SAVING THE SAVINGS CLAUSE: CONGRESSIONAL INTENT, THE TRINKO CASE, AND THE ROLE OF THE ANTITRUST LAWS IN PROMOTING COMPETITION IN THE TELECOM SECTOR

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

NOVEMBER 19, 2003

Serial No. 62

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

90–546 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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SAVING THE SAVINGS CLAUSE: CONGRESSIONAL INTENT, THE TRINKO CASE, AND THE ROLE OF THE ANTITRUST LAWS IN PROMOTING COMPETITION IN THE TELECOM SECTOR

WEDNESDAY, NOVEMBER 19, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. The Committee on the Judiciary has exclusive jurisdiction over all Federal antitrust laws and exercises oversight of the Federal agencies charged with their implementation. As Chairman of this Committee, I have made it a priority to rigorously assess the implementation of the antitrust laws. I have also sought to ensure that the lawmaking authority of the Congress and its exclusive legislative prerogatives are accorded the executive and judicial deference the Constitution commands.

The elimination of AT&T's telephone monopoly is widely regarded as a landmark procompetitive achievement inextricably rooted in the antitrust laws. While the former Bell monopoly had operated for decades in the comprehensive State and Federal regulatory scheme, the Government relied on the antitrust laws to provide the procompetitive remedy that regulation could not and cannot provide alone.

However, only two decades later the continued application of the antitrust laws in the telecommunications sector is under legal assault. The purpose of today's hearing is to examine how we have gotten to this point and how Congress can emphasize its clear intent in this important debate. While the 1982 consent decree produced almost immediate competitive gains in the long distance telephone market, local telephone service was still the exclusive province of the regional Bell companies who inherited much of the local infrastructure of the former AT&T monopoly. As a result, this Committee and Congress as a whole continued to spearhead efforts to ensure that the antitrust laws serve as an effective procompetitive tool.

The Telecommunications Act of 1996 represented the most decisive expansion of congressional resolve to bring competition to the telecom industry. The findings section of the 1996 act states that its purpose is, "To promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers by opening all telecommunications markets to competition."

In the 1996 act Congress enacted an explicit antitrust saving clause in the legislation. In plain language, it provides clear and unmistakable congressional guidance to both regulators and judges. The antitrust savings clause contained in section 601(c)(1) of the 1996 act provides that, "Nothing in this act or the amendments made by this act shall be construed to impair, modify or supersede the applicability of any of the antitrust laws. The clarity of this saving clause leaves very little to the imagination of a regulator or a judge. However, the imaginations of regulators and judges can sometimes be more active than we can predict, and in some cases their apparent misunderstanding of the will of Congress is disappointing and difficult to comprehend.

This saving clause was by no means the only significant antitrust provision contained in the 1996 act. To promote competition, section 271 requires DOJ to examine competitive conditions and local markets before the FCC approves the Bells' applications to provide long distance service. This elevated the Justice Department's role, reaffirming the centrality of antitrust laws and the act's effective operation. The antitrust laws provide relief to competitors when a monopoly maintains its position by inflicting significant injury on a competitor. When anticompetitive injury results from violations of the Telecom Act of 1996, the antitrust laws may also come into play.

Congress emphatically did not intend to create a safe harbor in which monopolists could violate the antitrust laws with impunity. Rather, the antitrust laws in the 1996 act are mutually reinforcing and remedial systems. Violations of the 1996 act may or may not establish an actionable antitrust claim, but the plain language and logical framework of the act preserve an antitrust remedy for sustained anticompetitive conduct.

Nonetheless, a record of considerable judicial confusion has developed over the last few years. In the *Goldwasser* decision of 2000, the Seventh Circuit Court of Appeals dismissed an antitrust claim against Ameritech and held that the 1996 act must take precedence over general antitrust laws. Last year, in the case of *Law offices of Curtis Trinko* v. *Verizon* the Second Circuit sharply departed from the reasoning contained in *Goldwasser* and recognized that a violation of the 1996 act may also violate the antitrust laws.

On March 3 of this year the Supreme Court took the case and oral arguments were heard last month. There is much at stake in this case. If *Trinko* is overturned, the historic role of the antitrust laws in promoting competition in the telecom sector and the clear intent of Congress will be judicially subverted. If this occurs, a swift and decisive legislative correction will be necessary and, rest assured, will be forthcoming. Everyone can rest assured that the antitrust laws will continue to apply to this industry.

I am also concerned about the standard for a section 2 violation that DOJ has proposed in the *Trinko* case and we will examine that issue today as well.

With that, I recognize the Ranking Member for his remarks.

Mr. CONYERS. Thank you, Mr. Chairman, and I join in welcoming the witnesses. In the 1996 Telecom Act this Committee and Congress was quite specific in its intentions with regard to the savings provision that the Chairman referred to, and here is what we said. "Nothing in this act or amendments made by this act shall be construed to modify, impair or supersede the applicability of any of the antitrust laws to the telecommunications industry." That means no matter what else we were doing in the Telecommunications Act that year, we were not changing a period, a comma, or a word of antitrust law.

Now, Mr. Deputy Attorney General, how could we have drafted that any more clearly? What would you have us write in the English language that would make it clear that antitrust is not being modified at all? And yet, the Department's position in case after case before *Trinko*, their position was exactly the opposite. In Intermedia and BellSouth, the Department of Justice expressly supported a finding that Intermedia had stated an antitrust claim alleging violations of the Telecom Act. In *Covad* and *BellSouth*, DOJ said in no uncertain terms that violations of the Telecom Act do constitute antitrust violations.

This is the Department of Justice position repeatedly. And now, the Department comes before the Committee without even an explanation as to why it has changed its position. It is like there is no precedent, there is no reason for us to worry about why you had the exact opposite point of view in other cases.

The Department of Justice ignores the history of antitrust and telecommunications, because there are hardly any persons in this hearing room that are not aware that FCC has no record worth talking about when it comes to antitrust. They just don't do it. Some people don't do windows. FCC doesn't do antitrust. You know that. And that is why it was that DOJ brought all the major cases, antitrust cases, busting up AT&T in 1954 and in 1974. As a matter of fact, it was the Department using antitrust that broke up AT&T in the first place.

Now, I and Hyde and Sensenbrenner and our staffs spent lots of time in 1996 in an effort to not only preserve antitrust laws in the Telecom Act, but to carve out a clear role for the Department in approving Bell entry into long distance. We worked hand in glove with the Department on these efforts, and that is why I feel disappointed today at the Department position, and I hope that we can bring this into alignment.

Now, maybe we can pull this thing out before we have to legislate. I am told that *Trinko* might be determined by the Supreme Court without reaching the antitrust savings clause issue. And as a result, this Department and our new antitrust chief will have another opportunity to revisit this issue.

Now, here is the crossroads we are at. 1996, historic, but now we are at a crossroads where we are either going to go back to the bad old days of monopolies or we are going to move forward to real competition that has to include meaningful antitrust oversight, and so I hope that these hearings today will help us reach that objective.

Chairman SENSENBRENNER. Thank you. Without objection, all Members may include opening statements in the record at this point.

Our first witness is the Honorable R. Hewitt Pate, who served as Assistant Attorney General for the Antitrust Division in the Department of Justice since June 16 of this year. General Pate is a graduate of the University of North Carolina and the University of Virginia Law School, where he graduated first in his class.

Our second witness is Alfred C. Pfeiffer, Jr. Mr. Pfeiffer is a partner in Bingham McCutchen's litigation group and cochairs the firm's antitrust and trade regulation group. He appears today on behalf of the Association of Local Telecommunications Services and the Competitive Telecommunications Association. Mr. Pfeiffer specializes in the application of the antitrust laws in the technology sector and is a graduate of St. Joseph's College and Yale Law School.

The third witness is John Thorne. Mr. Thorne is Executive Vice President and Deputy General Counsel at Verizon. Prior to joining Verizon, Mr. Thorne worked at the Ameritech Corporation. Mr. Thorne is also a lecturer in telecommunications law at Columbia University and graduated from Kenyon College and the Northwestern University School of Law. He is the counsel of record in the *Trinko* case.

The final witness is Christopher Wright, a partner in the Washington, D.C. Law firm of Harris Wiltshire and Grannis. Mr. Wright previously served as Deputy and then General Counsel of the Federal Communications Commission and as an assistant to the Solicitor General. He has argued 27 cases before the Supreme Court and is a graduate of Harvard College and Stanford Law School.

Would each of the witnesses please rise and raise your right hand and take the oath? [Witnesses sworn.]

Let the record show that each of the witnesses answered in the affirmative. Without objection, the written statement of each of the witnesses will be included in the record as a part of their testimony. We would like to ask the witnesses to confine their remarks to 5 minutes and then we will utilize the 5-minute rule when opening the witness panel up to questions.

Mr. Pate.

TESTIMONY OF THE HONORABLE R. HEWITT PATE, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. PATE. Thank you very much, Mr. Chairman. I appreciate this opportunity to be here with you today to talk about *Trinko* and other issues that relate to the important historic role this Committee has played in making sure that antitrust enforcement contributes to a competitive telecom industry. I completely agree, Mr. Chairman, with the antitrust philosophy that you recently expressed in your speech at the Phoenix Center. A strong commitment to antitrust is in complete accord with the respect for a free market that is the hallmark of conservatism because its proper application preserves and promotes the integrity of the free market.

I also agree with your sentiment there that we have to guard against misuse of antitrust to obtain outcomes through the legal system that couldn't be obtained in a competitive market. Now, you said all that more eloquently, but those basic points, I think, are very sound ones.

We at the division have built a strong record in telecom over many years from negotiating and enforcing the MFJ in the AT&T case you referenced to working with this Committee to pass a pro-competitive 1996 act, including working with this Committee to create the section 271 process under which the Antitrust Division has played, we believe, an important and constructive role in opening local telecom markets to competition. We have applied a very rigorous and a very exacting test under section 271. That process has taken several years. It has taken frankly longer than I think many observers expected at the time the act was passed.

But we believe the Bell companies have now come a long way. In terms of opening those markets, long distant authority under section 271 has now been approved in every State but Arizona, where an application is pending. We think the 1996 act set a sound course for spurring increased competition, continued innovation and wider consumer choice in the telecom sector. Spurred by the long distance incentive, the former local exchange monopolies of the Bell system have now taken steps to open their markets to competition.

In addition, new technologies such as those being introduced by wireless and cable companies, which have taken, again, somewhat longer than was expected at the time of the passage of the act with respect to cable telephony, those services are now in a position to have the potential for affording additional attractive competitive choices for consumers.

We have investigated, as you know, a number of telecom mergers since the passage of the 1996 act, including SBC Ameritech, WorldCom Sprint, and others, and we think our role in merger enforcement will be, has been and will continue to be an important part of keeping the sector competitive.

With respect to *Verizon* v. *Trinko*, which both the Chairman and Ranking Member mentioned in opening statements, in that case the Second Circuit had allowed a monopolization claim to go forward under section 2 of the Sherman Act on the basis of Verizon's failure to comply with the interconnection agreement it had negotiated pursuant to the market opening requirements of the 1996 act.

I agree with everything that both you, Mr. Chairman, and the Ranking Member have had to say with respect to the savings clause and we have been consistent both before my tenure at the Department and during it that nothing in the 1996 act exempts or creates an implied immunity from the antitrust laws for conduct occurring in the telecom sector. A corollary on this, in our view, which is also clearly found in the language of that savings clause, is that passage of the 1996 act did not have the effect of increasing obligations under the antitrust laws or incorporating the much more dramatic and necessary market opening requirements imposed on local telecom companies in that act.

So as our economy depends on a more robust, innovative, competitive telecom industry, vigorous antitrust enforcement is going to continue to play a crucial role. This Committee has a strong order of leadership in this sector and we look forward to continuing our work with you to ensure that business and consumers receive the benefits of the competitive telecom marketplace.

Thank you.

[The prepared statement of Mr. Pate follows:]

PREPARED STATEMENT OF R. HEWITT PATE

Good morning, Mr. Chairman and members of the Committee. I appreciate the opportunity to discuss the work of the Antitrust Division in protecting competition in the telecommunications marketplace.

The Antitrust Division appreciates this Committee's strong support for sound and vigorous antitrust enforcement. As you noted recently, Mr. Chairman, this commitment to antitrust is in no way inconsistent with respect for the free market. On the contrary, the proper application of the antitrust laws serves to preserve and promote the integrity of the free market upon which America's economic vitality depends.

The Antitrust Division has a strong record of vigorous enforcement and competition advocacy in the telecommunications sector over many years. The MFJ, our 1982 consent decree breaking up the AT&T monopoly, created an environment in which competition could flourish in all parts of the industry, except for the local telephone exchange service market, which the MFJ permitted the states to retain as a regulated monopoly, with most of the continental United States served by one of seven regional Bell operating companies. The Telecommunications Act of 1996, enacted with the Division's active support, eliminated legal restrictions on competition in local telephone service and established a national policy favoring competition and deregulation in all telecommunications markets. Following passage of the 1996 Act, the Division successfully advocated the procompetitive interpretation and implementation of the Act's local-market-opening provisions, and helped successfully defend the constitutionality of the Act's transitional restrictions on the Bell companies' entry into long distance.

Under the special role this Committee was instrumental in assigning to the Division, the Division has also evaluated long-distance service applications by the Bell companies under Section 271 of the Act, which requires a Bell company to meet certain local-market-opening criteria before the FCC grants it the ability to offer long distance telephone service in a state in which it is the incumbent local phone service provider. The Division developed a rigorous standard for use in evaluating section 271 applications: whether the local exchange market in the state in question was "fully and irreversibly open to competition." By explaining in detail how we would apply the standard in a variety of situations, and by devoting substantial resources to working with the Bell companies, other interested parties, and state commissions on the issue, the Division has helped enable the Bell companies to meet section 271's requirements in every state but Arizona, where an application is currently pending.

The Division carefully evaluated each application under its standard. The Division recommended that the FCC deny applications in five states; in all of these instances, the Bell company had to take additional steps to open its local exchange market to competition before refiling its application. In most states, the Division stopped short of recommending denial, but noted potential problems that it urged the FCC to review carefully before making its decision, and in some cases the application had to be refiled. In two states, the Division was able to recommend FCC approval without reservation.

Our evaluations examined whether the local exchange market was fully and irreversibly open to competition in terms of each mode of entry: resale of the Bell's local services, use of the competitive local exchange carriers' own facilities, and use of unbundled network elements. Our evaluations have focused on concerns about whether the systems used by competitors to access information from the RBOCs are appropriately robust, about whether needed inputs are provided to competitors in a timely and accurate manner, and about how changes to these systems have been instituted and how competitors have been notified.

Looking back, the "pro-competitive, deregulatory framework" Congress established in the 1996 Act set a sound course. We have seen significant progress in bringing increased competition to telecommunications markets. Spurred by the incentive of being permitted to enter the long distance market, the former local exchange monopolies of the Bell System have taken the necessary steps to open their markets to competition by facilities-based carriers, resellers, and network element users. New technologies, such as those being introduced by wireless and cable companies, are offering or have the potential to offer additional competitive choices to consumers. High-speed Internet service is available through cable as well as through the incumbent local telephone companies, with other competitors seeking ways to enter. Telecommunications services are being offered in attractive packages by a variety of competitors, and the number portability required by the Act, and which the FCC is now implementing, is going to make it even more convenient for consumers to take advantage of the choices. While more still needs to happen before the 1996 Act realizes its full promise in all telecommunications markets, it is abundantly clear that Congress made the right decision in opting for competition to spur continued innovation and increased choices for consumers.

Now that the transitional phase embodied in section 271 is drawing toward its conclusion, much ongoing work will remain to ensure that competition continues to take root and grow. While much of that work will fall to the FCC in enforcing the Telecommunications Act, we will continue to have our role of enforcing the antitrust laws against anticompetitive mergers, unlawful restraints of trade, and monopolization of telecommunications markets. We will also consult with the FCC, and provide comments as appropriate, on competition issues raised by existing or proposed regulations.

We have investigated a number of telecommunications mergers since passage of the 1996 Act, assessing not only whether the mergers might harm current competition but also whether they might impair potential competition from emerging or create new barriers to entry in the range of markets implicated by the technological revolution taking place in this sector. We have brought several important enforcement actions in the last few years.

- Our 1999 challenge to SBC's acquisition of Ameritech resulted in the parties divesting one of their two competing cellular telephone systems in 17 markets, including Chicago and St. Louis.
- Our challenge that same year to Bell Atlantic's acquisition of GTE and its joint venture with Vodafone resulted in divestiture of overlapping wireless operations in 96 markets in 15 states.
- Our challenge in 2000 to AT&T's acquisition of Media One focused on harm to competition in the market for aggregation, promotion, and distribution of broadband content, and resulted in divestiture of AT&T's interest in the Road Runner broadband Internet access service, along with limitations on certain kinds of agreements between AT&T and Time Warner, who purchased the divested Road Runner interest.
- Our lawsuit that year to block the merger of WorldCom and Sprint to protect competition in a variety of markets, including residential long distance service, Internet backbone service, data network and custom network services to large business customers in the U.S. and international private line services between the U.S. and numerous foreign countries, led the parties to abandon the merger.
- Our challenge that year to SBC's joint venture with Bell South to create a nationwide wireless network resulted in divestitures in 15 wireless markets in three states.

While I am not able to comment on any particular merger that is pending or that might be proposed in the future, I can assure members of this Committee that the Antitrust Division will look very carefully at any significant mergers in this industry, and take whatever enforcement action may be warranted, to ensure that they do not harm competition.

We are also being vigilant in monitoring the telecommunications marketplace for unlawful restraints of trade. In August, we filed the first charges in our ongoing nationwide criminal investigation into possible bid-rigging and other unlawful collusion involving the E-Rate program, a federally funded program created under the 1996 Act to subsidize the provision of telecommunications, Internet access, and internal communications to economically disadvantaged schools and libraries. Duane Maynard of Arvada, Colorado, a former electrical contractor pled guilty to participating in a bid-rigging scheme involving a E-Rate project in the West Fresno, California Elementary School District. He and others had conspired to ensure that Maynard's company would be the successful bidder for the general contract, that no other co-conspirator would submit a competing bid, that co-conspirator companies would serve as subcontractors on the project, and that any competing general bid would be stricken as nonresponsive. Maynard agreed to accept a higher sentence for having earlier given false testimony before the grand jury, and to assist us in our ongoing investigation.

In the monopolization area, we are continuing, almost eight years after passage of the 1996 Act, to work through issues regarding the Act's interpretation and its relation to the antitrust laws. We recently completed oral argument before the Supreme Court as amicus in *Verizon* v. *Trinko*, in which the Second Circuit had allowed a monopolization claim under section 2 of the Sherman Act to go forward against an incumbent local exchange carrier on the basis of the carrier's failure to comply with the interconnection agreement it had negotiated pursuant to the market-opening requirements of the 1996 Act. We believe the proper resolution of the issue in this case, whether passage of the 1996 Act augmented or altered the duties that section 2 of the Sherman Act imposes on dominant local exchange telecommunications providers, is critical for preserving the integrity and vitality of the antitrust laws. The antitrust savings clause in the 1996 Act makes clear that the antitrust laws continue to apply fully in telecommunications, and are in no way displaced by the 1996 Act's own requirements. A corollary to this is that passage of the 1996 Act did not have the effect of increasing any party's obligations under the antitrust laws. Consistent with existing precedents, and consistent with the Division's position since its 1991 amicus brief in *Consolidated Rail Corp.* v. *Delaware & Hudson Railway Co.*, and followed in our *Microsoft* and *American Airlines* filings, we are taking the position that, for an incumbent's denial of an essential facility to a rival to constitute a section 2 violation, the denial must be predatory or exclusionary—that is, it must make business sense for the incumbent only because it has the effect of injuring competition. While the Telecommunications Act can and does impose other requirements, we believe it is important to preserve the distinction between a violation of the Telecommunications Act and a violation of the Sherman Act.

Mr. Chairman, in the coming years, our economy is likely to depend more than ever on a robust, innovative, competitive telecommunications industry. Vigorous antitrust enforcement will continue to play a crucial role in fostering and protecting competition in this important sector. This Committee has a strong record of leadership in this critical area, and the Antitrust Division looks forward to continuing to work with you to ensure that businesses and consumers receive the benefits of a competitive telecommunications marketplace.

I would be happy to try to answer any questions the Committee may have.

Chairman SENSENBRENNER. Thank you, General Pate.

Mr. Pfeiffer.

TESTIMONY OF ALFRED C. PFEIFFER, JR., PARTNER, BINGHAM McCUTCHEN LLP, ON BEHALF OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES AND THE COMPTEL/ASCENT ALLIANCE

Mr. PFEIFFER. Mr. Chairman, Ranking Member Conyers, distinguished Members of the Committee, I am greatly pleased to have the opportunity to come before you this morning and present the views of ALTS and the CompTel/ASCENT Alliance regarding the importance of continued vigorous antitrust enforcement to conduct that may also be regulated under the Telecommunications Act of 1996. I think it is fair to say that between them ALTS and the CompTel/ASCENT Alliance represent virtually the entire competitive telecommunications sector and the threat to that sector today from the trinity of ineffective regulatory enforcement, the FCC recent Triennial Review order which single-handedly deregulates broadband, and the challenge to the applicability of the antitrust law as posed by the *Trinko* case, those dangers are very real.

Let me focus on *Trinko* with my comments here. The Justice Department's position in the *Trinko* case before the Supreme Court, I do believe, represents a dramatic about face. As Ranking Member Conyers mentioned in his comments, the Intermedia case and in the Covad case, both against BellSouth in the 11th Circuit in 2001, the Government not only rejected any claim of immunity in those cases from the 1996 act, but also recognized that the failure to comply with the access obligations imposed by the 1996 act can result in antitrust liability.

The position that is being taken in the *Trinko* case is the opposite of that. The Government is now proposing a new test that would be applicable to antitrust claims that involve sharing applications, including sharing obligations, under the 1996 act. The Government says that a competitor now must show that a monopolist is essentially engaging in conduct akin to predatory pricing, and they allude directly to the predatory pricing standard in their brief, and that they must forego monopoly profits before there can been an antitrust violation.

I would submit with respect to the Department and to Mr. Pate that there is no case that says that that is the only way in which exclusionary conduct can be shown under the antitrust laws. In fact, quite to the contrary, the antitrust laws have long imposed sharing obligations whenever it's necessary to stop a monopolist from extending monopoly power from one market into another market. From the *Leitch* v. *Barber* case in the 1930's to the Covad antitrust litigation in the 1990's, whether the monopoly is from a pattern, from a great idea, from an accident of history or from any other means, a monopolist cannot use access to its monopoly as a means to extend that power into a second market, and the lower courts have all agreed with that. That's why in the courts at least the essential facilities doctrine is not a controversial doctrine.

I would also add that, distressingly, this new quasi-predatory pricing standard that's being proposed is directly contrary to the history of the breakup of the old AT&T and Bell system monopoly. In those cases AT&T was found to have violated the antitrust laws when it refused to deal with its competitors and even when it nominally agreed to deal with them but didn't do so on reasonable terms. When the Government and the Bells turn their backs on that history and pretend it never existed, they are engaging in a frontal assault on the savings clauses contained in the 1996 act, and I feel that's exactly what the Bells are doing in this industry and in the *Trinko* case right now.

