

1 The transactions enumerated are included in the 7,960 applications granted since the 1996 Telecommunications Act. Many other similar transactions were approved. Those enumerated transactions, with the exception of the EZ/ARS transaction, required a waiver decision or order to address oppositions or because ownership waivers were requested. Data are as of May 21, 1999.

Appendix D - 2
MASS MEDIA BUREAU
Television Transfer/Assignment Applications Granted since Telecommunications Act of 1996

Number of applications granted:	Average grant time
Nonroutine 650[13]	Nonroutine180 days
Routine 36	Routine36 days
TOTAL 686	

Major Television Mergers Reviewed and Completed since 1996 Act[14]

Merging Parties	Filed	Granted	Mos to Grant
ABC-CAPCities/Disney	August 25, 1995	February 8, 1996	5.3
Savoy/Silver King	April 8, 1996	August 16, 1996	4.3
Citicasters/JACOR	February 22, 1996	September 17, 1996	7.0
Federal EnterprisesRaycom	July 18, 1996	September 24, 1996	2.2
New World Communications/Fox	August 13, 1996	November 7, 1996	3.0
Roy M. Speer/Silver King	September 13, 1995	March 11, 1996	6.0
Stauffer/Benedek	January 11, 1996	April 12, 1996	3.0
Brissette/Benedek	January 17, 1996	May 23, 1996	4.2
Elcom/Raycom	May 24, 1996	July 26, 1996	2.1
Park/Media General	July 30, 1996	December 10, 1996	5.6
Providence Journal/A. H. Belo	October 18, 1996	February 28, 1997	4.4
Renaissance/Tribune	August 1, 1996	March 21, 1997	7.6
AFLAC/Raycom	September 9, 1996	March 26, 1997	6.5
River City/Sinclair	July 3, 1996	March 28, 1997	8.8
Hearst/Argyle	April 7, 1997	July 16, 1997	3.3
U.S. Broadcast Group/Nexstar	August 7, 1997	November 6, 1997	3.0
AT&T/LIN	September 10, 1997	March 2, 1998	6.0
Max Media/Sinclair	February 11, 1998	June 29, 1998	4.6
Malrite/Raycom	April 21, 1998	August 13, 1998	4.0
Pulitzer/Hearst-Argyle	June 12, 1998	November 24, 1998	5.4
Guy Gannett/Sinclair	September 25, 1998	April 5, 1999	6.3
		Average Time To Grant:	4.9

[13] Nonroutine applications include applications requiring waivers of the rules, contested applications, applications requiring referral to the full Commission for review. This category also includes applications requiring staff-directed amendments by applicants.

[14] This list reflects highly complex assignment and transfer of control applications involving multiple television stations. In addition to the items listed above, formal orders were issued for numerous other television acquisitions since the 1996 Act. Further, other similar transactions were approved in a more summary fashion because they were unopposed and did not raise any concerns under the Communications Act. Data are as of May 21, 1999.

Appendix E
Wireless Telecommunications Bureau

May 1999

The number of license assignments and transfers approved in the following years.

The totals are as follows:

1995 22,907
1996 23,889
1997 24,084
1998 31,359
1999 ytd 4,868 (through March 9)

These figures represent the number of license call signs involved in license transfer and assignment transactions each year. (Note that under the FCC's rules, licensees are permitted to partition and/or disaggregate spectrum licenses. These partial transfers or assignments are included in the totals above.)

1998

	Filed Date	Grant Date	Elapsed Time
SBC/SNET	2/20/98	10/15/98	7 mon., 25 days
Worldcom/MCI	10/1/97	9/14/98	11 mon., 13 days
AT&T/Teleport	2/3/98	7/23/98	5 mon., 20 days
ALLTEL/360	3/26/98	6/22/98	2 mon., 27 days
AMSC/Ardis	12/31/97	3/16/98	2 mon., 16 days
Blackstone/Commnet	6/19/97	2/3/98	7 mon., 15 days

1999

GTE/PRTC	7/24/98	2/12/99	6 mon., 19 days
AT&T/TCI	9/14/98	2/18/99	5 mon., 4 days
Arch Communications/ MobileMedia	9/2/98	2/5/99	5 mon., 3 days
AT&T/Vanguard	10/26/98	3/11/99	4 mon., 13 days

[Note that average elapsed time for this group of transactions is **just under six months**.

Of the proceedings on this list that might be considered extraordinary (Worldcom/MCI, GTE/PRTC, AT&T/TCI, and Arch Comm./MobileMedia), the average elapsed time was **roughly seven months**.

Of the proceedings that might be considered complex but not extraordinary, the average elapsed time was **roughly five months**.]

New York Times
4/12/99
Editorial

Mergers That Foster Competition

It seems that barely a day passes without word of some new linkup within the once-separate industries of telephone, television and the Internet. Deals worth billions — in stock — are made by companies that have yet to earn $100 million in profits.

The latest reports say that MCI Worldcom, itself a product of a series of mergers, may buy Nextel, a wireless telephone company in which Craig McCaw is a major investor. If that deal happens, Mr. McCaw, who previously sold McCaw Cellular to AT&T, will have sold wireless companies to the two largest long-distance companies.

Many consumers watching all this unfold no doubt are confused about the economic and technological forces driving these mergers. They may also be troubled by what looks like a headlong rush toward consolidation. But while antitrust regulators need to keep a close watch, most of these deals reflect a vibrant state of competition, not an effort to end it.

The deals also reflect a state of confusion among the people running the companies involved. They can see that developing technologies are changing the world they will compete in, but they cannot see clearly which technologies will prevail. Some very successful companies fear they could become the 21st century's equivalent of buggy-whip manufacturers.

Local telephone companies worry that they will lose their core customers to cable companies. Long-distance phone companies fear that local companies will steal their customers, and vice versa. Both local and long-distance companies worry about competition from wireless carriers. Cable companies hope to seize Internet access business, but know that they will need to make huge investments if that is to work out.

All worry that the Internet could somehow take away part of their franchise. Wireless phone companies are afraid that they will lose their most valuable customers if they cannot offer service around the world with one phone number.

An important factor in this merger wave is the popularity of Internet stocks, which have risen to extraordinarily high prices. That has made it difficult for established companies to afford to buy Internet firms, but it has made it easy for Internet companies that have high-priced stock to expand by buying other companies for stock. Both Yahoo and Amazon.com have done deals to expand their Internet offerings, while America Online, a company now valued by the market at about the same amount as I.B.M., took over Netscape.

Some of the deals may prove to have been brilliant steps that positioned companies as leaders in a technology destined to become dominant. Others no doubt will have been bad for everyone except the investment bankers who pocketed fees for arranging them. The fact that companies are pursuing such deals is a positive one, however, reflecting both the uncertainty and the excitement of the technological progress now being made.

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