The dangers that competitive providers would face without strong antitrust enforcement are highlighted by recent news of a dinner hosted by SBC, Verizon, BellSouth and their trade association. I agree with the Los Angeles Times on the need for an investigation of whether any antitrust violations occurred in connection with that meeting, and here's why. We know that the Bells collectively sought contributions from their equipment suppliers to fund a campaign to eliminate competition. We know one Bell executive who spoke with the Times said, "Manufacturers may feel their arms are being twisted." And we know from the head of the Telecommunications Industry Association that the manufacturers felt the Bells were using "pressure tactics."

We also know the Bells have chosen not to compete with one another despite repeated promises to do so. Given these facts, there's sufficient evidence to warrant an investigation into whether the antitrust laws are endangered here. Needless to say, in light of all that's going on, now is not the time to weaken antitrust oversight of the telecom industry. Perhaps what is needed is for the Committee to simply amend the Telecommunications Act of 1996 and underline and perhaps double underscore the savings clauses and put exclamation points after them so that there can be no mistake about Congress's intent.

Thank you.

[The prepared statement of Mr. Pfeiffer follows:]

PREPARED STATEMENT OF ALFRED C. PFEIFFER, JR.

Mr. Chairman, Ranking Member Conyers, and distinguished members of the Committee:

I am pleased to have the opportunity to present the views of the Association for Local Telecommunications Services ("ALTS") and the CompTel/ASCENT Alliance regarding the importance of the continued application of the antitrust laws to activities that may also be subject to regulation under the Telecommunications Act of 1996. Collectively, these two trade associations represent virtually the entire competitive telecommunications industry. My primary goals here today are to impress upon the Committee the absolutely critical role that the antitrust laws play in creating and sustaining competition in telecommunications markets, and to explain why the Department of Justice's position in the *Trinko* case threatens that competition.

I am a partner in the law firm of Bingham McCutchen, where I co-Chair the firm's Antitrust and Trade Regulation group. I have practiced antitrust law for over 18 years, and have particular experience litigating antitrust claims that arise in the telecommunications industry. In addition, I am the Chair of the Communications Industry Committee of the American Bar Association's Section on Antitrust. The views contained in this testimony are in no way officially endorsed by or reflect those of the American Bar Association.

ALTS is the leading national industry association to promote local telecommunications competition. ALTS represents facilities-based providers, called Competitive Local Exchange Carriers ("CLECs"), that build, own, and operate competitive local networks. ALTS' mission is to promote facilities-based competition. ALTS member companies deploy circuit and packet switches, DSLAMs, fixed wireless antennas, fiber optic trunks, and other facilities in direct competition with the Baby Bells. Like all competitors, ALTS companies must purchase from the monopoly phone companies parts of the ubiquitous local telephone network to connect customers to competitive facilities. To this end, ALTS believes nondiscriminatory access to all local monopoly transmission facilities must be afforded CLECs so that consumers are allowed to enjoy the benefits and advantages that come with competition.

The CompTel/ASCENT Alliance was formed in November 2003 by the merger of the two leading trade associations in the competitive telecommunications industry, the Competitive Telecommunications Association (CompTel), founded in 1981, and the Association of Communications Enterprises (ASCENT)(combined as "CompTel/ASCENT"). With 400 members, CompTel/ASCENT is the largest and oldest association representing comptetitive facilities-based carriers, providers using unbundled network elements, global integrated communications companies, and their supplier partners. CompTel/ASCENT, which is based in Washington, D.C., includes companies of all sizes and profiles that provide voice, data and video services in the U.S. and around the world. Despite a wide variety of business models, CompTel/ASCENT members share a common objective: To create and sustain true competition in the telecommunications industry.

EXECUTIVE SUMMARY

The debate over access to the monopoly-controlled local telephone network is nothing new. For almost as long as there been a telephone network, there has been the question of the extent to which competitors should be provided access to the nonduplicable portion of the network. Given that the local phone network was built on the backs of ratepayers and supported by government-mandated guaranteed rates of return, both regulation and the antitrust laws have always been the instruments for providing competitive access to the network. This has been the case through the three phases of telecommunications antitrust history: the single regulated monopoly, AT&T; the break-up of AT&T; and the injection of competition into the telecom market by the 1996 Act.

Competition in the telecom market in the last 7 years is plainly evident. The Consumer Federation of America estimates that consumers are already saving up to $5 billion annually. Investment in infrastructure continues with ALTS estimating investments over $76 billion in next generation telecom networks. The Phoenix Center also has found that local competition has boosted wireline telecom employment 17% above historical trends, adding 92,000 wireline jobs. CompTel estimates that if local phone competition laws are preserved nationwide, consumers could save an additional $9 billion. In addition, innovation is best evidenced by the introduction and other facilities-based competitors of innovative broadband solutions, such as the integrated access product that offers small and medium-sized businesses voice and data over the same loop at remarkably lower prices than the Bell Company price. Similarly, this innovation is demonstrated by the availability of residential DSL service, which sat on the Bell monopolies' shelves until competitors brought the product to market after the 1996 Act.

The benefits of competition are not because of the strong enforcement of competition and antitrust laws, but in many respects in spite of them. The Bells have not been willing partners in the development of competition. Examples of Bell efforts to erect barriers to competition are too numerous to name but include sluggish responsiveness to requests for access to Bell lines, lost work orders, excessive charges to co-locate facilities, efforts to legislatively raise wholesale rates to keep competitors out of markets, and proposals to change the pricing formula for determining fair wholesale rates despite the support of the present formula—TELRIC—by Congress, the FCC and the Supreme Court. This is to say nothing of the Bells' efforts in the courts to extinguish the applicability of the antitrust laws to them, a move made more serious by recent reports about theBells' secret meetings to extinguish competition laws.

I recognize the principal purpose of this hearing is not to delve into the serious concerns raised by the U.S. Telecom Association's secret dinner meeting in Washington and the memorandum accompanying the exclusive dinner describing its efforts—with the help of SBC, Verizon, and BellSouth—to arm twist the Bells' suppliers into rebating or giving a kick back of their revenues to launch a $40 million campaign to end competition. However, this meeting puts in the starkest terms the monopolistic mindset of the Bell companies and the lengths to which they will go to maintain their dominant power in the telecom market. I fully concur with Ranking Member Conyers' statement that this meeting may well constitute impermissible activity and raises some troubling issues concerning the exertion of collective pressure over the manufacturers.

The threat looming to competition in the telecom sector is real given the trinity of weak regulatory enforcement, antitrust laws whose applicability is mired in litigation, and the recent Triennial Review Order that single handedly deregulated the broadband market. First, with regard to regulatory enforcement, the Bells themselves recognize fines as merely the cost of doing business and FCC Chairman Powell has concurred that the FCC's current enforcement authority "is insufficient to punish and deter violations." Second, the Triennial Review Order, despite concerns by a majority of FCC Commissioners, determined that requirements for the Bells to provide competitors with access to linesharing (the means by which competitors bring broadband into homes and businesses) would be phased out. The FCC also eliminated a competitor's access to any hybrid last mile facility that has an ATM or packet-based technology, further pushing CLECs out of the small and medium sized business market. Finally, if the Supreme Court finds in *Trinko* that the antitrust laws do not apply to the telecom industry, we will then be returned to a wholly unregulated telephone monopoly unchecked by enforcement powers, regulation, or the antitrust laws.

Such an outcome would have been unheard of in 1996 when Congress clearly intended for the antitrust laws to apply to the telecom industry. The Act is unambiguous in two savings clauses, the first of which states: "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." The Act also expressly confirms that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments."

Though three Federal Circuits have rejected Verizon's claim that somehow the savings clauses only mean that antitrust laws apply when there is predatory pricing, we face the possibility that the Supreme Court will find in Verizon's favor and severely limit the applicability of the antitrust laws. Particularly disturbing is the Justice Department's about face in support of Verizon's position.

As the competitive industry has argued to the Supreme Court, a ruling in Verizon's favor would be inconsistent with antitrust precedent. The antitrust case law, in both regulated and unregulated industries, demonstrates that no monopolist may engage in the exclusionary conduct the Bells have practiced in the last 7 years. Predatory pricing need not be shown to demonstrate an antitrust violation. In the first instance, the Bells' ownership of the telephone network is the quintessential example of an essential facility, which under decades of antirust rulings the Bells can be required to share with its rivals if the Bells try to leverage it for monopoly power over another market such as broadband. Additionally, monopoly conduct that forces competitors to raise their costs in an effort to destroy competition also would violate the antitrust laws. Neither of these cases require a showing of predatory pricing.

Given the Judiciary Committee's tireless role in overseeing the antitrust laws, and in particular, its efforts in 1996 to ensure that the antitrust laws continued to apply to the telecom industry, this hearing in and of itself should be an important and clear signal to the Justice Department that antitrust enforcement must be available to complement regulatory enforcement of the industry. Perhaps more importantly, it may require this Committee's leadership again to enact legislation—perhaps merely underlining the 1996 Act's savings clauses and adding two exclamation points—to serve notice and make clear that telecom consumers deserve the protection of both regulatory and antitrust enforcement.

I. ANTITRUST LAWS ARE ESSENTIAL TO TELECOMMUNICATIONS COMPETITION

This debate over access to the facilities ILECs control is not new. Local telephone monopolists have long been using their control over the nonduplicable local network—a network that literally connects by wire all end users in a given geographic region—to exclude competition in other markets that depend on access to that monopolized local network. And long before the 1996 Act, courts applied well-established antitrust principles to make sure competitive providers could obtain such access. Just as the antitrust laws first paved the way for open competition in the long distance telecommunications markets, the antitrust laws remain a necessary tool for overall telecommunications competition to remain and grow.

A. Background: Antitrust Law in the Telecom Sector

In general, the development of telecommunications antitrust law can be viewed in three phases: (1) the single regulated monopoly, AT&T; (2) the antitrust break-up of AT&T into a long-distance company and the Regional Bell Operating Company ("RBOC") local monopolies; and (3) the introduction of competition to local telephone markets by the 1996 Act. It is important to remember that regulation, such as that entailed by the 1996 Act, has been a constant in the telecom sector, through all these phases. Despite that regulation, the antitrust laws have always applied to the industry, just as they should today.

In the first phase, the telephone system was almost entirely controlled by a single monopoly (AT&T), which was regulated, but not subject to meaningful competition. The Communications Act of 1934 ("1934 Act") combined with various state legislation to provide an intricate structure of regulation. *See Jarvis, Inc.* v. *AT&T,* 481 F. Supp. 120, 122 (D.D.C. 1978). Even under this regulatory regime, AT&T had a duty to permit competing carriers, like MCI, to interconnect with its local exchange network. *See MCI Comms. Corp.* v. *AT&T,* 708 F.2d 1081, 1134–36 (7th Cir. 1983), *citing MCI Telecomms. Corp.* v. *FCC*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). Local telephone monopolists have long been required to provide competitors full access to their local networks, including to their local loops, through a process called interconnection. *See In the Matter of Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules,* 29 F.C.C.2d 870, 940, ¶ 157 (1971) ("Specialized Common Carrier"). The FCC regulated that interconnection duty and AT&T was famously found to have violated the antitrust laws for failing to comply with it—ncluding for its failure to lease local loops to competitors, a core part of the RBOCs' current anticompetitive strategy. AT&T's failure to allow competitors like MCI to interconnect, despite that duty, spawned numerous antitrust actions. The federal courts uniformly held that the 1934 Act and the detailed FCC orders and regulations implementing it did not exempt AT&T from antitrust liability.

The second phase of modern telecommunication law resulted from the United States' antitrust suit against AT&T, alleging it had used its local network monopoly to stifle competition in other, related markets, like long distance, that depended on access to the local network. *See United States* v. *AT&T,* 552 F. Supp. 131, 139 (D.D.C. 1982), aff'd sub nom., *Maryland* v. *United States*, 460 U.S. 1001 (1983). The lawsuit resulted in the 1983 "Modified Final Judgment" ("MFJ"), which prevented such unlawful leveraging by establishing separate companies (the RBOCs) to take ownership of the local networks in their respective regions. *See id.,* at 227. From the MFJ until Congress passed the 1996 Act, the RBOCs continued to operate as protected monopolies with guaranteed rates of return over virtually all local telephone service. *See AT&T* v. *Iowa Utilities Bd.,* 525 U.S. 366, 371 (1999).

In the third phase, post-1996 Act, Congress "ended the longstanding regime of state-sanctioned monopolies," *id.*, and established a "pro-competitive, deregulatory national policy framework' for telecommunications, opening all telecommunications markets to competition so as to make advanced telecommunications and information technologies and services available to all Americans." First Report and Order and Further Notice of Proposed Rulemaking: *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* FCC 99–48, No. 98–147, 1999 WL 176601, at 13, (Mar. 31, 1999) (*citing* 47 U.S.C. § 251). The 1996 Act requires RBOCs to make the local networks they control available to CLECs, on "just, reasonable and nondiscriminatory" terms pursuant to "interconnection agreements." 47 U.S.C. § 251(c)(3), (c)(6).

After the 1996 Act, competition in local telecommunications markets began to grow. New competitors sprang up and began to offer entirely new services to consumers, particularly broadband DSL. Investment in infrastructure occurred—and continues to occur—at a rapid clip. For instance, ALTS reports that new entrants in the local market have invested over $76 billion in next-generation telecommunications networks since the Act was passed.[1] Even more, new competitors have been successful in bringing lower prices to consumers in the traditional monopoly market of local phone service. The Consumer Federation of America estimates that local phone customers across the country are saving up to $5 billion annually, thanks entirely to competition.[2] CompTel estimates that if competition is preserved nationwide, consumers can save an additional $9 billion. And, most importantly, millions of Americans now, for the first time, have a choice for their local telecommunications provider.

This success can be attributed to a bedrock principle of antitrust law that Congress recognized and sought to implement through regulations set forth pursuant to the 1996 Act. That is, in order to promote competition in a monopoly market, and in order to move quickly to a fully functioning free market, access to the essential facilities of the telephone network must be made available to new entrants. This core principal, perhaps more than any other, provides the foundation upon which local competition is built. Congress mandated that access to the essential facilities of the phone network be achieved through "unbundling." The FCC determines which parts of the network must be unbundled and shared with competitors.

Despite the clear goals of the 1996 Act, the RBOCs did not freely open their networks to CLEC competitors. In fact, they did the exact opposite. They threw up every operational, legal, and regulatory hurdle they could find to prevent competition from developing the local markets. Knowing that delay was in their favor, the RBOCs used the court system to tie up competitive policy created by the regulators. During the wait for the courts to act, they snubbed the implementation of regulatory orders, using delay tactics to enable them to "wait competitors out of the market." As a result, the RBOCs delayed competitive entry for nearly seven years. Such a process cannot be what Congress had in mind when it passed the 1996 Act.

B. The Looming Threat

It is no exaggeration to say that the very future of local telecom competition hangs in the balance as the committee considers the matters before it today. The goals of Congress to create a competitive local telecom marketplace are in severe jeopardy. We do not propose that the RBOCs' exclusionary conduct represents the only challenge facing CLECs. Nor do we propose that Congress should protect CLECs from the ordinary workings of the competitive marketplace. But it would be inexcusable if the RBOCs were permitted to eviscerate local competition because they convinced the courts that Congress did not intend them to continue to be bound by the antitrust laws.

The 1996 Act did not create a regulatory enforcement mechanism to ensure that monopolies actually complied with the obligations of their interconnection agreements. Instead, Congress did two things: (1) it retained the enforcement remedies that existed under the 1934 Act; and (2) it made clear that it intended the antitrust laws to remain a vibrant enforcement tool to prevent local telephone monopolists from abusing their retained monopoly power.

First of all, regulatory enforcement of the unbundling requirements of the Act has been, to say the least, weak. The FCC acknowledges this. FCC Chairman Michael Powell told Congress that "[g]iven the vast resources of many of the nation's ILECs," the FCC's current fining authority of $1.2 million per offense "is insufficient to punish and deter violations in many instances." Letter from Chairman Powell to

[1] Available at *http://www.alts.org/Filings/2003AnnualReport.pdf*
[2] Available at *http://www.consumerfed.org/unep—200310.pdf*

House and Senate Appropriations Committees of 5/4/01. In fact, the FCC did not take a single step to enforce any unbundling requirement until this year.

Secondly, the Bell companies were granted vast deregulation with regards to broadband services by the FCC in the recently completed *Triennial Review*. In particular, the FCC eliminated CLEC access to hybrid lines (part copper and part fiber) that use packet-based technology. This relief granted to the Bells violates the statute and is arbitrary and capricious for several reasons. First, the FCC decision to grant relief based on the deployment of a particular technology violates the statute's mandate that its rules be nondiscriminatory and technology neutral. Second, the FCC's reliance upon Section 706 as justification for granting such relief is blatantly inconsistent with the plain language of Section 706 itself which requires the FCC to promote both local competition and investment in broadband. Moreover, with Bell efforts to extend such relief into the small and medium sized enterprise (SME) market, where there is no alternative provider, essentially relegates the small businesses of America to a deregulated Bell monopoly. In reaching such a conclusion, the FCC failed to account for the differences between small business customers and others that demand similar type services. Moreover, the decision is unreasonable because the FCC ignored the D.C. Circuit's mandate that unbundling relief be subject to a granular analysis of the marketplace.

The FCC also eliminated an unbundling requirement called line sharing. Line sharing enabled competitors to compete with the Bells for residential DSL services. As line sharing is phased out, it will become increasingly difficult for any competitor to offer local broadband services to customers, pushing the residential market, like the small business market, away from a competitive market and back towards an unregulated monopoly market.

This result is even more troubling when one considers that the antitrust laws have not been vigorously applied in the local market since the 7th Circuit's decision in the *Goldwasser* case. *Goldwasser* was the first case to ignore the savings clause, and started the ball rolling to where we are today. The ever-opportunistic Bell companies seized on *Goldwasser* to seek immunity from the antitrust laws. Inexplicably, the DOJ followed suit and also seeks to insulate the local monopolies from antitrust scrutiny.

Given the inability of the FCC to enforce the laws, given the vast deregulation granted to the Bell companies just a few months ago, and given the Department's incredible about-face as to their reading of the savings clause, it is no stretch to say the local telecommunications market is dangerously close to becoming an unregulated monopoly. This result is alien to the pro-competitive spirit of the Act, and must be averted.

II. *TRINKO* AND THE SAVINGS CLAUSE CONUNDRUM

The 1996 Act does not supplant or change the antitrust laws. It states so unambiguously through both a savings clause directed specifically at antitrust enforcement and an additional general savings clause:

> SAVINGS CLAUSE . . . 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.
>
> NO IMPLIED EFFECT This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.

1996 Act, Pub. Law No. 104–104, 110 Stat. 143, §§ 601(b)(1), (c)(1) (1996) (reprint at 47 U.S.C. § 152 note) (hereinafter cited as "1996 Act, § 601"). Though the RBOCs for a time argued that the 1996 Act created a form of quasi-immunity, now CLECs, RBOCs and the government all nominally agree that Congress intended for antitrust remedies to apply in full force to anticompetitive conduct whether or not subject to the 1996 Act.

While this should really be the end of the discussion, it is only the beginning. Presented with the quandary of resolving the inconsistency between their call for immunity under the 1996 Act and the unambiguous savings language, the RBOCs—and later the Department of Justice—came up with the perfect solution for making an end run around the savings clauses. The RBOCs now take the position that antitrust remedies apply, but that their refusal to grant access to the networks they control would never qualify as exclusionary under established antitrust principles. In effect, they seek the creation of a new rule that essentially imposes a predatory pricing requirement before a monopolist may be found to have engaged in an actionable refusal to deal. That proposed amendment to the Sherman Act is both unfounded and ill-advised.

The new rule the RBOCs and the government now propose is 1) inconsistent with well-established antitrust principles (as the Supreme Court put it in *Kodak,* what the RBOCs seek here would be "a radical departure in this Court's antitrust law," 504 U.S. at 479–80 n.29), 2) inconsistent with the position previously asserted by the FCC and the DOJ in antitrust cases involving the 1996 Act, and 3) inconsistent with the government's own pre-1996 Act antitrust enforcement actions. For these reasons the Second, Ninth and Eleventh Circuits have rejected the position Verizon and the government now assert in the *Trinko* case now pending before the Supreme Court. Should the Supreme Court agree with that position, the savings clauses in the 1996 Act would be rendered meaningless and CLECs will find it all the more difficult to offer consumers competitive telecommunications products in what, in effect, will be deregulated monopoly markets.

A. Inconsistency with Antitrust Precedents

Many decades of antitrust law, in both regulated and unregulated industries, make clear that no monopolist may engage in the type of exclusionary conduct the RBOCs have practiced so relentlessly for the past seven years. The claims against Verizon in *Trinko*, for example, are nothing new. Rather, they arise from the same conduct—abuse of the unique monopoly power inherent in the local telephone network—that led to the breakup of the old AT&T Bell System twenty years ago. Nonetheless, the RBOCs, DOJ, and FTC argue that courts should analyze claims against RBOCs using the same "sort of analysis [employed] with respect to predatory pricing." US/FTC Brief 16. That would be a massive change to, not an application of, the antitrust laws. It is true the courts "have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power." *Id.* But that is not the only form of conduct that qualifies as exclusionary. Rather, Section 2 jurisprudence recognizes that "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Id.,* 14 (quoting *Microsoft*, 253 F.3d at 58).

That is why courts analyzing claims of exclusionary conduct have focused not on attempts to establish a list of practices that are (or are not) exclusionary, but have analyzed instead the "anticompetitive effect" of the challenged conduct. *Microsoft,* 253 F.3d at 58. Thus, conduct is exclusionary if it "harms the competitive process." *Town of Concord* v. *Boston Edison Co.,* 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.). In *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985), the Supreme Court recognized the broad and flexible nature of exclusionary conduct: "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." 472 U.S. at 605 (*quoting* R. Bork, *The Antitrust Paradox*, 138 (1960)). *Aspen* went on to quote the Areeda and Turner definition of exclusionary conduct: "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32, (*quoting* P. Areeda & D. Turner, 3 Antitrust Law 626b, 78 (1978)). While the fact pattern in *Aspen* certainly met that test, the Court has never—in *Aspen*, *Kodak* or elsewhere—pronounced that only forsaking profits would do so. Indeed, the Seventh Circuit has interpreted *Aspen* to mean "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition." *Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.,* 797 F.2d 370, 379 (7th Cir.) (Posner, J.)*rehearing denied*, 802 F.2d 217 (1986), *cert. Denied*, 480 U.S. 934 (1987). That is precisely what Trinko and CLECs have alleged. The ILECs refuse to deal with CLECs with the specific knowledge that their refusal makes it impossible to compete.

1. The Courts Have Not Applied a Predatory Pricing Requirement

Antitrust precedents do not support the assertion that competitors must make a showing akin to predatory pricing before they may proceed with a refusal to deal claim. The claim ignores the history of antitrust enforcement in the telecom sector and, in doing so, ignores the savings clauses in the 1996 Act.

Although there has been much implied criticism of the label of essential facilities, the concept itself is surprisingly well-accepted. The concept is hardly controversial in principle: when a vertically integrated monopolist controls a facility that cannot practicably be duplicated, and which is essential to competition in some other markets, the monopolist may not use its control over that facility to gain a monopoly over those other markets. While the Supreme Court has never formally adopted the doctrine as such, it is in fact derived from a Supreme Court decision. *United States* v. *Terminal R.R. Ass'n of St. Louis,* 224 U.S. 383 (1912). And every Circuit Court of Appeal has adopted the doctrine, and all agree as to its elements. *Hecht v.* Pro-

Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. Denied*, 436 U.S. 956 (1978); *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co.* v. *Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. Denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc.* v. *John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Servs.* v. *Radford Cmty. Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc.* v. *AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp.* v. *Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1132–33 (7th Cir. 1983); *City of Malden* v. *Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *Vernon* v. *Southern California Edison Co.*, 955 F.2d 1361, 1366–67 (9th Cir. 1992), *cert. Denied*, 506 U.S. 908 (1992); *Aspen Highlands Skiing Corp.* v. *Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co.* v. *BellSouth Corp.*, 299 F.3d 1272, 1285–88 (11th Cir. 2002); *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1356–57 (Fed. Cir. 1999).

The concept of essential facilities is consistent with decades of antitrust rulings by the Supreme Court, which have routinely denounced efforts by monopolists to extend their monopolies from one market into another. *Kodak,* 504 U.S. at 479–80 n.29 (Supreme Court "has held many times that power gained through some natural and legal consequence such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'"); *Leitch Mfg. Co.* v. *Barber Co.*, 302 U.S. 458, 463 (1938) (attempted extension of monopoly from one market into another is illegal "whatever the nature of the device" used to do so).

There can be no doubt that the local telephone network is a paradigm example of an essential facility. The networks the RBOCs control were built up—with no risk, a rate of return guaranteed by ratepayers—over many decades, and simply cannot be duplicated. Even the government recognizes that a telecom antitrust case, MCI's struggle against AT&T, is the "leading case" dealing with the essential facilities doctrine. Here is how the government described the ruling in *MCI:* "a monopolist may be required to assist rivals by sharing a facility if the monopolist can 'extend monopoly power from one stage of production to another.'" (Brief For The United States And The Federal Trade Commission As Amici Curiae, No. 02–682 ("*Trinko* Amicus Brief") at 12)

2. Other Conduct, Such As Raising Rivals' Costs, Is Exclusionary

The RBOCs' proposed test is obviously flawed because it exempts from liability any anticompetitive conduct that does not involve the sacrifice of profits. Among other things, it thus immunizes the well-recognized propensity of monopolists to destroy competition without ever foregoing a cent of profit, by raising their rivals' costs. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Cost to Achieve Power Over Price*, 96 Yale L.J. 209, 224 (1986) ("Raising rivals' costs can be a particularly effective method of anticompetitive exclusion. This strategy need not entail sacrificing one's own profits in the short run. . . ."); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318–23 (2001) (discussing economic logic behind raising rivals' cost theory). Raising rivals' costs has been a primary mechanism by which RBOCs have destroyed competition.

Where a monopolist, like the RBOCs, controls inputs that are necessary to competition in other markets, it can thwart that competition by raising its rivals' costs of obtaining them. That may happen directly, as with the type of price squeeze condemned in the landmark *Alcoa* case, *United States* v. *Aluminum Co. of America.* 148 F.2d 416, 437–38 (2d Cir. 1945); see also Steven C. Salop, *Economic Concepts and Antitrust Analysis*, 56 Antitrust L.J. 57, 58–59 (1987) (evil of price squeeze is not predatory pricing; "rather, it is a claim that firms exclude rivals and gain power over price by raising their rivals' costs"). Monopolists have also found more subtle means to inflate their competitors' costs. *See, e.g., Ball Memorial Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.,* 784 F.2d 1325, 1339–40 (7th Cir. 1986) ("When a firm finds a way to confront its rivals with higher costs, it may raise its own prices to consumers without drawing increased output from them."); *Forsyth* v. *Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), aff'd, 525 U.S. 299 (1999) (reversed summary judgment; policy raised factual question of whether conduct raised competitor's costs); *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (raising rival's costs "would qualify as anticompetitive conduct unless [defendants] could demonstrate a legitimate business justification for it").

RBOCs have perpetrated both types of raising-rivals'-costs schemes—especially against facilities-based CLECs. The RBOCs have engaged in direct price squeezes, and routinely employ countless mechanisms, including stall and delay tactics, to make the interconnection process as time-consuming and costly as possible, all with no purpose but to extend their monopoly over the local telephone network into monopoly power over downstream markets such as the market for Internet access.

That is the state of antitrust protection that the savings clauses were meant to preserve. The attempt by the RBOCs and the government to eliminate those protections, and to challenge RBOCs only when they engage in the equivalent of predatory pricing, makes the savings clauses a nullity.

B. Inconsistency with Prior Interpretations of the 1996 Act

The position the government takes in *Trinko* also appears to be a radical and unexplained departure from the Government's prior position concerning CLEC antitrust claims against RBOCs. Until *Trinko*, the government did not mention or apply any special standard applicable to refusal-to-deal claims by competitors in this context. Indeed, the government opined to several federal courts of appeals that claims brought by CLECs almost identical to those brought by the Trinko plaintiffs stated antitrust claims.

1. Early FCC Position Recognized Need for Antitrust Enforcement

In implementing sections 251 and 252 of the 1996 Act (governing the arbitration for and approval of interconnection agreements between ILECs and CLECs), the FCC formally acknowledged that its regulations did not provide the "exclusive remedy" for anticompetitive conduct. First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96–325, 1999 WL 452885, 11 FCC Rcd 15499 (Aug. 8, 1996), ¶ 124. The FCC emphasized that, in addition to judicial review of arbitrations setting the terms of interconnection agreements, "parties have several options for seeking relief if they believe that a carrier has violated the standards under section 251 or 252," *id.*, expressly including private antitrust enforcement: "we clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws." *Id.,* at ¶ 129.

The FCC has also observed that even minor delays in providing interconnection to local telephone networks "can represent a serious and damaging business impediment to competitive market entrants" including facilities-based CLECs and AT&T, the CLEC serving Trinko. Second Report and Order, *In the Matter of Implementation of the Telecommunications Act of 1996*, 13 F.C.C.R. 17,018, ¶ 3 (July 14, 1998). FCC and state administrative agencies simply do not have the power to deter such conduct, nor to compensate its victims. Antitrust remedies, including treble damages and attorneys' fees, are necessary to make the ILECs, with their vast resources, obey the law.

2. 2001: DOJ and FCC Support CLEC Antitrust Claims

In an amicus curiae brief submitted to the Eleventh Circuit in *Intermedia Comms., Inc.* v. *BellSouth Telecomms., Inc.*, No. 01–10224–JJ (11th Cir., filed Mar. 28, 2001), a case in which BellSouth raised similar issues as Verizon raises in *Trinko*, the DOJ and the FCC expressly supported a finding that Intermedia had stated an antitrust claim by alleging violations of Section 251 of the 1996 Act. The DOJ and FCC opined to the Court of Appeals for the Eleventh Circuit in 2001 that a CLEC's allegations of an ILEC's "failure to provide reasonable interconnection" under the 1996 Act—remarkably similar to the allegations asserted by the *Trinko* plaintiff and by CLECs in other lawsuits against RBOCs—sufficiently "allege[d] exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition." *See* Brief for the United States and Federal Communications Commission as Amici Curiae in Support of Appellants, *Intermedia Communications, Inc.* v. *BellSouth Telecommunications, Inc.*, No. 01–10224–JJ (11th Cir. filed Mar. 28, 2001) at 25–26. Indeed, in its brief, the government described "exclusionary conduct" as: "conduct that 'not only (1) tends to impair the opportunities of rivals, but also (2) *either* does not further competition on the merits *or* does so in an unnecessarily restrictive way. . . . If 'valid business reasons' do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct is exclusionary." *Id.,* at 21 (*quoting Aspen*, 472 U.S. at 605, n. 32) (emphasis added).

In that same brief, the DOJ and the FCC also resoundingly rejected any interpretation of the 1996 Act that would provide BellSouth with antitrust immunity based on the existence of the 1996 Act. There, the DOJ and FCC stated:

> The United States and the FCC believe that it is essential that developing case law reflect an appropriate reconciliation of the [1996 Act] and the Sherman Act, affording the public the benefits of all the tools Congress has chosen to foster competition in this critical sector of the economy. The district court in this case

> [Intermedia] correctly stated the law: conduct that would have violated the Sherman Act before the enactment of the TCA still violates it today, whether or not it also violates the TCA. In doing so, the district court implicitly rejected BellSouth's argument that enactment of the TCA implicitly repealed Section 2 of the Sherman Act with respect to anticompetitive conduct involving competitor's access to local telecommunications networks.

Id., at 7–8.

In another *amicus curiae* brief submitted to the Eleventh Circuit in *Covad Communications Company* v. *BellSouth Telecomms., Inc.*, No. 01–16064–C (11th Cir., filed Dec. 17, 2001), a case in which BellSouth unsuccessfully raised arguments similar to those Verizon raises in *Trinko*, the DOJ and the FCC expressly rejected BellSouth's argument that "an incumbent monopoly provider of local telecommunications services cannot, as a matter of law, violate the antitrust laws by refusing to provide rivals access to its network on reasonable terms." *Id.,* at 11. Again, the government expressly recognized that violations of Section 251 of the 1996 Act may constitute antitrust violations. "Disputes over the terms on which a potential rival may obtain access to an incumbent local exchange carrier's network, whether or not they involve violations of the 1996 Act, will normally provide no basis for a finding of antitrust liability, *provided the incumbent's conduct makes no significant contribution to maintenance of its monopoly*. But if an incumbent engages in exclusionary conduct that effectively prevents the emergence of substantial competition, *a dispute over terms of access may be part of a claim under Section 2*." *Id.,* at 26 (emphasis added).

These declarations are not ancient. The government offered its views in *Intermedia* in May 2001 and in *Covad* in December 2001. Yet in 2003, in *Trinko*, the government repudiated those views, and opined that violations of the access duties imposed by the 1996 could never, as a matter of law, give rise to antitrust liability. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, No. 02–682 (Supreme Court, filed May 2003) at 16. Notably, the FCC did not join in the *Trinko* brief. Congress has not amended the antitrust laws since the United States and the FCC first opined on these issues. The change in the government's position is not justified.

C. Inconsistency with Pre-1996 Telecom Antitrust Enforcement

Perhaps most troubling about the government's change in position is that it so thoroughly rejects the history of antitrust enforcement in this very industry. Long before the 1996 Act, the Unites States brought an antitrust enforcement action against AT&T, then the local telephone monopolist, for failure to provide interconnection on reasonable terms. AT&T moved to dismiss at the close of the government's case-in-chief. In its brief in opposition to the motion, the government established that AT&T's conduct, much like the RBOC conduct at issue in *Trinko* and other CLEC-initiated antitrust litigation, fell well within the purview of the antitrust laws as interpreted and enforced by the government. *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Involuntary Dismissal Under Rule 41(b), *United States* v. *AT&T Co.*, No. 74–1698 (D.D.C., filed Aug. 16, 1981).

The government emphasized the exclusionary effects of raising-rivals'-costs schemes similar to those employed by Verizon and other ILECs:

> Even with respect to those limited facilities AT&T agreed to provide, it imposed a number of cumbersome and unnecessary technical and operational practices on its competitors which increased their costs and lowered the quality of their service, in marked contrast to the efficient interconnection arrangements made available to AT&T's own intercity private line connections. *Id.,* at 79.
>
> Broadly, the major features of AT&T's exclusionary conduct in the intercity services market have been the manipulation of the terms and conditions under which competitors are permitted to interconnect with AT&T's existing services and facilities, including those of the local exchange operators . . . *Id.,* at 67.

The approach suggested by the RBOCs and the government in *Trinko*, however, which would require the equivalent of predatory pricing to state a refusal to deal claim, would place all that plainly anticompetitive conduct beyond the reach of the antitrust laws. The government did not suggest the Court impose such a requirement on its claims against AT&T:

> While there may be instances in which a refusal to interconnect has no antitrust ramifications, that is simply not the case where a monopoly carrier seeks to use its market position to exclude a competitor. *Id.,* at 65.

> Although a company may normally choose to deal with whomever it wishes, a monopolist violates Section 2 of the Sherman Act if it refuses to deal with a competitor with the purpose of maintaining or extending its monopoly. [cites] Such conduct is unlawful because a refusal to supply or buy may be used to extend monopoly power into adjacent markets, and an integrated firm with monopoly power in one market can gain a competitive advantage in others by refusing entirely to deal with its rivals or by imposing arbitrary and discriminatory terms on them. Courts have consistently condemned such behavior. *Id.,* at 80–81.

Again, the antitrust laws have not changed in the interim. The antitrust laws did, indeed, impose precisely the kinds of sharing obligations mandated by the 1996 Act, long before that act came to pass. As a result, the attempt by the ILECs and the DOJ to rewrite history is simply an end-run around the unambiguous savings clauses in the 1996 Act.

III. CONCLUSION

Mr. Chairman and members of the committee, regulations can promote competition and protect consumers. But in all markets, the antitrust laws are a crucial backstop. This is especially true in the area of wireline telecommunications, where the market is dealing with the very substantial vestiges of a government-sponsored monopoly. It is even more true in the local telecommunications market, where increasing deregulation of the monopoly leaves little between monopoly market power and the consumer.

I should emphasize that the main benefit of anti-trust laws isn't the fact that anti-competitive actions are the subject of civil or criminal sanction; it is the fact that many thousands of anti-competitive actions are averted, as potential market predators are dissuaded by the prospect of such sanctions. The limited sanctioning ability of regulatory agencies—mainly relatively minor fines—lack the deterrent effect of the tools provided by anti-trust laws.

I believe there are two things that this Committee and this Congress should pursue to ensure the promotion of competition and the protection of consumers. The first can begin today. Congress should make clear to the Department of Justice that regulatory enforcement and anti-trust enforcement are not an either-or choice; rather they compliment each other. Congress should further encourage DOJ to intervene wherever possible to make this clear to the courts, and to actively monitor and participate in rulemakings at the FCC to ensure that competition is not undermined.

The second measure is more difficult, but probably more important. Congress should clarify once and for all in statute that the savings clause in the 1996 Act means exactly what it says. It has been humorously suggested that the courts might get the message if the section were amended by underlining it and adding two exclamation points. But whatever form that clarification takes, it should make clear that telecommunications consumers deserve the protection of both regulatory and antitrust enforcement. Additionally, we further support Chairman Sensenbrenner's suggestion that, should the Supreme Court reach the merits in *Trinko* and adhere to the Bell company position, this Committee should work rapidly to remedy that result.

Competition is at a crucial stage in the local market. Consumers are beginning to truly taste the benefits of a more free market. But the FCC has granted vast deregulation to the Bell companies, to the point where only the antitrust laws can ensure that competition continues to flourish. Do not let the monopolies convince you that somehow those laws do not or should not apply.

Chairman SENSENBRENNER. Thank you very much, Mr. Pfeiffer. Mr. Thorne.

TESTIMONY OF JOHN THORNE, SENIOR VICE PRESIDENT AND DEPUTY GENERAL COUNSEL, VERIZON

Mr. THORNE. Mr. Chairman, Ranking Member Conyers, Members of the Committee, thank you very much for the opportunity to testify here today. I've got to say that the subject is important and to me at least so interesting it makes me want to write a book about it, and I did, and teach a class about it even. It is a critically important issue.

Preliminarily, Mr. Chairman, I want to say that I think there is less disagreement from at least Verizon and I think the other companies in similar positions about savings clause and immunity than might meet the eye. Verizon argued the *Trinko* case in the Supreme Court without referring to the savings clause until the reply brief, when it had been addressed by *Trinko* on the other side. We don't see the savings clause being abrogated one bit by the position that Verizon took.

Likewise, we do not argue any immunity from the antitrust laws. Verizon not only sells service, it's a large buyer of products and services from others. We are in favor of full antitrust enforcement in telecom and other industries.

The argument we made in the Supreme Court was centered only on the issue of whether to—whether antitrust should be expanded from where it had been before to require successful companies to lend a helping hand to their rivals, creating competition, creating competition through forced cooperation in the form of turning over customers and facilities to rivals at discounted prices. We argued that that expansion had not been justified and that there were no prior cases that required anything like that and that there was no justification for an expansion here.

I would like to say that it's not just Verizon making an argument about the proper scope of antitrust. We were supported in the Supreme Court by a number of important parties: The Communications Workers of America, who at the time they wrote their amicus brief for us were not exactly on the friendliest of terms. We were negotiating a new agreement. They were threatening a strike. But on behalf of their 730,000 members they put in an amicus brief arguing that antitrust had never required the dismantling of successful businesses.

The Telecommunications Industry Association, the manufacturers of equipment and software to the entire industry, approximately a thousand companies, companies like Lucent and Nortel and Alcatel, put in a brief supporting Verizon and the Government's position in the case. And I've got to say they were there under no pressure to file amicus briefs in the Supreme Court. To the contrary, they are happy selling equipment, fiber-optic equipment, switches, other equipment to the CLECs.

Lucent's stock price was at its highest point when it was selling the most to the CLECs. They just want to see the market grow. They want to see the maximum output. They're in the same position as consumers in just wanting to see the market perform well. Their brief to the Supreme Court argued that there's a fallacy some people entertain that somehow all of the investment in the industry already occurred and only needs to be shared now. Instead they say the investment needed is continuing, that there is a huge and highly variable amount of investment occurring. It was as high as $50 billion a year a few years ago. It's down to an historic low of $20 billion this year. They would like to see that turned around. They think expansion of antitrust will deter investment. They're a beneficiary from investment on any side, ILECs or CLECs.

Other companies outside the telecom industry, United Parcel Service, Visa, Honeywell, Kodak put in an amicus brief saying that if you expand antitrust you're not just addressing a telecom issue.

You're affecting all industry. And they argued that expanding antitrust the way *Trinko* had argued would affect their business, in fact in one case, UPS, had affected their business. There's a decision in the Southern District of New York that has caught up UPS, and there are some other decisions as well outside of telecom following *Trinko*.

The Washington Legal Foundation put in an amicus brief arguing that there are special problems of abuse by class actions if you expand the substantive basis of liability class actions will follow, and indeed that's happened here. We have, I think, 35 or 36 class actions that have been filed against telephone companies alone all over the country in seven or eight States. There's been a class of all telephone users in California certified against SBC.

Finally, the eight States of Virginia, Alabama, Delaware, Indiana, Nebraska, New Hampshire, Oklahoma and Utah filed an amicus brief arguing that the essential facilities doctrine cannot expand antitrust. The normal requirements need to be met. And second, and I hope this will be pleasing to you, the second major heading of their brief with which we agree is, I quote, in passing the Telecommunications Act of 1996, Congress intended neither to expand nor to contract the ability of an antitrust claim. That was our position. That's their position, and I hope that's what comes out of this hearing.

[The prepared statement of Mr. Thorne follows:]

PREPARED STATEMENT OF JOHN THORNE

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify before the Committee regarding *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, No. 02–682 (U.S.). I am the counsel of record for Verizon in the Trinko case. I also teach telecommunications law at the Columbia Law School and have written several academic treatises on these subjects.[1]

Competitors and class action plaintiffs' lawyers have widely tried to turn Section 2 of the Sherman Act for the first time into a supplemental mechanism for redoing what the 1996 Telecommunications Act already does—but doing it through radically different and inappropriate means, including jury decisions, treble damages, and class actions. This inappropriate attempted expansion of antitrust, not the 1996 Act's Savings Clause, is the core issue in the Supreme Court in *Trinko*. The transformation of Section 2 that the plaintiffs in *Trinko* and other cases ask for is not just unjustified, but tremendously draining of resources in an industry that cannot afford it. Editorials about the case have recognized that the proposed expansion of antitrust is a "Frankenstein" monster created by plaintiffs' lawyers who "see a gold mine here."[2]

The *Trinko* and other complaints ask the courts to recognize a new Section 2 duty. They ask that Section 2 require a monopolist to turn over its sales to rivals by sharing assets at specially discounted prices—that is, they seek to impose on every monopolist a duty to dismantle itself. But that hasn't ever been a Section 2 duty and shouldn't now be made into one. The 1996 Act does impose such duties, through Sections 251 and 252 as they've been implemented. But the 1996 Act is a comprehensive regime for making, calibrating, and flexibly adjusting the judgments that are unavoidably needed to implement a duty to share at special discounts. The required judgments cannot properly be transformed into *antitrust* judgments. And the existence of the 1996 Act regime, with all its statutory guarantees of fast regulatory and judicial response to access demands, is one good reason to *avoid*, not to *start*, expanding Section 2 into what would unmistakably be new territory.

[1] The 2004 supplement to P. Huber, M. Kellogg & J. Thorne, Federal Telecommunications Law (2d ed. 1999), which will be published later this month, reviews the FCC and court decisions under the 1996 Telecommunications Act and antitrust law in this area. I will provide to the Committee's staff a copy of the supplement when it is available.

[2] Editorial, *Son of Frankentobacco*, Wall St. J., Aug. 23, 2002, at A12.

The claim by Trinko and other plaintiffs would change Section 2 into a condemnation of monopoly itself. But Section 2, going back at least to the 1920 *US Steel* case, has *not* done that. *US Steel* declares that Section 2 "does not compel competition" and does not condemn "size."[3] Other cases have reaffirmed that *possession of a monopoly*, if obtained without violating the Sherman Act, is *not* a Section 2 offense. What that means is that Section 2 doesn't compel a monopolist to give rivals a helping hand in displacing its own sales, that is, in dispossessing itself of its monopoly. Although the 1996 Act does impose a duty to create competition, Section 2 of the Sherman Act has never imposed that duty. It has been restricted to preventing monopolists from *interfering with independently arising competition* through conduct that can properly be condemned.

That distinction is fundamental and has always been respected. Section 2 has never required a retailer to change itself into a wholesaler, or a service provider to transform itself into a renter of facilities, as made clear, for example, in the Fourth Circuit's *Laurel Sand* decision.[4] In common sense and doctrinal terms, it is a legitimate business decision as a matter of law to just continue making one's sales and enjoying the fruits of one's investments, as much for a monopolist as for any other firm. In a system premised on *competition*, not cooperation, any firm may refuse to turn over its business to rivals, let alone to create an elaborate and burdensome apparatus for dealing with any would-be intermediary that asks for a piece of the business—an apparatus that, in the telecommunications context, has required billions of dollars in expenses to create special ordering systems, multi-level responses to customers, constant negotiations and disputes over the prices of individual access elements and the when and how of making them available.

There are a host of reasons why Section 2 has quite properly never been applied to impose a duty to start sharing assets with rivals at special discounts. One shorthand summary might be as follows. Any such *antitrust* duty presents unmanageable risks of doing more harm than good—of impairing the short-run and long-run investment incentives that the Sherman Act most fundamentally protects, and of generating transaction and administrative costs that offset benefits. The antitrust system just isn't institutionally suited to reliably counterbalancing those risks and costs. The antitrust system therefore has never taken on the challenges that are inherent in implementing duties of sharing—challenges that Justice Breyer recognized in his opinion in the *Iowa Utilities Board* case a few years ago[5] and that the D.C. Circuit, speaking through Senior Judge Williams, recognized in the *United States Telecom Ass'n* case somewhat more recently.[6]

These are challenges that historically have been left to *regulatory* regimes, not the antitrust system. Then-Judge Breyer explained this in his opinion for the First Circuit in the *Town of Concord* decision.[7] Today, the 1996 Act assumes those challenges in the telecommunications setting.

The 1996 Act "access duties" require decisions about what network elements and services must be shared, at what prices, on what other terms, and for how long. These judgments are technically complex, requiring an understanding of the operation and economics of telecommunications networks and services. They must be based on facts and reasoned economic analysis and must operate within the statutory constraints of the 1996 Act, like any agency decisions. But the judgments are necessarily experimental in assessing, on the one hand, when sharing on particular terms seems likely to produce the kinds of benefits contemplated by the statute and, on the other hand, when such sharing, by making piggybacking too attractive, is likely to undermine the kind of independent competitive investments the statute seeks to promote. The judgments must therefore be ever-changing. The 1996 Act is comprehensively undertaking the task of making those judgments, at both the federal and state levels. And it does so through an expert, flexible, agency-centered process that is more suited to making, and constantly adjusting, the necessary judgments. That separate regime highlights why the antitrust system is not suited to the task.

The only circumstances where Section 2 has recognized a single-firm duty to engage in some kinds of dealing with rivals is a narrow one: where the firm has refused to sell to rivals (or rivals' customers) what the firm was already voluntarily selling to others on the desired terms. That particular kind of stark discrimination has been present in *every one* of the cases finding liability for a refusal to deal—

[3] *United States* v. *United States Steel Corp.,* 251 U.S. 417, 451 (1920).

[4] *Laurel Sand & Gravel, Inc.* v. *CSX Transportation, Inc.,* 924 F.2d 539, 545 (4th Cir. 1991).

[5] *AT&T Corp.* v. *Iowa Utils. Bd.,* 525 U.S. 366 (1999).

[6] *United States Telecom Ass'n* v. *FCC,* 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[7] *Town of Concord* v. *Boston Edison Co.,* 915 F.2d 17 (1st Cir. 1990).

in *Lorain Journal*,[8] in the 1920s and 1990s *Kodak* decisions,[9] in Otter Tail,[10] and in *Aspen Skiing*,[11] as well as in the *concerted action* cases of *Terminal Railroad*[12] and *Associated Press*.[13] It was also present in the Seventh Circuit's *MCI* case,[14] apparently the first and only case of liability under the there-formulated "essential facilities doctrine." (That doctrine, as Justice Breyer has noted, is not a Supreme Court doctrine. It was formulated in *MCI*, but it got little attention there because its application was not even contested by AT&T on the local-access claims; AT&T's sole argument was a defense of good-faith practice under a changing regulatory regime. No later appellate application of the doctrine has resulted in affirming liability, and such later interpretations of this doctrine have made clear its proper limits—including the Fourth Circuit's *Laurel Sand* decision mentioned above.)

The discrimination situation—the stark refusal to make available to competitors (or their customers) the very services and terms being voluntarily made available to other customers—has been the pre-condition to demanding of a monopolist an explanation for a refusal to share: if you're selling this to others at a price that is profitable and lets you recoup your investment, what reason is there for not selling the same thing at the same price to a rival? There might be answers—differential treatment can be justified; it isn't by itself illegal—but without that discrimination there has not been liability for refusals to share. There are at least two basic reasons. First, where the defendant is already voluntarily offering the desired terms, there is no antitrust intrusion on the basic competitive choices of (a) what to sell and (b) at what price—the choices through which a firm enjoys the rewards of successful investments. There is, accordingly, much less reason to worry about deterring long-run and short-run investments by requiring the results to be shared. Second, the institutional task for courts is much more manageable in this situation. The voluntarily sales furnish a standard of conduct—*equality*—that the courts do not have to define on their own.

It is worth highlighting how different is the situation where a claim is made for sharing on newly forced terms (as opposed to terms already being offered voluntarily) and, therefore, why Section 2 has never recognized such a claim. Any effort to demand sharing of assets on new terms requires something antitrust juries and judges, through a treble-damages system, can't reliably do. To elaborate a little on what I've summarized above, the problem that has never been undertaken in the antitrust system is to strike a balance so as not to do more harm than good, both in the short run *and* in the long run.

Long-run investment incentives would be threatened by a *Section 2 rule* that says you must share the reward if your investments turn out successful enough. The essence of the *US Steel* point about the limited reach of Section 2 is that antitrust respects that truth. Indeed, this is a fundamental reason for having property rights in the first place, as Professor Elhauge has recently elaborated in his Stanford Law Review article.[15] *US Steel* and the *Standard Oil*[16] case note that the Sherman Act respects these property rights.

Even in the short run, there are at least three problems with sharing duties—as recognized in the FCC's *Triennial Review Order* and in the opinions of Justice Breyer and Senior Judge Williams mentioned above. *First:* a duty to share assets risks diminishing the incumbent's investments in creating those assets in the first place, and in maintaining and upgrading them, for the rewards must be shared but the risks fully borne. Local telephone networks in particular need such investment: they do not spring from the ground, but require the constant attention of hundreds of thousands of employees and billions of dollars investment. *Second:* a duty to share risks deterring independent investments by new entrants: sharing may be cheaper, and is certainly less risky, than investing in one's own facilities. *Third:* a duty of incumbents to share can harm the *best* new entrants, those who *do* build their own facilities: they are faced with competition not just from the incumbent but from all the rivals who can cheaply share the incumbent's assets. On top of these risks, the costs of implementing and administering any sharing duty can be very substantial, so that any market benefits must be large enough to exceed those costs.

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[8] *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951).

[9] *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 368–69, 375 (1927); *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

[10] *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973).

[11] *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985).

[12] *United States* v. *Terminal Railroad Ass'n,* 224 U.S. 383 (1912).

[13] *Associated Press* v. *United States,* 326 U.S. 1 (1945).

[14] *MCI Communications Corp.* v. *AT&T,* 708 F.2d 1081 (7th Cir. 1983).

[15] Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. (forthcoming Nov. 2003), *www.law.harvard.edu/faculty/elhauge.*

[16] *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911).

And: if the incumbent can't reliably determine the required sharing terms in advance—if there are vague legal standards requiring years of costly and uncertain litigation—the risk of retrospective treble damages skews choices toward overgenerous sharing.

Again, my point is not that, conceptually, there is no situation where these risks and costs could be outweighed by the possible benefits in encouraging investment in unshared assets that compelled sharing of some assets might make possible. The Supreme Court recognized in the *Verizon* v. *FCC* case that it is "not obviously unreasonable" to conclude that there are such situations where *compelled* competition has net benefits and that the 1996 Act is Congress's experiment to identify such situations.[17] But that experiment is being conducted through expert agencies and administrative processes that can be flexible—in adopting and revising and abandoning particular sharing duties; in quickly responding to access demands; in knowledgeably evaluating complaints about implementing complex interconnection agreements; in designing performance measures, with accompanying levels of penalties, that reflect the newness and complexity of the tasks they are imposing.[18] The antitrust system, without this kind of expertise and flexibility, has thus never recognized sharing duties on newly forced terms.

The importance of flexibility was illustrated just recently in the FCC's recent *Triennial Review Order*.[19] A few years ago the FCC required incumbents to share *pieces* of the spectrum available on their loops, so-called line-sharing. But it now has concluded that that judgment is mistaken, as it actually can discourage independent competition.[20]

That is just one illustration of the judgments that regulators at both the federal and state levels must make. The many massive FCC orders, and the numerous state-level orders that have been issued over the years, display the magnitude and complexity of the task and the range of subjects that must be addressed, and reevaluated, in light of changing circumstances. They address access to different kinds of switch-to-customer connections (different kinds of "loops"), different kinds of interoffice trunks and switches, different forms of access to central offices, varieties of computerized ordering, billing, and other operation-support systems. With respect to all these matters, the agencies must determine the terms on which they think that there will be greater benefit than harm in forcing the incumbents to share, rather than forcing new entrants to take the risks of investing on their own. Yet the cases brought by Trinko and other plaintiffs would have all these judgments made under Section 2 of the Sherman Act before juries and judges, working alongside the agencies but applying different standards and operating under different timeframes.

The sharing duties alleged in those cases would not only be novel as a matter of antitrust law and unjustifiable for the substantive and institutional reasons I've mentioned. The 1996 Act is itself a good reason for not expanding Section 2 newly to recognize such duties. Doctrinally, the comprehensive regime of the 1996 Act furnishes one reason not to expand Section 2 under the often-recognized principle that a general statute, especially a common-law like one such as the Sherman Act, shouldn't be newly expanded to cover what more specific federal regimes already are addressing. That familiar principle has been recognized by the Supreme Court in a number of contexts, including in the ERISA context in the 2003 *Black & Decker* case,[21] and it is reflected in the Seventh Circuit's *Goldwasser* decision[22] in this area particularly.

Expanding Section 2 in this context is distinctly *unnecessary* in this area, given the 1996 Act. The 1996 Act gives statutory rights to quick decisions for regulators on access demands, subject to judicial review. That system, including the reviewing courts, cannot be expected to fail unless the antitrust system, including the same courts, would fail as well. Then-Judge Breyer relied on a similar point for the First Circuit in the *Town of Concord* decision.

Expanding Section 2 in this context is particularly *unwise* in this area. Doing so would raises serious problems of disruption of and interference with the regulatory processes for implementing the 1996 Act. Expanding Section 2 in this area, in fact, would re-introduce the very kind of judicial regulatory regime that Congress re-

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[17] *Verizon Communications Inc.* v. *FCC,* 535 U.S. 467, 510 (2002).

[18] Current available annual penalties regarding Verizon's performance exceed $1.24 billion. Attachment A summarizes the performance regime and these penalties.

[19] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01–338, et al., FCC 03–36 (released Aug. 21, 2003) *(Triennial Review Order)*.

[20] *Triennial Review Order* ¶¶ 255–261.

[21] *Black & Decker Disability Plan* v. *Nord,* 123 S. Ct. 1965 (2003).

[22] *Goldwasser* v. *Ameritech Corp.,* 222 F.3d 390 (7th Cir. 2000).

jected when it effectively ended Judge Greene's role in the 1996 Act, returning the task of fine-tuned telecommunications regulation to administrative agencies.

Expanding Section 2 would reduce the agencies' flexibility in performing their delicate balancing task demands, especially their ability to enforce ceilings on sharing duties, which are as important as floors in that regime, for it is the refusal to allow sharing that induces the independent investments by new entrants that constitutes genuine competition. The process of weaning entrants *off* no-longer-justified sharing, or excessively favorable terms of sharing, can only be impaired by adding antitrust—the threats of treble-damages, class actions, hard-to-change injunctions, and, even, the sheer expense of defending complex antitrust suits, even while participating in the two-level regulatory proceedings superintending the very same matters.[23]

There are hundreds, maybe thousands, of agreements between incumbents and competitors. They are lengthy, complex, and detailed, all doing something new and involuntary. Disputes are inevitable under many of the open-ended and technical terms of the agreements, which is why there are built-in performance standards and penalties and expeditious dispute-resolution mechanisms, like the one that resolved the problem here in months. Yet recognizing the claims of Trinko and others would allow all these disputes to be made into antitrust cases simply by adding the allegation of a pattern of violations intended to slow overall marketwide entry. Those suits threaten years of costly, uncertain, and risky litigation before diverse juries deciding whether the incumbents dismantled themselves rapidly or helpfully enough. That prospect tilts the 1996 Act balance in only one direction.

In particular, it impairs the expeditious resolutions of problems under the 1996 Act. In the *Trinko* case itself, for example, AT&T and Verizon had a state-approved agreement saying "don't go to court to redress grievances," but instead use fast nonjudicial processes to resolve problems. They used those processes: the underlying problem was fully resolved, with compensation paid, in a few short months. The prospect of treble-damages antitrust class actions can only impair the ability of the 1996 Act regulatory regime to achieve such efficient resolutions—and only drains resources from telecommunications investment, which is now so sorely needed.

Thank you again for the opportunity to testify before the Committee today. I am happy to answer any questions.

ATTACHMENT A

Each state has adopted a Performance Assurance Plan that defines automatic penalties to be paid by incumbent local carriers to the CLECs for performance deficiencies. These PAPs have been repeatedly adjusted in their details as state commissions have found different aspects of performance to require different levels of motivation. The total level of available penalties is quite high. The first PAP, established in New York, was justified as sufficient because it put at risk a sizeable fraction of Verizon's annual profits from the state. In reviewing New York's PAP, the FCC concluded: "We believe it is useful to compare the maximum liability level [under the PAP] to Bell Atlantic's net revenues derived from local exchange service—after all, it is primarily its local service profits that Bell Atlantic would have a theoretical incentive to 'protect' by discriminating against competing local carriers. * * * In 1998, Bell Atlantic reported a Net Return of $743 million in New York: $269 million [the amount then at risk under the PAP] would represent 36% of this amount." Application of Verizon New York, 15 FCCR 3953, ¶436 (1999). The New York PAP subsequently was increased to $293 million, or 39% of Verizon's Net Return.

The current total of available annual penalties in Verizon's states (not counting New Jersey) is $1.24 billion. New Jersey has no annual cap on the penalties that could be incurred. Aside from New Jersey, the total amounts of available penalty levels were set initially as a fraction of profits from the state (usually 39%), but because profits have declined while the penalties have stayed the same or increased, the fraction of Verizon's profits that could be forfeited is generally much larger than 39%. For example:

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[23] *E.g.,* Remarks of John A. Rogovin, FCC General Counsel, Manhattan Institute (Oct. 30, 2002), available at *www.manhattan-institute.org/html/clp—10–30–02.htm* ("unquestionably there is going to be a lot of tension" between antitrust and FCC implementation of the 1996 Act; "[I]t's difficult to imagine how a private case getting into this 'essential facilities' issue—dealing, for example, with the local loop—is not going to bump up quite seriously into what the commission is doing").

State	Annual Available PAP Penalties	2002 Net Return	Available Penalty as a % of Net Return
New York	$293 million	$68 million	433%
Massachusetts	$155 million	$130 million	119%
Virginia	$206 million	$323 million	64%
Pennsylvania	$197 million	$481 million	41%
Maryland	$161 million	$253 million	64%
D.C.	$44 million	$56 million	78%
New Hampshire	$43 million	$45 million	96%
Rhode Island	$22 million	$14 million	154%
Delaware	$18 million	$17 million	102%

Chairman SENSENBRENNER. Thank you, Mr. Thorne.

Mr. Wright.

TESTIMONY OF CHRISTOPHER J. WRIGHT, FORMER GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION, PARTNER, HARRIS, WILTSHIRE & GRANNIS LLP

Mr. WRIGHT. Thank you, Mr. Chairman and Ranking Member Conyers. I very much appreciate the opportunity to be here.

I've also worked on these issues for years. While working for Solicitor General Starr, I worked on the *Kodak* case that Mr. Pfeiffer mentioned, and as General Counsel of the FCC under Chairman Kennard I learned just how difficult it is to introduce competition into the local telecom market.

Mr. Thorne and I were on a panel about 2 months ago, and I asked him whether under Verizon's theory of *Trinko* it was an antitrust violation if the CEO of a Bell company instructed his managers to do everything they can to undermine competition from companies that must lease network elements from the Bell company. I provided an example in which the CEO directed his managers to slow deployment of loops to competitors and to provide discriminatory maintenance of those essential loops. In my hypothetical the CEO justified his behavior on the ground that the company would make more money if it maintained its monopoly on the retail market. Mr. Thorne answered that that would not be a violation of the antitrust laws, which is an accurate representation of the view they presented to the Supreme Court. I'd be very interested in hearing whether Mr. Pate thinks discriminatory provisioning of essential telecom facilities violates the antitrust laws.

As has been stated, the Government's *Trinko* brief takes the position that a monopolist normally may refuse to deal if it would make higher profits by maintaining and extending a retail monopoly than it would by wholesaling facilities to competitors. It appears that the Government thinks the only circumstances in which there's no business justification for such action is a situation where the monopolist sacrifices its short-term profits.

I think, as Mr. Pfeiffer has said, that raising rivals costs is as effective as sacrificing profits and is a traditional basis for finding anticompetitive behavior and it certainly fits into what the Supreme Court in *Kodak* ruled, that it is an antitrust violation under section 2 for a company to use monopoly power to foreclose competition, to gain a competitive advantage or to destroy a competitor.

So in our view, we believe the savings clause clearly preserves such claims. As Ranking Member Conyers stated, one of the arguments that has been advanced is that Telecom Act remedies are sufficient, we don't need antitrust enforcement. Of course that's not an answer to the savings clause, which saves antitrust remedies without respect to whether Telecom Act remedies are sufficient. And Congress, no doubt, saved antitrust law because it knew that the threat of treble damages might motivate the Bell companies to lease their essential facilities to competitors on a nondiscriminatory basis when their natural inclination would be to undermine competition.

But in any event, Telecom Act remedies are not sufficient, as Ranking Member Conyers said, as Chairman Powell of the FCC has repeatedly stated, and the FCC has not been an enforcement agency for some time. I am proud that I helped Chairman Kennard create an enforcement bureau. I know there are good people in that bureau. I know that they're trying to turn it around, but it is far from having the capacity and competence of an antitrust court.

While I disagree with the Antitrust Division's position in *Trinko*, its position is premised on the theory that enforcement of the requirements of the Telecom Act will be sufficient to open local telecom markets to competition. I certainly agree that proper interpretation and enforcement of the Telecom Act is also essential.

As I explained in my written comments, section 271 of the act is now the most important provision of the act. Although the Bells speak of it as if its significance was limited to defining what they had to do to open their markets to competition, section 271 also requires the Bells to continue to comply with the competitive checklist or lose the ability to provide long distance service.

Verizon and the other Bells have flooded the FCC with forbearance petitions asking the Commission to relieve them of the obligation to comply with section 271 now that they have gotten their side of the bargain and entered the long distance market.

Mr. Pate is right. The Antitrust Division has played an essential role under section 271 so far on advising the FCC on how to implement the Telecom Act, including recommending that the Commission adopt a TELRIC pricing standard, which it did. The Division should continue to play that important role.

Thank you very much.

[The prepared statement of Mr. Wright follows:]

PREPARED STATEMENT OF CHRISTOPHER J. WRIGHT

Thank you for the opportunity to present my views on the very important issues you are considering at this hearing. I have dealt with these issues over the last two decades while working for the Solicitor General, as General Counsel of the Federal Communications Commission, and, most recently, while representing telecommunications companies. Because of that experience, I understand just how difficult it has been to dismantle the monopolies given to the Bell Operating Companies.

The main point I would like to make is that proper enforcement of the antitrust laws and section 271 of the Communications Act is critical to ensuring that local telecommunications markets become as vibrantly competitive as the long-distance market and the wireless market. Proper enforcement of the antitrust laws and section 271 will give consumers real choices, but faulty enforcement will lead to a reversal of the modest steps that have been made toward opening local telecommunications markets to competition and could lead to the extension of the Bells' dominance into the long-distance market.

The Importance of Antitrust Enforcement. I know the Committee is very familiar with the *Trinko* case and the other cases involving the antitrust savings clause, such as *Goldwasser*.[1] And the Committee certainly knows that Congress included a savings clause in the 1996 Act to make clear that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[2] Despite the savings clause, the Bells have relied on some unfortunate dicta in *Goldwasser* to argue that the enactment of section 271 and the other market-opening provisions of the Telecommunications Act of 1996 preempted the application of the antitrust laws in the telecom sector. That argument is a loser: On account of the antitrust savings clause, there is simply no way to conclude that, if a Bell company violates both the Telecommunications Act and the antitrust laws, a person injured by the action may not bring an antitrust action. The Department of Justice never endorsed the Bells' preemption argument in its broadest form—indeed, the Antitrust Division opposed the Bells on that issue in the lower courts—and in the Supreme Court the Bells have not emphasized the preemption argument in its straightforward form.

Verizon and the government have instead advanced positions that would unduly restrict the application of the antitrust laws. Those laws require monopolists to make their facilities available to competitors in circumstances where that is essential to permit the development of competition. For example, in the *Kodak* case, the Supreme Court held that Kodak could not refuse to sell parts used to repair Kodak copiers to independent service organizations that sought to compete with Kodak in the market for servicing copying machines.[3] Without that requirement, the Court recognized, Kodak could leverage its monopoly in the parts market into the service market. In earlier cases, the Court reached similar conclusions. For example, in *Otter Tail* the Court held that section 2 of the Sherman Act required an electric utility to sell power at wholesale to municipalities that wanted to replace the utility as the retail provider of electric power.[4] And in the *MCI* v. *AT&T* case that played a key role in the break-up of AT&T, the Seventh Circuit held that telecommunications facilities are the archetypal example of essential facilities.[5]

In the *Trinko* case, Verizon has attempted to distinguish *Kodak* and *Otter Tail by pointing out that in those cases the defendant had voluntarily agreed to deal with competitors at some point in time. While that is so, it is truly a distinction without a difference. In fact, that approach would reward companies that consistently take every possible step to prevent the emergence of competition. And that approach would make the antitrust laws a dead letter in the telecom sector. Under the interpretation of the antitrust laws advanced by Verizon in Trinko*, it would not violate the Sherman Act if a Bell company CEO told his managers that, because the company would have higher profit margins without competition, they should do everything they can to undermine competitors that must lease essential facilities from the Bell company—including slow-rolling deployment of those facilities and providing discriminatory treatment with respect to maintaining those facilities—as long as the company never voluntarily agreed to lease facilities to competitors.

The Antitrust Division supported Verizon in *Trinko*, but it emphasized a different argument. The Antitrust Division stated that, to find an antitrust violation, a court must always find evidence of exclusionary conduct and advanced an unduly restricted interpretation of that phrase. In the federal government's view, "exclusionary conduct" is a "demanding standard," and it appears that the "sacrifice of short-term profits" in order to injure competition is the only form of anticompetitive behavior the Antitrust Division finds sufficient.[6] While the "sacrifice test" makes sense in the predatory pricing cases where it originated, it does not make sense in the context of essential facilities and monopoly leveraging cases like *Trinko*. Under the test, it would be a valid defense for a monopolist to argue that it makes "business sense" for it to exploit its dominant position and undermine the development of competition because it would make more money if it maintains and extends its monopoly than it would if competition develops. But competition will never develop

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[1] *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko,* Sup. Ct. No. 02–682 (argued Oct. 14, 2003); *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

[2] Section 601(b) of the 1996 Act (codified at 47 U.S.C. § 152 note).

[3] *Eastman Kodak Co.* v. *Image Technical Services, Inc.,* 504 U.S. 451 (1992).

[4] *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973).

[5] *MCI Communications Corp.* v. *AT&T Co.,* 708 F.2d 1081 (7th Cir. 1983).

[6] Brief for the United States and the Federal Trade Commission in Sup. Ct. No. 02–682, *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko*, at 7–8.

in local telecommunications markets—and never would have developed in the long-distance market—if that were the standard.

The Antitrust Division's analysis rests on a faulty understanding of the effect of the savings clause in particular and the 1996 Act in general. Under the Act, Bells with authority to provide long-distance service must lease specific "network elements" to competitors at cost-based rates. While not every violation of the duties established by the 1996 Act necessarily is an antitrust violation, repeated failures to provide nondiscriminatory access to essential network elements, taken in order to frustrate the development of competition, are straightforward violations of section 2 of the Sherman Act under *Kodak, Otter Tail*, and *MCI* v. *AT&T*. That conclusion is reinforced by the 1996 Act because, under antitrust law, it has always been appropriate to consult "extrinsic law" to determine what is anticompetitive.

Yet the Antitrust Division seems to think the legal regime Congress established in 1996 immunizes the Bells from antitrust liability, despite the savings clause. Most particularly, as its brief makes clear, in the Division's view the fact that Congress required the Bells to lease network elements at wholesale rates that are lower than the retail rates the Bells could charge if they maintained their monopolies provides a valid justification that has the effect of conferring immunity from the antitrust laws.[7] That is backwards: although not every violation of the Telecommunications Act is a violation of the antitrust laws, the fact that the Telecommunications Act requires the leasing of network elements at cost-based rates does not immunize failures to do so, taken to impede competition, from antitrust liability. To the contrary, as the government acknowledged in its brief, under the antitrust laws the "violation of extrinsic statutory or legal duties may be significant in determining whether conduct is exclusionary for antitrust purposes."[8] By enacting the savings clause, Congress made clear that antitrust law—including the normal rule that it is appropriate to consult extrinsic law to determine what is anticompetitive—continues to apply.

Moreover, Congress did not go to the trouble of making clear in the 1996 Act that it was saving the antitrust laws from preemption so that antitrust laws would be construed to have no role to play in that effort. To the contrary, Congress understood that the antitrust laws had played a key role in opening the long-distance market to competition and knew that the threat of antitrust remedies could play an important role in opening local markets to competition. And, contrary to the position espoused by the Antitrust Division in *Trinko, it makes no sense to contend that the Bells may present a legitimate business justification in an antitrust action by arguing that they don't want to do what the 1996 Act compels them to do because they will be better off if they retain their monopolies.*

In addition, contrary to the arguments advanced by Verizon, the existence of the regulatory regime Congress created in 1996 makes application of the Sherman Act easier. Congress has established a process to determine what network elements the Bells must lease to competitors and the prices for leasing them. An antitrust court therefore need not struggle with questions about the price at which those facilities must be leased, but can concentrate on determining whether a company violated its legal duties in order to maintain or extend its monopoly. Thus, rather than the sacrifice test, the appropriate antitrust standard is whether a defendant impeded access to a facility it is legally required to provide to competitors in order to thwart competition.

With respect to antitrust enforcement, I would also like to make the point that regulatory remedies by themselves are unlikely to be effective. I say that as someone who worked for seven years at the Federal Communications Commission and, while there, helped Chairman Kennard establish the new Enforcement Bureau. I also know that the Bureau has an excellent staff and that there are many able staff in the state commissions around the country. But I also know how limited their resources are, how ferociously the Bells have fought since 1996 to enter the long-distance markets without really opening their local markets to competition, and how resource-intensive the development of a case demonstrating anticompetitive actions can be. In addition, the FCC primarily views itself as a rulemaking body, and it deals with Bell company representatives every day while acting in its quasi-legislative capacity. It is very difficult for it to put on its quasi-adjudicative hat and act as a judge with respect to those companies—and I don't think anyone who is familiar with the Commission disagrees that the FCC is more comfortable when making rules than when resolving complaints. And finally, as Chairman Powell has stated repeatedly, the FCC's authority to punish carriers that violate the Telecom Act is quite limited.

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[7] *Id.* at 3 n.1.
[8] *Id.* at 25 n.10.

For those reasons, there really is no question that the Bell companies are much more likely to provide nondiscriminatory access to their essential facilities if antitrust remedies are available than if there is merely the possibility of regulatory action. And experience since 1996 has confirmed that consumers—and especially residential and small business customers—have no prospect of benefiting from the competitive alternatives Congress intended to provide by means of the 1996 Act unless competitors may lease those facilities on nondiscriminatory terms and at cost-based rates.

Section 271 enforcement is more important than ever. The FCC will soon grant the final petition authorizing a Bell company to enter the long-distance market. Although the Bells seem to think that section 271 is therefore now less important, in fact section 271 is now more important than ever. Section 271 specifies what a Bell company must do to enter the long-distance market and also *what the Bells must do to continue to provide long-distance service*. Section 271(d)(6) makes clear that a Bell company's authorization to provide long-distance service should be suspended or revoked if it does not continue to comply with section 271's competitive checklist. That means that section 271 has superseded section 251, which governs all incumbent local exchange carriers, as the principal statutory provision governing the Bell companies. Before the section 271 petitions were granted, the requirements of section 271 did not actually apply to the Bell companies—those requirements told the Bell companies what they must do to obtain authorization to provide long-distance service. After a section 271 petition has been granted, however, section 271 has increased legal significance—a violation of the checklist now calls for the imposition of the remedies listed in section 271(d)(6).

As I know this Committee is well-aware, Congress crafted section 271 to require the Bell companies to take the steps necessary to let competitors into their markets before the Bells were permitted to enter the long-distance market, and there is a real danger of the Bells extending their dominance into the long-distance market on account of their control of essential facilities if they are not required to continue to take the steps necessary to open their markets to competition. In particular, they must lease their essential facilities to competitors at nondiscriminatory rates. Because that requirement is so critical, the competitive checklist in section 271 requires the Bell companies to lease four specified network elements—loops, transport, switching, and signaling—on a nondiscriminatory basis at cost-based rates. By leasing those four network elements—which have come to be known as the "platform of network elements" or "UNE-P"—a competitor may enter local markets as easily as the Bells may enter the long-distance market, which the Bells do by leasing capacity from interexchange carriers at the cost-based rates available in that highly competitive market. The competitive choices now available to residential customers and small businesses primarily depend on nondiscriminatory access to the platform of network elements.

The Bells relied heavily on the existence of competitors using the platform of network elements in support of their section 271 applications. Early on, they persuaded the FCC that a competitor leasing the platform is a "facilities-based" competitor within the meaning of "Track A" of section 271. Now they argue that a competitor using the platform of network elements provides merely "synthetic competition." That is not so—any more than the competition the Bells provide in the long-distance market is "synthetic" because they lease facilities to provide long-distance service. But in any event the Bells can't have it both ways—they can't be permitted to point to UNE-P competitors as evidence that their local markets are open to competition so they may enter the long-distance market and then turn around and eliminate the ability of those competitors to provide service. That is a classic bait-and-switch tactic.

But that is only one example of the arguments the Bells are already advancing in an attempt to renege on their side of the bargain embodied by section 271. There are at least three other examples. First, in the recent *Triennial Review* proceeding, the Bells persuaded the FCC to adopt an "impairment" standard under section 251 which provides that incumbent local exchange carriers do not have to lease network elements to competitors even where those competitors "would suffer from a substantial cost disadvantage" and "are likely to sell less of their product" without access to the network elements.[9] In other words, under the FCC's new test, a competitor is not necessarily "impaired" in providing competitive service if its product is non-

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC No. 03–36, ¶ 112 (rel. Aug. 21, 2003) *("Triennial Review Order").*

competitive without access to the network elements Congress identified as essential to the development of competition. It is hard to see what "impairment" means if it does not apply in that circumstance, as Judge Bork explained in a letter that the Commission followed in part, but only in part.[10]

Second, the Bells persuaded the FCC that, even though the competitive checklist specifically requires the Bells to lease network elements under the "cost-based" standard adopted by Congress for network elements in 1996, and even though it is undisputed that loops, transport, switching, and signaling are "network elements," the Bells do not necessarily have to charge cost-based rates for those network elements. And the FCC seemed to think that the Bells could set the prices for those network elements in some cases without arbitration by state commissions, who are charged by the 1996 Act with the task of establishing rates for network elements when the parties cannot agree.[11] But Congress did not establish both substantive and procedural rules for determining the prices of network elements so that the Bells could ignore those rules.

Third, Verizon filed a petition asking the FCC to "forbear" from enforcement of the four items on the section 271 checklist if a new entrant is not "impaired" without access to the network element under the FCC's new test. The FCC recently denied that request, explaining that the section 271 checklist could not be more clear that Bell companies that are authorized to provide long-distance service must lease the four network elements to competitors without regard to the impairment test.[12] Verizon has brought suit challenging that decision. It also has filed a modified forbearance request asking the Commission to refrain from enforcing the checklist insofar as it requires the Bells to lease network elements that may be used to provide high-speed transmission capabilities, and that petition is pending.[13]

The Bells' new arguments are aimed at reversing the modest gains competitors have made in offering competitive alternatives by eliminating the availability of the platform of network elements. For example, with respect to residential and small business customers, it is entirely clear that, without the platform of network elements, the competition provided by MCI's Neighborhood plan and similar offerings would simply not be possible. And the Bells can make network elements unavailable just as effectively by pricing them at discriminatory rates as by refusing to lease them at all. The Antitrust Division played a critical role in 1996 by filing comments explaining that in detail and urging the FCC to adopt a long-run incremental cost pricing standard, which we did.[14] Five former chief economists of the Division—a bipartisan group, I would like to add—also played a critical role that year by making a filing urging the FCC to stand by its pricing rule after the Eighth Circuit, at the Bell companies' urging, overturned it.[15] Of course, the FCC stood by its pricing rule and the Supreme Court ultimately upheld it in *Verizon* v. *FCC*.[16] Nevertheless, and despite many more pressing matters, the FCC has opened a proceeding at the Bells' request to revisit its pricing rules.

The positions currently being advanced by the Bells are very much in keeping with the Bells' consistent efforts since 1996 to enter the long-distance market while keeping their local markets closed to competition. As I am sure many of you recall, SBC persuaded a district court judge to declare section 271 unconstitutional as a Bill of Attainder on New Years' Eve 1997. That decision, designed to allow them to provide long-distance service without opening their local networks to competition, was overturned, of course.[17] And the Bell companies' position was all the more startling because Congress had enacted section 271 exactly as the Bell companies had urged in order to avoid any constitutional problem.[18]

In addition to arguing that section 271 is unconstitutional, SBC also argued that the FCC had erroneously denied their section 271 application for Oklahoma on the basis that there was no competition when, SBC claimed, there was competition—it pointed out that four employees of a would-be competitor were getting service from their employer on a test basis. Of course, the D.C. Circuit rejected the argument that such evidence established that SBC had opened the Oklahoma market

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[10] Letter from R. Bork to Chairman Powell, attached to filing by A&T in FCC Docket 01–338 (Jan. 10, 2003).

[11] *Triennial Review Order,* ¶¶ 656–64.

[12] Public Notice, *Commission establishes comment cycle for new Verizon petition requesting forbearance from application of section 271*, FCC 03–263 (Oct. 27, 2003) (citing *Triennial Review Order*).

[13] *Id.*

[14] Comments of the U.S. Department of Justice, FCC CC Docket 96–98 (May 16, 1996) at 31.

[15] Letter from B. Owen *et al.* to R. Hundt, FCC CC Docket 96–98 (Dec. 2, 1996).

[16] *Verizon Communications, Inc.* v. *FCC,* 5535 U.S. 467 (2002).

[17] *SBC Communications, Inc.* v. *FCC,* 154 F.3d 226 (5th Cir. 1998).

[18] *BellSouth Corp.* v. *FCC,* 162 F.3d 678, 690–91 (D.C. Cir. 1998).

to competition.[19] But the point is that the Bells early on advocated positions that would have permitted them to enter the long-distance market without showing that their local markets were open to competition. Along the same lines, Verizon argued that a more obscure provision—section 272(e)(4)—authorized it to enter the long-distance market without satisfying the competitive checklist—another argument that the courts rejected that would have permitted the Bells to provide long-distance service while retaining their local monopolies.[20]

The Bells also argued that they should be permitted to disconnect network elements solely for the purpose of raising their rivals' costs. Or, the Bells argued in the alternative, they should be permitted to impose "glue charges"—payments not to disconnect network elements in the first place. The Supreme Court condemned the Bells' argument, using very strong language. "As the Commission explains," the Court said, the Bells sought to "'disconnect[] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants."[21] The Court saw no more reason to permit the BOCs to "impose wasteful costs" on competitors than to permit them to "sabotage network elements."[22] However, in a confusing footnote that apparently was added to the *Triennial Review Order* at the last minute, the FCC appears to have concluded that Bells with authority to provide long-distance service need not combine network elements, at least in some circumstances.[23] That would either effectively deny competitors the ability to use the platform of network elements or raise their costs for no productive reason.

The common thread in each of the arguments the Bells advanced before their section 271 applications were granted is that the Bells wanted to enter the long-distance market without taking the steps necessary to open their local markets to competition. The common thread in each of the arguments the Bells are currently advancing is that, now that they have obtained authorization to provide long-distance service, they want to stop taking the steps that made competition possible. But Congress made very clear in section 271(d)(6) that the Bells must continue to comply with the checklist after they have entered the long-distance market. No other approach would make sense. As the Supreme Court said in the *Verizon* decision, the Bells "have an almost insurmountable competitive advantage" on account of their ownership of network elements resulting from their prior status as franchised monopolists.[24] Competitors must continue to be able to lease those bottleneck elements at nondiscriminatory rates or the competition that has developed will disappear.

This Committee's close attention to the FCC's resolution of these issues is therefore more important than ever. Enforcement of section 271's obligations is no longer in the background, but is now at the forefront. I therefore urge the Committee to ensure that section 271 is implemented as Congress intended, and that the Bells are not permitted to close local markets to competition now that they have entered the long-distance market.

It also would also be helpful if the Antitrust Division urged the FCC to require the Bell companies to provide nondiscriminatory access to the four network elements Congress listed in section 271 at cost-based rates. The Division's comments in 1996 were very helpful in establishing those requirements. The Division also has expressed doubt concerning the merit of a number of section 271 applications that the FCC nevertheless has approved, despite the FCC's duty under the statute to give "substantial weight" to the views of the Department of Justice—which highlights the need for continued oversight. In any event, it surely would make no sense, but instead would completely undermine the role Congress assigned the Department, if the FCC were now to forbear from enforcement of the requirements of section 271.

Finally, although I disagree with the Antitrust Division's position in *Trinko*, its position is premised on the claim that enforcement of the requirements of the 1996 Act is sufficient to open all telecommunications markets to competition. Given that position, it is all the more important for the Department of Justice to make sure that the requirements of the 1996 Act, and especially the requirements of section 271, are applied as Congress intended.

Chairman SENSENBRENNER. Thank you very much, Mr. Wright.

[19] *SBC Communications, Inc.* v. *FCC,* 138 F.3d 410 (D.C. Cir. 1998).
[20] *Bell Atlantic Telephone Cos.* v. *FCC,* 177 F.3d 1057 (D.C. Cir. 1997).
[21] *AT&T Corp.,* 525 U.S. at 394, *quoting* FCC Reply Brief at 23.
[22] *AT&T Corp.,* 525 U.S. at 394.
[23] *Triennial Review Order, supra,* n. 1989.
[24] *Verizon,* 535 U.S. at 490.

The questions will be done pursuant to the 5-minute rule, and Mr. Tracci on my staff has noted who has arrived in what order and that's—the Members will be called in the order in which they arrived, alternatively by side, starting with me.

General Pate, one of the reasons why I feel so strongly on this issue is that the Telecom Act does not give standing to consumers to try to enforce the provisions of the law, whereas the antitrust laws do. And you mentioned in your testimony that the Department has taken the position in its *Trinko* amicus brief that an incumbent's denial of an essential facility to a competitor would only constitute the antitrust violation where it involves a sacrifice of short-term profits. That makes sense only insofar as it helps the defendant obtain or maintain monopoly power. You mention that this standard was advanced by the Department in its Microsoft and American Airlines filing. However, it is my understanding that that standard was not adopted by the Court in either of these cases.

Can you cite a judicial precedent where the standard that you have advocated has been found to apply in the telecom sector, and do you think that the acceptance of this standard by the Supreme Court in *Trinko* would recast traditional antitrust analysis in the manner that would undermine the scope and application of the savings clause?

Mr. PATE. With respect to Microsoft, we advanced that standard. It is not our reading of the opinion that the Court rejected it or used a balancing test, but rather that it was a standard that we advanced and that the Court's opinion can be read to indicate acceptance of that standard. There is a balancing discussion elsewhere in the case that has to do with what analysis should be applied once conduct is found to be exclusionary, which is the purpose for which we apply the "but for" test that you're talking about.

In American Airlines, likewise, while the Court found that our factual submission didn't meet the standard, we do not read the opinion to reject that standard, which we were happy about because we thought that was a—excuse me.

Chairman SENSENBRENNER. Well, doesn't that just get to half the argument Mr. Wright has advanced to say, okay, you know, if the standard says you don't cut your short-term profits because of this behavior, but you drive up your competition's costs so that they become noncompetitive in the marketplace? Isn't that the same result?

Mr. PATE. No. The point that we're making in the *Trinko* brief is, first, that the savings clause preserves antitrust, does not modify antitrust.

Chairman SENSENBRENNER. But you're trying to change how antitrust has been viewed in this area in the brief that you have advocated. And you know, I think Mr. Wright makes a good point. There are two sides to the coin. One is to engage in monopolistic activity by sacrificing your short-term profits. The other side of the coin, which you have not addressed and I think you ought to, is driving up the competition's costs so that they can't be competitive. Same result occurs either way.

Mr. PATE. The antitrust laws we believe, as interpreted by the Supreme Court, strongly support the position we take in *Trinko*. They're based in the Court's decision in *Aspen*. They've been consistently applied by the Department in Microsoft and American Airlines and in the telecom sector. And with respect to the Intermedia brief, which was mentioned earlier, which was filed in March of 2001, before I came on duty at the Department, we supported reversal of the district court's opinion there which had dismissed the plaintiff's claim. But in the course of doing that we quoted the very same standard, and to quote from that brief, we said that conduct is not deemed exclusionary for purposes of section 2 of the Sherman Act unless it lacks a valid business purpose; i.e., it makes no business sense apart from its tendency to exclude and thereby create or maintain market power.

So that is the standard we're applying, including in cases where we believe the particular plaintiff has stated a good case. It is not, as has been suggested, in any sense an about face.

Chairman SENSENBRENNER. I don't think you've answered my question.

Gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I thank the witnesses for their testimony. I turn to the infamous memo of the United States Telecommunications Association and—at the dinner. I take from your expression you've at least heard about it, Mr. Pate.

Mr. PATE. I've read newspaper reports about it, that's right.

Mr. CONYERS. Okay. Mr. Pfeiffer, heard about it or seen it?

Mr. PFEIFFER. Yes, sir.

Mr. CONYERS. All right. You're under oath, guys. Thorne, heard about it or seen it?

Mr. THORNE. I have heard about it. I have not seen it and I was not at the dinner.

Mr. CONYERS. But your President was.

Mr. THORNE. I understand.

Mr. CONYERS. And you don't talk to him, do you?

Mr. THORNE. No, I do talk to Mr.——

Mr. CONYERS. You do? Did he mention the dinner to you?

Mr. THORNE. I have not talked to him, but I saw the newspaper account about it.

Mr. CONYERS. I said did he mention the dinner to you?

Mr. THORNE. He did not.

Mr. CONYERS. Okay. And you're not going to ask him about it either, are you?

Mr. THORNE. I will if that's helpful to you.

Mr. CONYERS. Well, would it be helpful to you? I mean, you're the Vice President.

Mr. THORNE. My understanding of what——

Mr. CONYERS. Are you the Vice President?

Mr. THORNE. I'm the Senior Vice President and Deputy General Counsel of Verizon.

Mr. CONYERS. And this wouldn't be helpful to you and your President to talk about this where, in which it was stated we're going to describe to them as our 3-year goal for comprehensive Federal legislation to substitute market-based competition for Government-managed competition. And our immediate short-term objectives in furtherance of this broader goal in current proceedings before the FCC on UNE-P/TELRIC pricing broadband and UCF—USF.

Do you know what that sounds like? A strategy for dumping the Telecom Act of 1996.

Mr. THORNE. With all respect?

Mr. CONYERS. Yes, with all respect.

Mr. THORNE. With all respect——

Mr. CONYERS. Yes.

Mr. THORNE. It sounds to me like an attempt by an industry under siege to try to get back on its feet and I think it's best summarized—my view of this is best summarized by what the Chairman said last week at the Phoenix Center, that having the affected industry come together to discuss lobbying and legislation and regulatory strategy is fair, and I quote, lobbying campaigns are part of the American tradition and that is so important in this sector.

Mr. CONYERS. Absolutely. Well, I'm glad he told you that because I agree with him. I want to make it clear that companies and individuals are free to join together and make plans to lobby their Government. That's a first amendment right that applies to everybody. What is not protected is, and in fact is a violation of our antitrust laws, is trying to use market power to coerce suppliers to participate in a lobbying campaign.

Now there's a line in there, my friend. And when in this memo we're talking about how much we're going to collect from people to a 3-year financial commitment to this campaign, somebody's coming close to the line. You know, I suggest you talk to the President, Thorne, I mean, it wouldn't hurt, about this. This is pretty serious stuff, even if it's legal.

Mr. THORNE. It's obviously serious to get the industry to come together and——

Mr. CONYERS. No, it's obviously serious to talk about hitting up the suppliers for money to change the law. That's what's obviously serious.

Mr. THORNE. With all respect again.

Mr. CONYERS. Yes, some more respect. Okay.

Mr. THORNE. Mr. Ranking Member.

Mr. CONYERS. There's a lot of respect going around here today.

Mr. THORNE. The manufacturers have of their own accord supported a reduction of the requirements of the FCC and the States and the agreements have imposed of sharing because they see too much sharing deterring——

Mr. CONYERS. Okay. Can we talk about this after you've talked to your President?

Mr. THORNE. I would be happy to meet with you and discuss this.

Mr. CONYERS. The answer is yes, right?

Mr. THORNE. Yes, it is.

Mr. CONYERS. Okay.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. Gentlemen, good to have you all with us. Mr. Pate, let me put a two-part question to you.

Is it your opinion that the *Trinko* case expands antitrust liability, A, and B, are there industries or business entities that are subject to regulation by Federal or State agencies or both that are not subject to antitrust laws?

Mr. PATE. That's an important question, yes. The reason we participated in the case is because we believe that the Second Circuit opinion in *Trinko* unduly expanded antitrust liability for all sectors of the economy in a way with respect to monopoly leveraging that had been rejected by the Supreme Court and with respect to essential facilities was beyond any proper interpretation of section 2. So that's why we are in the case.

Number two, as to those industries, it has been our position at the Division that special purpose regulations should not exempt industry antitrust oversight. That's in different areas that's gotten different hearings in the courts. We recently were on the losing side of an attempt to argue in the securities industry that securities regulation should not exempt participants from the antitrust laws. In a recent case we were on the losing side of that. But the traditional Division position has been in general terms against exemptions to the antitrust laws.

Mr. COBLE. But are there in fact people who enjoy exemption, industries or business entities?

Mr. PATE. Well, certainly there are a number of antitrust exemptions that Congress has passed, Capper-Volstead in the agriculture area, McCarran-Ferguson in the insurance industry. There are examples of that. My point is that we generally want to see that sort of thing be as narrow as possible and generally are very skeptical about any calls to increase exemptions from the antitrust laws, which we think are critical to protecting consumers.

Mr. COBLE. Mr. Thorne, do you believe that the telecommunications industry should be exempt from certain antitrust laws?

Mr. THORNE. I do not, and for the reason that I mentioned before, that we are a customer of telecommunications products and services and want to see competition all around. It benefits us if the markets grow unrestrained.

Mr. COBLE. And I don't mean this critically, Mr. Thorne. I don't think you've ever said that, but your body language tells me that you'd probably like to see the telecommunications industry exempt. Am I misreading your body language?

Mr. THORNE. No, no. Let me be clear. Perhaps the—we have not argued for an exemption. Now, whether we might like it in some other world in a different hearing, a different universe maybe, I mean we can talk about that. But we have not argued for an exemption and there are good reasons not to because we are on the customer side for a very large budget of expenditures each year, and so we benefit from free competition in the industry. And I don't actually know how you would exempt one industry and not others at the same time.

Mr. COBLE. And for the record, I'm one of your customers, and I am not complaining about the service I get from you all.

Mr. THORNE. Thank you very much.

Mr. COBLE. Mr. Pfeiffer and Mr. Wright, let me put this question to each of you. Is it your opinion that the 1996 Telecommunications Act is promoting competition and forcing the Bell companies to open their local markets?

Mr. PFEIFFER. If I may, yes, I do believe that the 1996 act was designed and says it was designed to promote competition. I'm not sure that it necessarily opens markets in the sense that the antitrust laws would not have otherwise required those markets to be opened. I think it does specify in more detail steps that need to be taken. But I think the requirement to share an essential facility like the monopolized local telephone network has existed for decades under the antitrust laws and I don't believe the 1996 act changes that. I don't believe it created that duty.

Mr. COBLE. Mr. Wright.

Mr. WRIGHT. Let me just add that one important change the 1996 act made was prior to 1996 when it was illegal to provide competitive telecommunications service, local service, in most States and section 253 of the Telecom Act preempted such rules. So prior to 1996 an antitrust claim would have been dismissed on the ground that State law prohibited competition. But after 1996 there is a different result in that respect.

Mr. COBLE. I see my amber light, which tells me the red light is imminent. So I will yield back.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Pate, what were the factual findings of what Verizon did, what were the findings of the lower court?

Mr. PATE. Are you speaking about the *Trinko* case?

Mr. SCOTT. Right.

Mr. PATE. It was assessed on a rule 12(b)(6) standard with reference to the allegations in the complaint so that the allegations were failure to meet the interconnection obligations under an interconnection agreement negotiated with respect to New York service under the 1996 act. But there were not factual findings.

Mr. SCOTT. So the allegations—you're saying the allegation, what was the allegation then that got thrown out, that they did not comply with the 1996 act?

Mr. PATE. In summary the allegations were that in the context of the competitive provider's resale of wholesale service obtained from Verizon to retail customers that in a number of very specific respects Verizon's conduct did not meet the standards set forth in the 1996 act.

Mr. SCOTT. Are you talking about overcharging and providing a different level of service?

Mr. PATE. I'm not sure that I recall an allegation of overcharging, but levels of service, exactly that, that in a number of specific respects the service that was alleged to be provided by Verizon was not—was alleged not to meet the standard of the 1996 act.

Mr. SCOTT. What is the sanction for doing that under the Telecom Act?

Mr. PATE. Well, in this——

Mr. SCOTT. If that was factually true, what would the sanction be?

Mr. PATE. I was not involved in these proceedings, but my understanding of what happened in this case was that there was a fine of $10 million imposed in administrative proceedings.

Mr. SCOTT. Now, was it your understanding that the legislative intent of the Telecom Act would be that antitrust provisions would be in addition to whatever the sanctions might be under the Telecom Act?

Mr. PATE. Well, it's my understanding of—as Ranking Member Conyers put it—that given the language that says that the 1996 act does not modify the antitrust laws, that if conduct violated those laws before the 1996 act it would still be a violation of the antitrust laws. If it did not violate the antitrust laws then the 1996 act didn't change that. The antitrust laws were left fully and applicable in the same way that they were prior to the act.

Mr. SCOTT. Violation of a law to enhance a monopoly position would constitute a violation of the antitrust law, wouldn't it?

Mr. PATE. It could. But I don't think that in this context, well, certainly in this context it is not fair to say that each and every one of the specific market opening requirements of the 1996 act have any support as violations of the antitrust law in and of themselves. And I think every court that has addressed the situation has agreed that the 1996 act was intended to do something different from and beyond what the antitrust laws do in terms of imposing sharing obligations.

Mr. SCOTT. But if you violate the law to enhance your monopoly position, wouldn't that constitute a violation of antitrust?

Mr. PATE. The antitrust laws don't look to other statutes to incorporate standards and thereby be an enforcement mechanism for any other regulatory statute whether it be telecom, franchise protection or otherwise. Rather, the antitrust laws set forth standards to determine whether conduct is anticompetitive. That's one of the key points that we're making in the *Trinko* submission, that to adopt the very specific list of obligations that Congress created in the 1996 act would in fact modify the standards of the antitrust laws, and the savings clause among other things makes clear that that would not be the correct application.

Mr. SCOTT. Well, if a—Verizon, in this case, were to consistently provide the differential, a differentiated service and were able to maintain a monopoly position because people wouldn't want the bad service, they would want the good service, and they were able to maintain a monopolistic position, that wouldn't be a violation of the antitrust law?

Mr. PATE. It could be. It is not our position that because conduct is the same type of conduct that's covered by the 1996 act that there could never be an antitrust violation. Rather, the point is that the specific list of obligations in the 1996 act which go well beyond antitrust, that the violation of those don't necessarily state an antitrust claim. And that in this specific case, and we've reached contrary conclusions in other specific cases, but in this specific case what the plaintiff was doing was alleging specific failures under that laundry list of 1996 act obligations.

Mr. SCOTT. And making it impossible for anybody to effectively compete?

Mr. PATE. Well, that's a conclusion that I think is not supported in terms of looking at the specific list of allegations in the complaint, which the plaintiff had two opportunities to amend before the district court dismissed it. It's a question of what are the allegations in a particular case as opposed to any sort of theory on our part that 1996 act conduct can't ever be the subject of an antitrust violation. That's an important distinction.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you, Mr. Chairman. Assistant Attorney General Pate, I want to commend you for, I think, trying to explain to this Committee what the antitrust laws are and what they aren't, and it's my recollection that antitrust laws are designed to tell companies stop doing things that harm your competition, you know. It's not designed to tell companies to go out and help your rivals by giving them certain things. Am I correct?

Mr. PATE. That's an important part of the point we're making in *Trinko*. I wouldn't say that it never imposes an obligation to assist your rivals. Clearly sometimes it does. But we say that in order to have antitrust law perform important functions, those times need to be when the refusal to assist is done for reasons that clearly indicate anticompetitive behavior. If you think about it, the antitrust laws are telling people to go out and compete with one another, not to get together and share monopolies. That's something that may have been and was, in the judgment of Congress, necessary to jump-start competition under the 1996 act. That's not generally the approach to the antitrust laws.

Mr. BACHUS. But you know when you take the antitrust laws and you start trying to get them to be used to compel companies to go out and assist their competition, that's not what the antitrust laws were ever intended to do. Now, the 1996 act did actually put some affirmative duties on the companies to, you know, to share their facilities, to share their lines. But, I mean, that's a different thing apart from antitrust laws. I think the——

Mr. PATE. Well, I certainly generally agree that antitrust is much more directed to preventing affirmative misconduct against rivals and that's something we do all the time. In some cases it may impose a duty of assistance, but that's something that we have to be very careful about, and that's part of the point that we are making in the *Trinko* case.

Mr. BACHUS. Well, let me address this to Mr. Thorne and maybe going on with this. But, Mr. Thorne, the Telecommunications Act does require you to enter into agreements with carriers that may request to use your services or facilities?

Mr. THORNE. That's correct.

Mr. BACHUS. Now, knowing that, these agreements are subject to regulatory approval, I think. Is that right? In fact there are performance standards, you all have to do certain things?

Mr. THORNE. Every agreement must be approved by the State commission unless the State commission declines, in which case the FCC must approve it.

Mr. BACHUS. And under the Telecommunications Act, did we not set the FCC and the State commissions up as the people that would regulate these affirmative duties?

Mr. THORNE. The structure as you've described is one of agreements between customers as to how they would like to do business. Approved by States with FCC rules as the guideposts. This particular agreement, for example, between Verizon and AT&T, at

AT&T's insistence we'd agreed not to haul each other into court, that if there were a service glitch we would fix this quickly without litigation, and that's what happened here.

Mr. BACHUS. But you know, to use all these new requirements that have been put onto you in the 1996 act, to say that if you don't do those you're guilty of antitrust violations to me is a sort of new body of jurisprudence.

Mr. THORNE. There are no cases that require companies to dismantle themselves and turn over their facilities and customers at discounted prices. There are no cases under the antitrust laws prior to this one.

Mr. BACHUS. What about legal scholars? What have they said about these new court decisions that actually say that, you know, that anybody that has a telephone, if you violate any of these new requirements or they think you do, that they can take you into court?

Mr. THORNE. Well, Professor Hovencamp, University of Iowa, who maintains the——

Mr. BACHUS. Now, he is the—the Members may know, he is the leading authority on antitrust.

Mr. THORNE. I think he is recognized as the leading authority. He's consulted with Verizon. He's also consulted with Covad. But the supplement to his treatise, which is his own academic word for prosperity, is that the *Trinko* case was wrongly decided. Professor Einer Elhauge at Harvard University thinks *Trinko* was wrongly decided. That's a new stand for a lot of your article. Professor Richard Epstein of University Chicago—I could list more.

And, actually, some of the judges that are recognized as antitrust experts, starting with Richard Posner in his second edition of his antitrust law treatise, he was just awarded the Sherman prize, I think, a week ago by the Antitrust Division. Judge Niemeyer in the Fourth Circuit, Judge Tjoflat in the Eleventh circuit, and I don't want to leave out Judge Diane Wood, who was a deputy in the Antitrust Division of the Clinton administration who wrote for the Seventh Circuit, the *Goldwasser* decision.

Mr. BACHUS. Let me just simply——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I think at the end of the day I won't ask any questions, but I do want to just make a couple of observations.

Reading from the memorandum that was distributed in preparation for this hearing, the section entitled Purpose of the Hearing, the last sentence says, the hearing will examine the role of the antitrust laws in preserving competition in the telecom sector, the intent of Congress when it included an antitrust savings clause in the 1996 act, the relationship between the antitrust laws and the 1996 act in promoting competition in the telecommunications marketplace, and possible legislative remedies to judicial circumvention of the antitrust savings clause contained in the 1996 act.

I think all of those are appropriate purposes for having a hearing such as this, and I applaud the Chairman and the Ranking Member of the Committee for having this hearing for those purposes.

I'm troubled that we may be putting too much emphasis on the possibility or an effort to intimidate the court to rule a particular way, and I would observe that the sentence before that last sentence that I just read emphasizes to us that the Supreme Court granted cert on March 3, 2003, and oral arguments took place on October 14, 2003, in the *Trinko* case.

So I really am not planning to ask any questions about that case.

If there was one thing I observed during the deliberations leading to the passage of the Telecommunications Act of 1996, it is that there was never a single occasion on which any of the players, except possibly the consuming public, showed up in my office and were not well represented. I think everybody is going to be well represented, has been well represented in the *Trinko* case.

I may have some questions about where the Justice Department has drawn the line; and if we get to a juncture where we need to do something under this rubric in the last sentence of possible legislative remedies to judicial circumvention of antitrust savings clause contained in the 1996 act, I'll be right here with this Committee and be ready to jump on that bandwagon, but I think to the extent we start to separate ourselves on this Committee as being on one side of this case or the other side of this case, I'm a little uncomfortable with that.

So I think the purpose of the hearing is great. I hope we will stick to that purpose, and I trust that the judicial process will yield a result at some point, and if the legislative process then finds it necessary to respond to that, I'll be right here.

I thank you, gentlemen, for being here to testify and for the wonderful job that I guess all of you are doing in connection with this case. Thank you so much.

Chairman SENSENBRENNER. Thank you.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Pate, the general consensus in the telecommunications industry seems to be that some consolidation is both likely and probably necessary. There are four RBOCs and several large independent telephone companies and three large long distance companies and half a dozen major wireless companies and a whole lot of excess capacity that could, at least in part, be rationalized through consolidation. Most of the regulatory barriers such as spectrum caps and line of business restrictions have been eliminated, leaving only the antitrust laws as a potential legal barrier to merger activity.

I'd be interested to hear your thoughts on what would constitute good consolidation or bad consolidation without discussing specific combinations. What issues would trouble you about vertical combinations and what issues would trouble you about horizontal combinations, given that none of us are really smart enough to know exactly what the right number of competitors is? Can we be assured that you'll balance the need for rationalization and efficiency against the need to also ensure that consumers continue to have the benefits of a fully competitive marketplace?

Mr. PATE. Well, the answer to the last part of your question is clearly yes. One thing that we don't do is spend time trying to decide what good consolidations there would be or how we think the industry ought to look. That is for private entities to decide. As to bad combinations, certainly we are going to examine in each geographic market—taking the wireless area where we look at the particular service providers in a geographic market, we're going to look as we do at any case whether a combination would lead to diminished competition and increased prices for consumers; and if it would, we'll stop it. That's what we've done in our merger program generally.

We do take account of efficiency, and so if there is a place where companies can achieve efficiencies in a way that lead us to think the merger would actually have benefits for consumers, then obviously that merger ought to be approved. But as to what specific combinations and consolidations, I couldn't speculate about that.

Mr. CHABOT. Right. I wouldn't expect you to get into that.

Next, would you agree with the premise that even in a market where there may be substantial competition there can be submarkets such as the market to serve small businesses that are not vibrantly competitive? Can you identify any such markets in the telecommunications industry? If so, what steps can the Department undertake to ensure the development of more competition in these areas; and what remedial action might the FCC or Congress undertake to ensure the development of more competitive choices in any such areas?

Mr. PATE. Well, the term submarket I think is disfavored in the antitrust case law, but that's a technical point. The point you make is that we need to look at different product markets within the telecom sector. I think it's been observed by any number of folks in this industry that competitive entry has been greater, for example, in the business sector than in the residential sector. That involves complicated pricing and access issues that the FCC grapples with.

So, again, I wouldn't try to give you a policy prescription as to parts of the industry that ought to be regulated in a different way, but, yes, if we're evaluating a merger, we look at the different product market segments and geographic market segments and make sure that competition is protected in each of those individually. That's how we approach it.

Mr. CHABOT. Okay.

Finally, in a response to a question from the Committee after your last appearance here, you suggested that the telecommunications and media section within the division, "Is responsible for investigating proposed mergers and potentially any competitive conduct in a wide variety of communications and media markets, as well as engaging in competition advocacy as appropriate at the State and Federal levels." Can you be more specific about the staffing and funding levels for the section as well as what in the absence of any significant merger activity the employees principally do? And how does the size of the telecommunications and media section compare to other working groups within the division?

Mr. PATE. I would say it's roughly of the same size of the six civil sections that we have at the Antitrust Division, in the neighborhood of 25 full-time attorneys. It's also supported by some of our 50 to 60 economists in that group.

In that particular section, they'd be surprised to hear the suggestion they're not busy with mergers. They have, for example, the news corps direct TV transaction under review and others. They have responsibilities that go beyond simply the section 271 function they've been performing or looking at telecom mergers.

We do consult with the FCC at a staff level to make sure the technical expertise we developed in serving the function that this Committee and Congress gave us in section 271 is available. Where appropriate, we file comments and engage in competition advocacy out of that section.

We don't break our budget down in a section by section way, but that ought to give you a rough idea of the people and what they do there.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman.

I also want to say a word of welcome to each of these four witnesses today and thank you for sharing your time and your expertise with us. We have, I think, benefitted from the testimony you've provided.

I'm interested in the scope of the savings clause and its application in the *Trinko* case, which is the primary subject of our conversation today. As I read the savings clause, it basically says that conduct that would have been an antitrust violation apart from the provisions of the 1996 act would still remain an antitrust violation after that act is adopted. So in order to determine the reach of the savings clause in the *Trinko* case, one would have to ask if there is a duty for the local exchange carriers to turn over portions of their facilities to competitors at discounted rates that arises from the antitrust law alone, not looking to the 1996 act but just looking to the antitrust law.

In posing my question to you as to whether or not the antitrust law standing alone imposes that kind of duty, let me suggest that the line of cases that refer to refusal to deal really are not appropriate in this context and are not proper examples because they relate to exclusionary treatment of one competitor or one class of competitors from a benefit that is conferred by the monopoly power upon others, and we really don't have that kind of exclusionary treatment alleged in the facts of the *Trinko* case or, for that matter, the *Goldwasser* case that preceded it.

So the question that I would pose to you is, apart from the refusal to deal doctrine, does antitrust law taken alone impose any duty on monopoly providers to make their facilities available to competitors? Do they have any antitrust obligation to do that?

Mr. Pate, let me begin with you; and others who might want to comment are welcome to do so. Mr. Pate.

Mr. PATE. Well, I thank you, Congressman Boucher.

I think the passage of the 1996 act itself is a good indication that the antitrust laws were not and have not been thought to impose on a monopolist the duty to dismantle itself and to break itself into wholesale and retail markets. That was a legislative judgment of what was needed to jump-start competition in an area that had been a Government-sanctioned monopoly. The '96 act does that.

I wouldn't go so far as to say there would never be an obligation to share under the antitrust laws under the standard that we've set out. If in fact, for example, a firm has excess capacity, particularly if they've been offering it to others, but even if they didn't, if a clear showing could be made that they were refusing to enter into a profitable transaction for the purpose of preventing competition from arising, that could state a claim. We evaluate that on a case-by-case basis. In the *Trinko* case, we concluded that, rather, what was going on was an assertion that the laundry list of specific '96 act obligations amounted to an antitrust claim; and, in our judgment, it did not.

Mr. BOUCHER. Thank you.

Let me ask Mr. Thorne if he would care to comment.

Mr. THORNE. Just briefly.

All of the prior cases requiring sharing of a—by a single firm of what it sells have involved the feature of discrimination. The firm was already in the business under the demanded terms of selling to others and then had refused—when a competitor or customer came to it and said we'd like to buy what you're selling to others had refused just to those—to those potential customers.

Mr. BOUCHER. So you're saying those earlier cases would fall within the bounds of the refusal to deal doctrine?

Mr. THORNE. All of them did and for two good reasons. One is the institutional problem of courts in setting new terms of sharing that aren't already voluntarily provided that the institutional concerns that are now solved through interconnection agreements, State approvals and the FCC; and, second, the worry that competition manifests itself through increased output and investment and you'll deter investment if you require too much sharing, and deciding when sharing has become too much is the kind of thing better trusted to an agency than an antitrust jury that is unable to revisit the issue.

Mr. BOUCHER. So you're not aware of instances where this obligation on the part of a monopoly provider has been imposed outside of the refusal to deal line of cases?

Mr. THORNE. That's correct. In fact, the cases——

Mr. BOUCHER. Let's give Mr. Pfeiffer an opportunity to comment. I think he probably has a contrary view.

Mr. PFEIFFER. Yes, I do. I think I have a very strongly contrary view.

The notion that the sharing obligations of the 1996 act were new requirements as it was phrased earlier, I think it is a misnomer. The MCI and AT&T cases going back to the 1980's required exactly this kind of sharing. Collocation, one of the elements under the '96 act, was affirmatively required in the AT&T litigation. Leasing of local loops for the exclusive use of the party leasing them was required under the prior antitrust law. That was not a new creation of the 1996 act. That was, with respect, what the AT&T litigation was all about, was interconnection, which included those two aspects.

I would also have to say with regard to refusal to deal cases, Kodak has been thrown out as an example of that. I had the fortune or misfortune of working on the Kodak antitrust litigation for over 10 years. The micrographics portion of that case never involved prior sales, and so the notion that that was a discrimination aspect of that case is in fact inaccurate.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Pate, first of all, let me thank you for your service to our country. To me, you're an example of the type of public servant who could be found in either Republican or Democratic administrations and who is very competent, who doesn't get the recognition or appreciation that perhaps you deserve. There are many people like you, but I just wanted to say we appreciate your testimony and your service to your country today.

My first question is actually directed to you, and this is not a setup, by the way. The first question is to ask you to respond to an assertion Mr. Pfeiffer made in his written testimony where he said that the Department's position in the *Trinko* case would threaten competition in the telecommunications market. I think I know how you feel, but would you—I don't know that that question has been directly addressed, and would you do so? At a time—well, after the way you led off, I'd have a hard time disagreeing with anything you would say, and I thank you for that, but maybe quoting Mr. Pfeiffer allows me to do that.

Mr. PATE. No, we obviously do not think that we're taking a position in *Trinko* that would harm competition in telecom markets. What we're doing, rather, as has been suggested, is pointing out the distinction between—and with all respect to Mr. Pfeiffer, I think it's impossible to read the background of the '96 act. What the courts have said about it, what was said in the legislative history, I believe that Congress didn't think it was doing something dramatically new to jump-start competition. But, because of that, we think it's important to distinguish between that special jump-starting of competition in the '96 act and the general duties that section 2 of the Sherman Act imposes, which, while they're important, are not the same as the '96 act obligations.

Mr. SMITH. Thank you, Mr. Pate.

Mr. Pfeiffer and Mr. Thorne, and perhaps in that order, another question I don't think has been addressed today is the effect of the *Trinko* case on the investments in the telecommunications industry. What impact do you think that that case will have?

Mr. PFEIFFER. Well, I think in the wake of the 1996 act, as was, I believe, mentioned in my testimony, there has been scores of billions of dollars invested in competitive telecommunications networks. To the extent that *Trinko* cuts off the ability for those competing firms to gain access to provide those innovative products and alternative services you will see not only the wasting of those assets, as has already occurred with ousted companies like Northpoint and Rhythms and others, you will also see the inability for competitors to come in and make other additional investments. You will see a loss of the jobs that have been created in the competitive sector and a loss of innovation and a loss of consumer choice.

Mr. SMITH. Mr. Thorne, you may have a different view.

Mr. THORNE. Well, somewhat. I don't want to make an argument that sharing of existing facilities can never be beneficial. The judgment of Congress in the '96 act is that some sharing is a good thing to give the FCC the proxy to figure out how much sharing is.

I do believe strongly that too much sharing does deter investment. It deters investment by the ILECs who built the facilities who have to share. It deters involvements by the CLECs who are sharing rather than building their own. And the equipment manufacturers who weighed in on the side of the Government in Verizon in this case strongly believe that there's a lot of opportunity for the market to grow that is being damped by too much sharing egged on by the antitrust cases.

The Wall Street Journal editorial that talks about the class action potential for abuse talks about the cheerleaders of the class actions thinking of telecom now as the next asbestos or tobacco to be brought down, brought low. It's a gold mine for lawyers. It's clearly the opposite of the investment that is needed.

Mr. SMITH. Thank you, Mr. Thorne.

Mr. Chairman, thank you.

Chairman SENSENBRENNER. Thank you very much.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. I have just a few simple questions, and I'll direct them to Mr. Pate.

In response—I want to just follow up on the earlier question by the Chair of the Committee. I presume that where there's a factual basis where there is a driving down of—rather, an escalation of costs to the competitor, you would consider that a violation of the antitrust statute. Is that——

Mr. PATE. I don't think it's correct to say that it has been our view or the view of any court that simply to assert raising a rival's cost, as it's called in some of the literature, in and of itself states a violation of the antitrust laws. We, of course, look at whether there's going to be an assertion of an anticompetitive effect from any course of conduct, but the standard that we look at in this case of an asserted duty to share is one that's based on whether the conduct made business sense standing on its own and apart from exclusion of competition, not simply at the rival's cost structure.

Mr. DELAHUNT. See, I think that's the problem I have. Because if the effect of the action—and I'm not even referring specifically necessarily to *Trinko* or to even the telecommunications—is to drive up the costs of a competitor, to injure a competitor, I think that would create a very strong inference that there is an anticompetitive patent of conduct that should be considered violative of the antitrust scheme.

Mr. PATE. Well, the point you make is an important one, and it's key to focus on the difference between cases where the assertion is that the competitor needs to help and assist its rival versus one where the competitor is taking an affirmative act against the rival. So if you drive up your rival's costs by—to take the extreme example used earlier—burning their factory down, obviously you're right. But if the question is that the incumbent has, let's say, a valuable distribution system, that it's developed and its rival says, hey, we'd like you to give that to us because our cost structure would be lower if we got to use your facilities rather than our own, then that's a very different question and that's why——

Mr. DELAHUNT. My time is fleeting.

Mr. Wright, you had a question that I thought you wanted to pose to Mr. Pate. Why don't you use some of my time to pose that question?

Mr. WRIGHT. Well, thank you very much, because I think we're getting very close to where the answer is.

So what if a Bell company said we have a duty to lease loops to a competitor but we're going to do it on a discriminatory basis in order to raise the rival's cost because we'll make more money if we maintain our monopoly in the retail market, is that a violation of the Sherman Act and the Antitrust Division field?

Mr. DELAHUNT. I'll adopt Mr. Wright's question as my own, Mr. Pate. Would you respond?

Mr. PATE. Well, I think the question tries to characterize the situation in the way that suggests the answer—if what you're saying is that the incumbent company has said—which is I think the way that it would be more likely characterized—that if we are going to meet our obligations under the '96 act but do it to the letter and not necessarily the way the CLEC would prefer to see that done, then that can be characterized by the competitive exchange provider in exactly the terms that you assert. That's why we think the way to approach this is to take an objective test, not focus on, you know, what is the intent, and try to say would the conduct make business sense but for exclusion and not looking solely at the question of what does that conduct do in terms of simply looking at the rival's cost structure. So——

Mr. DELAHUNT. Mr. Pfeiffer, do you have anything to add?

Mr. PFEIFFER. Yes, sir. Thank you.

I guess the example that I would give is how can it make business sense for companies to do the things that they stand accused of doing in these cases? For example, with regard to the collocation, which is putting equipment into a central office, I have personally experienced denials, flat-out denials by the Bells that there's any space available. We've had to go to court to get an order allowing us to inspect the central office. When we've gone there, there's been room for a bowling alley.

Mr. DELAHUNT. Let me interrupt you, because my time is running out. I guess the question is, where would a corporation's conduct not be considered justified by a legitimate business reason? Presumably there's always a legitimate business reason that one can establish. That's my problem, Mr.——

Mr. PATE. If it's established on the facts. I mean, we're getting into the question of evaluating cases on a case-by-case basis. In the context of evaluating the complaint, you've got to assume the allegations are true. Different cases have different outcomes.

We took a position in Intermedia that would have said a complaint stated a claim in *Covad* that you shouldn't have an immunity but that you couldn't tell on the record whether there was a claim; and in *Trinko*, given the allegations there and two chances to amend, that we didn't think that particular complaint stated a claim.

So maybe Mr. Wright's client could come up with a situation where the answer would be different, but that doesn't in any way suggest that our *Trinko* position is an effort to undermine the savings clause or anything about the '96——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Thank you, Mr. Chairman. I thank the witnesses for testifying.

Mr. Thorne, do you support or does Verizon support the Seventh Court's Circuit Court of Appeals' analysis in the *Goldwasser* case? It may have been addressed before, but I apologize——

Mr. THORNE. It was not addressed before. The answer is yes, but different people read it different ways, so let me describe very briefly how I read it.

The first thing that Judge Wood wrote was that the antitrust laws had never before required companies to dismantle themselves at discounted prices for rivals. The antitrust laws had never done that prior to the Telecom Act.

Then the question was, how does the Telecom Act affect that prior decision? And her reading was to expand antitrust into the same area that the '96 act was covering would be a double mistake, first, for the reasons that antitrust had not been expanded before and, second, because of possible interference with the '96 act.

Mr. FLAKE. Mr. Pate, what was your analysis?

Mr. PATE. Well, with all due respect to Mr. Thorne, when we got into this line of cases, we believed that the RBOCs were asserting a line of argument that could suggest immunity or preemption. That is why the Department's has been consistent in these cases in saying that what you do is evaluate them under section 2 of the Sherman Act standing alone. You don't look to the '96 act as a potential source of preemption.

There have been some things in the *Goldwasser* opinion that are clearly correct, such as the characterization that the '96 act added duties, but other parts of it that some folks read as an implied preemption of the antitrust laws, and we have been concerned to say that that is not the right way to read the savings clause. And that is the position we took in the Supreme Court in *Trinko* as well.

Mr. FLAKE. Do you take the position that Chairman Sensenbrenner of this Committee takes, that a legislative fix is now needed?

Mr. PATE. Well, I'm not here to take any position on specific legislation. I'm not aware, though, of—I certainly would not agree that anything in the *Trinko* brief that we in the Federal Trade Commission filed indicates that the savings clause is not being respected.

Maybe that is a helpful response.

Mr. FLAKE. Mr. Pfeiffer, currently, 96.8 percent of local and residential small business markets are controlled still by the RBOCs, 82.5 percent the local medium and large-sized business markets. Only nine States—10 States, I guess, have now met the requirements of the FCC. At what point is there a marker—at what point would the competitors say that competition, has been reached? What kind of methodology can be used?

Mr. PFEIFFER. I think in the sense of that competition has been reached to the point that no more sharing obligations are required. If that's your question, I think the difficulty is—and this relates to the investment question that went earlier. The local network, the last-mile network is never going to be duplicated. Access to that is going to have to continue to be provided. That existed, again, well prior to the 1996 act for—just to allow the emergence of long distance competition. And in the 1996 act, as Mr. Wright pointed out, they eliminated the State restriction against local competition, but access to that local last-mile facility is always going to be required. So I don't know that I can set a benchmark of now we've got 70 percent or 55 percent Bell control, because they will still control the local loop, the last mile.

Mr. FLAKE. Mr. Thorne, you maintain it's lack of investment that is really—why we haven't had as much competition and that is why the Bells want a little more freedom there. Mr. Pfeiffer and his industry claims that it's lack of access. Which is it?

Mr. THORNE. Well, just to again answer briefly, my view of the state of local competition is probably a bit—from my point of view may be pessimistic, but from the consumers' point of view very, very optimistic. There has been a large shift of local loop competition to competitors. In New York, for example, the *Trinko* case came up. A year ago, 25 percent of the customers had been shifted to CLECs. There's a large amount of intermodal competition now from cable companies and from wireless companies which are going to be accelerated by the porting of telephone numbers. I guess that happens end of this week or beginning of next week. There's a large amount of competition.

Then the question becomes, do you want to accelerate competition further, and what is the best way to do that? We think that too much sharing actually has more costs than benefits, because it deters investment.

Mr. FLAKE. Last word on that, Mr. Pfeiffer.

Mr. PFEIFFER. I don't see how you can talk about deterring investment in the local loop facilities. The case law has consistently recognized that it is not practical to duplicate the local loop, and I don't think that there's any reasonable way to disagree with that. You're talking about untold billions of dollars and years it would take to replicate a physical wire to every house and every business in the United States. There's no ability to do that, and it would be an unwise application of investment money to have people duplicate that.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. Thank you for holding this hearing, and I thank the witnesses for really a very well-put testimony.

Mr. Pate, I'd like to pursue a little more an area that Mr. Conyers got into earlier, not in any questions to you, but let's take two hypotheticals and let me see if you agree with me.

A group of competitors decide to—they have a common interest in trying to change a law or a regulation and take a common position with respect to a Government policy, and they try to enlist a group of their own suppliers and persuade them that they have that same interest as well. My assumption is that that is protected activity, first amendment protected, Noerr-Pennington protected. Is that a fair assumption?

Mr. PATE. Well, I'd want to be careful about saying that. Noerr-Pennington provides broad rights of companies even to act collectively, which they ordinarily can't do under the antitrust laws, in order to petition the Government. That would, I expect, include discussing that with other potential petitioners, but we'd be concerned to make sure that that doesn't involve a sham meeting where prices are being fixed or something of that nature. So——

Mr. BERMAN. Well, let's assume it's only about trying to get the Government to change a policy.

Mr. PATE. Well, I think you're right then in saying that the case law provides pretty broad latitude for things that involve petitions to the Government under the first amendment and the antitrust laws as the courts construe them.

Mr. BERMAN. Now let's take the other hypothetical, that the competitors who decide to do this seek to enlist the clout of their suppliers by directly threatening them with cutting off their status as suppliers unless they pony up both financially and in terms of their lobbying resources to this cause. Is that still protected at this time under this hypothetical?

Mr. PATE. Well, as you know, an actual group boycott is something that is illegal under the antitrust laws. It still comes under the category of per se illegality.

As to the question of threatening to engage in that activity, I can't imagine every hypothetical. I wouldn't want to say that you couldn't imagine a situation where that would raise concern. But what the antitrust laws would be concerned about is, as I say, a group boycott where economic power is actually used to compel some sort of conduct. It wouldn't even need to be that. A group boycott in and of it can create serious problems under the antitrust laws.

Mr. BERMAN. By the way, what if it's not a group boycott? What if it's just an individual company wanting the supplier to participate and contribute to the effort with the direct threat that that supplier would lose——

Mr. PATE. Well, we've spent a lot of time this morning talking about what the duties are of companies in the unilateral context, but, generally speaking, a company is free to deal with or decline to deal with a supplier for its own business reasons when it's acting unilaterally.

Mr. BERMAN. What are the facts then in this group conduct? What would be the factual things you would be looking for in deciding whether it was protected activity or anticompetitive activity that arguably would be in violation of existing law?

Mr. PATE. Well, I think the group boycott cases suggested that if there has been an actual agreement that's been followed up with denial of business that's done on a collective basis then that can be considered a group boycott, a concerted refusal to deal, to use the other term that the case law employs.

Mr. BERMAN. Well, then back up one second again. The threat to do that—the threat to do that, is that a relevant fact? Let's assume we're not at the point where we know what the consequences of whether the—in other words, if you're saying that the action of refusing to deal is the only place where we would get into it, then what you're saying is if they are successful—if their threat persuades the suppliers to participate, then there's no illegality. In other words, to the extent that the conduct produces the result they want as opposed to producing the boycott that there's nothing wrong with it. Is that what you mean to be saying?

Mr. PATE. Well, the cases I'm familiar with arise in the conduct—in the context where there's been an actual agreement and some evidence of a boycott. I can't imagine——

Mr. BERMAN. No, no, no, no. Wait——

Chairman SENSENBRENNER. The gentleman's time has expired.

Before calling on the next Member of the Committee, I would like to welcome a group of students from a D.C. public high school, a program to build community leaders. This is sponsored by the Close Up Group and the Capital Communications Program.

What we're talking about here today is the application of antitrust laws to the telecommunications industry. When you start talking about the fine points of antitrust laws, it usually puts people to sleep; and I apologize if that's what is happening to you folks. However, this has direct implication of how much your phone is going to cost 10 years from now. So we're talking about how much money stays in your pocket and how much money may go out to pay the phone company, whether you have a land line or go to a long distance service or a package service or the like. So, welcome, please stay awake, because your pocketbook is impacted here.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I just have a couple of quick questions, actually, really for Mr. Thorne.

The goal of the USTA is to win comprehensive Federal legislation to substitute market-based competition for Government-managed competition. At least that's what you've stated. And I'm interested in what the competitive behavior has been in the areas where you are free to compete. You're free to enter other Bell operating territories and lease their lines, and I'm wondering whether you're doing so. You've complained that the leased lined from other Bell operators is at a very low rate, and I guess my question is, is if that's the case, why don't you go into those other areas, take advantage of those low rates and compete? Can you tell me why that's not happening?

Mr. THORNE. I'd be happy to. That's a good question.

First, just to disagree with respect to some parts of the premise which are that the Bell companies have not competed, in fact they have. Verizon wireless, Verizon communications wireless business is providing the highest quality wireless service throughout the country in competition with every other wireless provider and——

Ms. LOFGREN. But that is not the question. Most people still have a land line. They don't have a wireless line as their main effort. So there's the market. How many markets are you competing with in that market?

Mr. THORNE. Just, again, with respect—the growing part of the business, the part of the business where we see the greatest opportunity, we have not hesitated one bit to compete with others and to do it very effectively, as wireless illustrates.

But let me go to the use of the UNE loops at TELRIC prices. If Verizon were the only one offering a UNE loop in—pick a favorite city in California.

Ms. LOFGREN. How about San Jose, my home?

Mr. THORNE. In San Jose, if we were the only ones, then the margin we could look at as the difference between the current retail and the depressed TELRIC UNE price—and that could be a pretty big margin, 50, 60 percent—but we would not be the only CLEC going into San Jose. We'd be there with AT&T and with MCI and with a bunch of others.

Ms. LOFGREN. If I may, because we don't have that much time and also I have to go to the floor to speak on an issue that is on right now, Covad is in our county, and they've litigated vigorously to be able to compete. You've complained that the prices are too low. If they're too low, I don't understand why some RBOC doesn't come in and take advantage of those low rates to compete in San Jose. Why has that not happened?

Mr. THORNE. The margin that Verizon would look at is the difference not between the RBOC retail and the discounted wholesale price but between the CLEC retail, the other CLECs that are there; and it's a much thinner margin. Now, Covad in particular has a checkered history as——

Ms. LOFGREN. I think that's quite rude and unfair to say.

Mr. THORNE. Well, with respect to, again, Margot Neitus, one of your constituents, a grandmother who used to work for Covad, said she was directed to falsify trouble reports about Bell Atlantic and Verizon service and that when she said that is dishonest——

Ms. LOFGREN. I think—actually, I get a lot of complaints about your company as well, and I'm not here to attack Verizon or anyone else. I'm just wondering about why there appears to be an arrangement not to compete, and I don't think that it is appropriate to start bringing up issues without having, you know, the object of your attack able to respond. I think that's just tawdry behavior.

Mr. THORNE. Well, there's absolutely no truth to the premise that there's been a refusal to compete. The opposite is true.

Ms. LOFGREN. Well, how many markets are you competing against other RBOCs?

Mr. THORNE. Through wireless and through——

Ms. LOFGREN. No, land line. No, name one—do you have one or two areas where you're competing?

Mr. THORNE. We're competing with a variety of methods——

Ms. LOFGREN. No, but I'm asking specifically, are you competing anywhere on your land line for local service?

Mr. THORNE. We're competing, as I said, intermodally through wireless——

Ms. LOFGREN. No, you're not answering my question, sir. I would assume, then, you would know where you're competing. Is that correct?

Mr. THORNE. That's not correct.

Ms. LOFGREN. No, on the land lines, are you competing anywhere?

Mr. THORNE. We're not using UNE loops of other RBOCs, because the margins there between the retail that CLECs charge and the wholesale that's available in UNE loops is thin. But you're——

Ms. LOFGREN. All right. I yield back the balance of my time, Mr. Chairman.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Sánchez.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

I just want to—I have one question actually to ask, but I want to preface my question just with the remarks that, as a freshman, I'm here to learn as much as I can about as many issues as I can; and at this late date in my first year I'm still not an expert on telecom. So I'm going to apologize up front.

I do want to associate myself with the comments made by my colleague, Mr. Watt. It's obvious that there is a very complex issue, and so I'm interested in some thoughtful discussion and hearing as many points of view about this issue as possible.

Both sides sort of today have testified in detail about the impact that the outcome of the *Trinko* case will have on their businesses on the antitrust law and on competition in the telecom market, but I haven't really heard a lot—or I've heard some generalities, actually, about the impact that it's going to have on customers. So this question is directed specifically to Mr. Thorne and then to Mr. Pfeiffer. I'd like you to please describe in detail how customers will be impacted by the Supreme Court—if the Supreme Court rules in favor of Verizon in the *Trinko* case and how customers will be impacted if the court rules against Verizon in the *Trinko* case.

Mr. THORNE. That's a big question. Let me just address it in a couple of ways and make sure Mr. Pfeiffer has a chance to say what he would like to.

A very specific way in which customers will be affected by the outcome is if massive class actions go forward against the incumbent telephone companies and drain their resources in litigating and settling class action cases, then there will be less investment, there will be more sharing; and the extra sharing will itself deter investment by both the incumbents, who, having to share, will invest less and the CLECs, who, being able to share and having a triple-your-business-plan, money-back guarantee through antitrust, will prefer to share rather than make independent investments that they could make. So the deterred investment will adversely affect customers.

The other—and it's a smaller way, but it's unique to this case where customers will be affected. There, CLECs have made bargains with Verizon and other ILECs.

AT&T here made a bargain that it preferred to deal with Verizon on a no-litigation basis. Rather than litigate, which can take years to get a service fixed if there were a glitch, it preferred to immediately resolve the problems. That's what happened here. AT&T was paid with the other CLECs a total of $10 million of compensation that was available to remit to any affected customers. The service glitch was quickly, quickly solved; and the next day a class action law firm in its own name brought this case, reopening what had just been settled by AT&T and Verizon.

So customers are benefitted if the agreements their CLECs strike can be enforced.

Ms. SÁNCHEZ. Mr. Pfeiffer.

Mr. PFEIFFER. Thank you. I think there are a couple of aspects to answering your question.

One is, if the Supreme Court in *Trinko* rules that antitrust supervision is inappropriate for any matters governed by the 1996 act, which is what is being advocated, then what you're left with essentially is supervision by the FCC. Chairman Powell has publicly stated that the remedies available to the FCC are inadequate. The fine authority they have is inadequate to deter unlawful conduct by the Bells; and so you're, first off, starting with the inability to deter unlawful conduct.

The notion that somehow investment in the networks is going to be deterred if the Supreme Court upholds the antitrust applicability here to me makes no sense. The obligations to share that are being violated are obligations under both the antitrust laws and under the 1996 act. So to the extent that the Bells are now tells us that if the antitrust laws go away, they won't feel bound by the 1996 act would seem to me to be a pretty striking admission that they're not taking the '96 act seriously.

The final point that I would say is, holding DSL up as an example, those DSL competitors who did not avail themselves of their antitrust rights are no longer here. They have been driven out of business, every one of them.

Covad, which did avail itself of its antitrust rights and sued to get access to the network, got access, reduced its costs by doing that and is, as a result, providing concrete benefits today to consumers. They are the only competitive alternative to the Bells for that broadband product. That is a direct innovation that the Bells were not providing and a direct benefit to consumers. You will see that lost.

Ms. SÁNCHEZ. Thank you, gentlemen.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I apologize for not being here earlier, and I apologize to the panel if I ask redundant questions, but there are some issues that are of concern, and I appreciate the panel being here today for that purpose.

Mr. Pate, before the breakup of AT&T, the Bell system attempted to assert that because its conduct was subject to regulation it should be shielded from antitrust prosecution for behavior that occurred within the scope of its regulated business. The Bell system clearly wanted such an outcome, as the regulator had demonstrated over time an inability to curb the abuses of the monopoly. But, thankfully, Judge Green made it clear that he would not accept such an argument.

Today, unfortunately, we have a somewhat similar situation. The Bells claim that the antitrust prosecution isn't appropriate to deal with the violations of the market-opening provisions of the act, and the chairman of the FCC claims that he will be tough on enforcement but admits that he lacks the tools to be tough.

If the chairman of the FCC doesn't have the tools and you give away the antitrust jurisdiction that is intended to backstop the FCC, how in the world are we ever going to get these local markets opened? How can we deregulate before we are certain that the residual monopoly control over the last mile has been dissipated?

Mr. PATE. Well, the Division took the position back in the *AT&T* case that it was incorrect to argue that regulatory supervision took the antitrust laws out of play, and that is the same position that we take in the *Trinko* case today, that we've taken consistently in the briefs we filed under the 1996 act savings clause. That's a different thing from saying that all of the provisions of the 1996 act are enforceable through section 2 of the antitrust laws, and the savings clause doesn't say that. To the contrary, it says that the 1996 act was not intended to modify the antitrust laws.

But as to your question about preemption of antitrust through regulation, I agree with what you say, and that's been our consistent position.

Mr. CANNON. Thank you.

Mr. Thorne, what do you think the effect of the *Trinko* case decision could be on investment in the telecommunications industry?

Mr. THORNE. That's a good question. I think that the *Trinko* case, if it's decided against Verizon, will deter investment at two levels. It will deter investment by the incumbents who, having to share more, will invest less in what things have to be shared because they bear all the risk of the investment and any upside would have to be shared. It will deter investment by the competitors who will prefer to take the less risky and cheaper method of sharing rather than making independent investments that they're able to make.

Just one quick response to your question, if I can shed some light on it. I read chairman Powell's remarks about the level of available penalties, but in Verizon's case, when we put this—and I put this in my written testimony. There are annual available penalties, well over a billion dollars, if we seriously screw up the provisioning of wholesale lines to our rivals. State by State the commissions have imposed amounts that now are large fractions or in some cases exceed the profits we get from telephone service if we mess up provisioning to our rivals, and that is under the existing agreements and existing State and FCC enforcement mechanism without antitrust.

Mr. CANNON. Thank you.

Do you believe the failures to comply with the obligations contained in the 1996 act can also form the basis of a Sherman claim?

Mr. THORNE. The sorts of violations of the '96 act alleged in the *Trinko* case and some similar cases that are pending in the Courts of Appeals, the answer is no. Because those are requests not to avoid interfering with independent rivals' activities but instead to lend a helping hand by turning over facilities and customers at discounted rates. That is something the antitrust law has never required.

Mr. CANNON. In your testimony you emphasize the limited scope of the essential facilities doctrine. Do you believe that the local telecommunications infrastructure constitutes an essential facility?

Mr. THORNE. Given the amount of competition through competing wires by cable companies, competition from wireless companies, including Verizon Wireless's own very successful wireless company, I think the answer has now become no, that the local loop is no longer essential. There are other ways you can make telephone calls. And for some services like broadband services that DSL and cable modem compete for, the preferred method is now something not on a cable company. The preferred method is—I mean, sorry, not on a telephone system but on a completely independent system. So I don't think even under the essential facilities rubric we would any longer qualify.

Mr. CANNON. Thank you, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank the Chairman, and I thank the witnesses.

I am reminded of a famous philosopher who said, can't we all get along? And I'm reminded of this room, in 1996, I think it was my first term here in the United States Congress, and the work that we thought we were doing was to find a good balance as relates to opening up the markets and as well being able to preserve the sanctity of competitiveness, and I truly believe that that is a key responsibility of this Judiciary Committee.

I'd just like to cite for the record the number of employees that we have in Texas that are dependent upon the telecommunications industry, so I don't come to these questions and this issue very lightly. I have the burden of close to 80 percent of the State's 168,688 telecom employees fell into this category, and that is service providers, and that was documented in year 2000, whereas equipment makers employed only 20 percent. Ninety-six percent of telecom establishments in Texas are service providers. The remaining 4 percent have equipment making as their primary focus. Texas is only second to California in service provider jobs.

I only say that to say that the eyes of Texas are upon me in terms of the inquiries and where we are today, and I will try to be focused in my questions to those who are here.

Let me start with Mr. Pate so that I can understand this a little better. I know that, as the antitrust section, we've always looked to you to be the standard bearer for competition in antitrust protection. I'm a little confused as to the position you took in the *Trinko* case, was to join in with Verizon, as I understand it, and the FTC. Is that my understanding?

Mr. PATE. Well, certainly the case that we filed a joint brief with the Federal Trade Commission and that——

Ms. JACKSON LEE. To say what——

Mr. PATE.—position we take is that the Second Circuit's decision should be reversed. So, in that sense, yes, we are taking the same position as Verizon——

Ms. JACKSON LEE. Explain your position then, please.

Mr. PATE. The position we're taking is that the Second Circuit was in error by advancing theories of antitrust law that did not have support under section 2 of the Sherman Act as it's been interpreted, both by creating a facilities cause of action that doesn't require a showing of exclusionary conduct under section 2 and by adopting a monopoly leveraging theory. We take the view that the Second Circuit was right in saying that the savings clause of the 1996 act makes clear that for the incumbent phone companies like Verizon to suggest that they have an immunity from antitrust law is wrong. So there are two sides to the position we're presenting. They're both important.

Ms. JACKSON LEE. Let's pursue the latter, if you would. We're here in the Judiciary Committee. You're in the executive in the antitrust section of the Department of Justice. How do we find a balance if we just look globally and look overall on this very difficult industry, now 1996, where 7 years later we're back in a controversy again of ensuring competition and recognizing that the Baby Bells, in essence, large employers of my constituents, have almost become larger than, say, AT&T. How do we ensure competition with the present structure?

Mr. PATE. Well, I don't know that it's really ever going to be a possibility that everybody will just get along. There are different interests in this industry, and it's the job that this Committee performs to let those interests be heard and to strike a balance. In the 1996 act, you did that in a very complex and comprehensive way, not drawing the line all the way in favor of the CLECs nor all the way in favor of the regional Bells but putting in place a mechanism where those markets could be opened.

While I don't—while I agree that it's very important that we're vigilant about competition on land line services as they've existed, it's also true that, while it's taken a long time, there are very positive signs in terms of competition from cable telephony, from other service methods and that local markets are getting more competitive as the section 271 obligations were met. So I think you all in this Committee have a key role in striking that balance. That's what the '96 act was all about.

Ms. JACKSON LEE. I guess what we're trying to do now.

Mr. Thorne, will you tell me what is wrong with regulating price, particularly when we have noted in the competition that we've seen prices go up on local service? What's wrong with that, and what's wrong with using antitrust laws to ensure there's competitiveness and competitiveness with prices?

Mr. THORNE. Philosophically, the best way to regulate prices is with competition, let competitors compete to lower their cost structure and improve their service and have the price set by independent rivalry. That is the best method.

The second best method and the one that's used at the retail level for telephone service is to have regulators set retail prices, and that's what still happens in Texas for retail prices. There have been some adjustments in the rebalancing of residential and business and urban and rural areas where the prices were once more uniform and are now coming closer to what their costs are.

The regime we've got under the '96 act offers rivals a serious discount, 50, 60 percent off the retail price to use the same physical facilities. So take Verizon in Texas, we can offer a service for—I know the New York numbers by heart. I don't know the Texas numbers, but in New York it's probably a better example. We get an average of about $40 a month for retail service. We offer the same physical facilities to a rival at $13, leaving quite a bit of margin for—or opportunity for the rivals to sell. That's the second tier of regulation that's applied under the '96 act but has never been applied under the antitrust laws.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

Let me thank the witnesses for coming and debating a very important issue. Let me say that we may be seeing you all back after the *Trinko* case is decided. So don't get too far away.

The Committee stands adjourned.

[Whereupon, at 12:02 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Prepared Statement of the Honorable Linda T. Sánchez, a Representative in Congress From the State of California

I thank Chairman Sensenbrenner and Ranking Member Conyers for convening this important hearing today to hear testimony on antitrust laws in the telecommunications industry, the "savings clause" in the Telecommunications Act of 1996, and the impact of the Supreme Court's upcoming decision in the *Verizon Communications Inc.* v. *Law Offices of Trinko ("Trinko")* case.

After reading the witness statements of advocates of Incumbent Local Exchange Carriers (ILECs), Competing Local Exchange Carriers (CLECs), the Department of Justice in *Trinko*, and the Chairman of this Committee, it is clear that there is disagreement on how to promote competition in the telecommunications industry. The first priority of all parties involved, the ILECs (Verizon, SBC, BellSouth, and Qwest), CLECs (competitors without ownership of local network infrastructure), the Federal Communications Commission, the Department of Justice (DOJ), the Supreme Court, and the Committee on the Judiciary should be to promote competition in a way that benefits the consumer. This Committee, with exclusive Congressional jurisdiction over antitrust laws and their implementation by both the Department of Justice and the Federal Trade Commission, must continue its long history of promoting competition in the telecommunications industry by enacting legislation and overseeing agencies to accomplish that purpose.

For instance, the Telecommunications Act of 1996 (1996 Act) is comprehensive legislation designed to promote competition in the telecom market. In particular, the 1996 Act's "savings clause" promotes competition by providing that "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." I agree with the position of the Chair and Ranking Member that the savings clause specifically, unmistakably says that violations of Sections 251 or 271 of the 1996 Act may also create an antitrust cause of action under Section 2 of the Sherman Act.

In several cases argued in federal courts the issue of causes of action under both the 1996 Act and the Sherman Act have been debated. In *Goldwasser* v. *Ameritech Corp. ("Goldwasser")* the Seventh Circuit court of appeals held that antitrust claims cannot survive if the allegations of anticompetitive conduct are "inextricably linked" to violations of the 1996 Act. The *Goldwasser* court held that violations of the 1996 Act should be examined under the specific enforcement structure of the 1996 Act alone—not under antitrust laws, and that the 1996 Act imposes duties on the ILECs that are not found in the antitrust laws.

In the *Trinko* case, the Second Circuit Court of Appeals held, in a case factually similar to *Goldwasser*, that the plaintiffs may maintain a cause of action under Section 2 of the Sherman Act where plaintiffs allege conduct that violates the 1996 Act. The court also recognized that violations of the 1996 Act might also be characterized as anticompetitive or exclusionary conduct that violates the Sherman Act. The *Trinko* court disagreed with the *Goldwasser* court's ruling denying a plaintiff's ability to maintain freestanding antitrust actions just because those actions might have stated a separate claim under the 1996 Act. The DOJ filed an amicus brief in the *Trinko* case siding with Verizon and, many argue, imposed a more stringent test for antitrust liability.

The ILECs join Verizon in arguing that causes of action under Section 2 of the Sherman Act cannot be simultaneously maintained with violations of the 1996 Act. For the ILECs, the *Trinko* case is about the inappropriate expansion of Section 2 of the Sherman Act not the 1996 Act's savings clause. The ILECs argue that sections 251 and 252 of the 1996 Act impose affirmative duties on ILECs to grant CLECs access to their network, and thereby help CLECs to compete. The regulatory duties imposed by the 1996 Act provide a comprehensive structure to ensure that ILECs share local network facilities with CLECs. The Sherman Act, on the other hand, imposes a duty not to harm competitors, but no duty to help competitors. As such, ILECs argue causes of action under Section 2 of the Sherman Act should be dismissed when the anticompetitive behavior is within the regulatory framework of the 1996 Act.

The CLECs side with plaintiff *Trinko*, a CLEC customer. The CLECs believe that the argument espoused by Verizon and the DOJ's amicus brief undermines the applicability of the antitrust laws in the telecom industry and does not give full effect to the savings clause in the 1996 Act. According to the CLECs, anticompetitive behavior by one of the ILECs may create a cause of action under both the 1996 Act and the Sherman Act. They contend DOJ must aggressively exercise its antitrust authority to deter anticompetitive behavior in the telecom industry, as opposed to aligning with the Bell companies as it did in *Trinko*.

The CLECs also argue that the ILECs are trying use their near monopoly power to change the law governing the FCC's TELRIC pricing methodology for unbundled elements. The change would enable the ILECs to raise the prices competitors pay for network elements, which would mean higher consumer prices, less competition, and larger ILEC profits. The CLECs believe this result could have a negative impact on consumers. They estimate that 30 million local lines are now served by CLECs, and that the resulting competition lowers prices, phone bills, and improves service. They cite reports by Consumer Federation of America and The Association for Local Telecommunications Services estimating that 50 million consumers have saved approximately $5 billion dollars on their phone service, and that CLECs have invested $76 billion since the 1996 Act was enacted, and anticipate $71 billion in telecom investment over the next five years. The CLECs believe that the savings enjoyed by customers is the direct result of the regulatory regime and oversight exercised by the Judiciary Committee over the telecom industry.

The arguments by both the ILECs and their competing CLECs in cases like *Trinko* and in testimony submitted for the hearing today are persuasive. Both the ILECs and CLECs contend that their interpretation of the law will benefit consumers, which remains the ultimate goal. However, I also recognize that each of the companies will interpret the law in a way that is most profitable for them. My interpretation of the law is that the 1996 Act imposes duties on ILECs and CLECs to conduct their businesses in a way that promotes competition and benefits the consumer. I agree with the Chairman and Ranking Member that the savings clause unequivocally maintains the operation of the Section 2 of the Sherman Act in the telecommunications industry and in some lawsuits where causes of action are also brought under the 1996 Act. The application of the 1996 Act and Section 2 of the Sherman Act must be carefully performed on a case-by-case basis.

The question that remains unanswered for me is: given emerging technologies in the ever-changing telecommunications market, what acts or omissions by ILECs and CLECs are anticompetitive? With the development of digital subscriber line (DSL) technology, wireless, cable, and satellite technologies, consumers have more telecommunications options today than existed when the 1996 Act was enacted. In light of the Supreme Court's upcoming decision in the *Trinko* case, it is important for the Committee on the Judiciary to continue to hold hearings on the telecommunications industry and the impact developing technologies have on competition in the industry. Further hearings will help to clarify whether the ILECs position or the CLECs position should be adopted. Additional hearings will also help us determine whether more regulation, less regulation, or maintaining the present level of regulation is the best way to maximize competition and benefits for consumers.

I thank the Chairman and Ranking Member for the opportunity to include my statement in the hearing record. I look forward to future hearings on the telecommunications industry and working with my colleagues on the Judiciary Committee to promote competition and ensure the best service for consumers.

RESPONSES TO POST-HEARING QUESTIONS FROM R. HEWITT PATE

Answers by Assistant Attorney General R. Hewitt Pate
To Questions for the Record
Hearing on "Saving the Savings Clause"
House Judiciary Committee
November 19, 2003

Questions from Chairman Sensenbrenner

Question 1: In your testimony, you mentioned that the Department has taken the position in its *Trinko* amicus brief that an incumbent's denial of an essential facility to a competitor would constitute an antitrust violation only "where it involves a sacrifice of short term profits . . . that makes sense only insofar as it helps the defendant obtain or maintain monopoly power." You also mention that this standard was advanced by the Department in its Microsoft and American Airlines filings. Has this standard been adopted by the Supreme Court or any other court in the telecom context?

> **Answer:** The position that the Department and the FTC took in the amicus brief in *Verizon v. Trinko* is that in evaluating single-firm conduct in the context of claims for the violation of a duty to assist competitors, the appropriate standard is whether the conduct asserted as an antitrust violation would make economic sense for the defendant but for the elimination or lessening of competition. The standard we advocated was well-grounded in Supreme Court precedent, including particularly *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). The Supreme Court has now rendered its decision in *Verizon v. Trinko.* While the Court did not explicitly mention the standard offered in our brief, the Court's discussion of *Aspen* is consistent with the standard we proposed.

Question 2: In a 2001 amicus brief filed in *Intermedia Communications, Inc. v. BellSouth*, DOJ defined exclusionary conduct as that which "tends to impair the opportunities of rivals" in "an unnecessarily restrictive way." Has the Department abandoned this standard, and can you explain why?

> **Answer:** The Department did not change its position. Our *Intermedia* amicus brief (at page 21) and our *Trinko* amicus brief (at page 14) both quoted that language, from footnote 32 of the Supreme Court's *Aspen Skiing* decision, and the two briefs attributed the same significance to that language. Our *Intermedia* brief also stated (at page 24) that "conduct is not deemed exclusionary for purposes of section 2 of the Sherman Act unless it lacks a valid business purpose; i.e., it makes no business sense apart from its tendency to exclude and thereby create or maintain market power."

Question 3: Could the adoption of this "profit sacrifice" standard by the Supreme Court in *Trinko* recast traditional antitrust analysis in a manner that would undermine the scope and application of the antitrust savings clause contained in the 1996 Act?

> **Answer:** The antitrust savings clause ensures the continued application of the antitrust laws as they would apply in the absence of the 1996 Act. The Supreme Court's *Trinko* decision makes this clear. The standard advocated in our *Trinko* amicus brief was well-grounded in Supreme Court precedent, and therefore did not represent a substantive change in antitrust law from when the 1996 Act was enacted.

Question 4: Could this elevated standard required to prove exclusionary conduct be applied in other industries, and is the Department planning on advocating this standard in any pending or future filings?

> **Answer:** The standard advocated in our amicus brief, which is consistent with the discussion in *Trinko*, could certainly be applied in industries other than telecom. Indeed, antitrust legal standards are generally not industry-specific, but are meant to apply across the entire economy. We have litigated using this standard in both *Microsoft* and *American Airlines*, and the essence of this standard, grounded primarily in *Aspen*, can be found in our 1991 amicus brief in *Consolidated Rail Corp. v. Delaware & Hudson Railway Co.*, S. Ct. No. 90-380. Thus, we would anticipate using this standard when appropriate in the future.

Question 5: If so, how would this impact the traditional competitive balancing test that has formed the basis of judicial analyses of anti-competitive conduct?

> **Answer:** The traditional competitive balancing test is part of the rule of reason analysis under Section 1 of the Sherman Act, while the standard advocated in our Trinko brief is specific to section 2 of that Act. Therefore the standard would have no effect on the traditional competitive balancing test under Section 1.

Question 6: As you know, the essential facilities doctrine recognized by all circuit courts of appeal imposes an affirmative obligation upon monopolists to make facilities deemed essential to competition available to competitors in specified circumstances. Do you believe that the standard that DOJ articulated in its brief would affect the application of the essential facilities doctrine?

Answer: As indicated in our amicus brief, it is our view that the so-called "essential facilities doctrine" does not properly identify a stand-alone Section 2 violation, untethered by traditional Sherman Act requirements. Application of the standard we advocated, by insisting that Section 2 liability for monopolization or attempted monopolization not be found absent exclusionary conduct, helps ensure that the essential facilities doctrine does not conflict with established Supreme Court Section 2 law. The Supreme Court has never adopted the essential facilities doctrine, and declined to adopt or reject it in its *Trinko* opinion. We believe, however, that its opinion is consistent with our view that that doctrine is subject to the traditional requirements of section 2 of the Sherman Act.

Question 7: In response to a question from Mr. Cannon at the July hearing before this Committee, you indicated that it might raise antitrust concerns for a company with a monopoly share of the voice market and a significant broadband market share to refuse to sell broadband to customers who buy voice service from competitors who use unbundled elements. Since you gave that answer, on October 21, the Georgia Public Service Commission accepted its staff's recommendation that BellSouth's practice of refusing to provide DSL to consumers who sign up for MCI voice service was anticompetitive and an illegal tie-in, citing the Jefferson Parish antitrust tying decision of the United States Supreme Court. The Georgia Commission was not deterred by the fact that the FCC had not prohibited this conduct. Have you followed up since July with any investigations of this type of conduct that you agreed could raise antitrust concerns and, if not, why not?

Answer: Although the conduct described could raise antitrust concerns, it is necessary to examine prevailing conditions in the relevant markets, including number and market shares of participants and how the conduct affects competition, to determine whether a potential violation has occurred. The Department is aware of the proceedings in the Georgia PSC, and is aware that the FCC has released a public notice in response to a BellSouth request for a review of various aspects of decisions by state commissions in this area. The Department is in the process of reviewing allegations related to marketing practices of DSL and cable modem providers to determine both whether any enforcement action under the antitrust laws is appropriate and whether we can provide useful input in the FCC proceeding.

Question 8: In response to one of Congresswoman Lofgren's written questions after the July hearing, you replied: "The issue is not whether any efficiency or cost-savings is found, but instead whether the benefit is worth the investment required to achieve it, apart from any benefit derived from excluding competition." Does your proposed test therefore require, at the pleading stage and without any discovery: 1) assessment of the nature and amount of a monopolist's investment; 2) determination of the nature and extent of a benefit to the monopolist; 3) establishment of a causal link between that investment and the benefit; and 4) determination of whether that benefit is separate and distinct from any anticompetitive harm? Is this test easy and fair to apply at the motion to dismiss stage?

Answer: The standard advocated in our *Trinko* amicus brief would not require, at the pleading stage and without any discovery, any of the four items listed in the question. As noted at pages 27-28 of our brief,

> The Federal Rules require only that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), a statement that need only "give the defendant fair notice of what the plaintiff 's claim is and the grounds upon which it rests," *Swierkiewicz* v. *Sorema*, 534 U.S. 506, 512 (2002) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957)).

A Section 2 complaint must, however, allege exclusionary conduct. In our view, the standard we advocated is both fair and not unusually difficult to apply at the motion-to-dismiss stage.

Question 9: Under your test articulated in *Trinko*, why is it that you do not weigh the magnitude of the anticompetitive impact from the monopolist's conduct and whether the monopolist knew that this exclusionary effect would follow in determining whether a complaint against a monopolist can move forward? Is such impact and knowledge relevant in making such a determination about a complaint? If so, why is it not part of the test?

Answer: As explained in our *Trinko* amicus brief, at pages 16-17, the principle that "a refusal to aid rivals that makes economic or business sense *apart* from a tendency to impair competition" should not be treated as exclusionary "reflects the infrequent pro-competitive benefits and the frequent anticompetitive risks posed by a generalized requirement that firms assist rivals." On the other hand, as we suggested on page 18 of our brief, if Congress or the regulatory agencies identify circumstances where they conclude that it is desirable to require an incumbent to share its facilities under a system of price and access regulation, or where they conclude that new entrants should be permitted to use the monopolist's facilities while establishing themselves, industry-specific legislation and regulation can be devised to effectuate that result. But basing *antitrust* liability on a unilateral refusal to aid rivals that makes business or economic sense even apart from any tendency to impair competition, but which nevertheless happens to impair the opportunities of rivals, would present serious risks of harming consumer welfare.

Question 10: I understand that some Regional Bell Operating Companies are asking the FCC to forbear from requiring portions of the competitive checklist requirements of Section 271 to continue to apply fully. I would expect that the Department would be concerned about watering down the requirements that were in place when long-distance was granted with (or without) DOJ support. Is the Department going to weigh in at the FCC to preserve the requirements and continuing vitality of Section 271?

Answer: The Department was a significant participant in the 271 process, providing evaluations that analyzed whether local exchange markets were fully and irreversibly open to competition. We continue to monitor local exchange markets for potential violations of antitrust laws. We are also following the FCC's ongoing efforts to determine the extent to which obligations imposed by the Telecom Act continue to be appropriate in light of changes in market conditions, and will continue to comment or consult with the FCC when we conclude that we can provide useful guidance on local competition issues.

Question 11: The FCC gave the RBOCs pricing flexibility for their special access services despite the fact that non-incumbent carriers rely on these bottleneck connections to reach their customers. The Bells, however, claimed that they needed pricing flexibility to respond in a competitive market for special access and that the market would keep their rates in check. But their prices instead have increased. Where the Bells received special access pricing relief, reports are that they have universally increased – rather than decreased – their rates. Reports are that they now enjoy margins as high as 50% and – according to a study filed with the FCC – are reaping at least $5.6 billion in windfall profits from their special access services. Don't these facts describe a market that is not competitive and that requires action to protect competitors?

Answer: Antitrust enforcement is essentially focused on three objectives: first, to prevent and remedy conspiracies in restraint of trade, typically among competitors; second, to prevent and remedy exclusionary or predatory conduct that monopolizes or attempts to monopolize a market; and third, to prevent and remedy mergers that are likely to substantially lessen competition. High profit margins and large profits do not by themselves indicate an antitrust violation. Beyond remedying those three specific types of legal violations, the Department of Justice does not have authority to restructure a marketplace or impose additional behavioral rules in order to make a market more competitive. In some market sectors, Congress has given a regulatory agency authority to take some of these steps in certain circumstances; in this instance, that agency would be the FCC.

Questions from Ranking Member Conyers

Question 1: In assessing whether a monopolist has engaged in exclusionary conduct, what significance, if any, do you give to a monopolist's serious violations of positive law that have the effect of eliminating competition? Is it important in determining whether an antitrust complaint can proceed whether a monopolist excludes competition by flouting legal or regulatory requirements that competitors rely on in deciding to invest and compete?

Answer: Our *Trinko* amicus brief, at page 12 n. 3, noted that in some contexts, not directly implicated in *Trinko*, "courts have sometimes found that the violation of other extrinsic duties – such as prohibitions against fraud and deception – may be a significant factor when ascertaining whether the conduct is exclusionary for antitrust purposes." And as you suggest in the second sentence of your question, in reference to reliance by potential entrants on the legal and regulatory structure, consideration of that structure may help illuminate the competitive consequences of the conduct at issue. These could be important considerations in determining whether enforcement action is warranted.

Question 2: In light of your position in *Trinko*, what statutory drafting changes do you think the Congress needs to make in the Telecom Act, the antitrust laws, or both, for the Antitrust Division to conclude that a monopolist's conduct that (1) excludes competitors and constitutes a serious violation of a statute that is intended to open markets to competition and give access to essential facilities, and (2) knowingly causes more anticompetitive harm than any independent benefit to the monopolist, could be redressed under the antitrust laws?

Answer: The Department does not recommend that any changes need to be made to the antitrust laws in light of the Supreme Court's opinion. As indicated above, we believe the standard we advocated in our amicus brief is the appropriate standard under section 2 of the Sherman Act for evaluating denial of assistance to a competitor. As also indicated above, if Congress decides that additional regulatory requirements, beyond what is required under the antitrust laws, are warranted in this particular situation, legislation could be enacted to that end. We would recommend caution in imposing any requirements that could interfere with pro-competitive business zeal.

__Question 3__: Is it true that an important part of the Department's case in the historic lawsuit it filed that led to the break-up of the Bell System was the alleged ineffectiveness of perhaps well-intentioned regulators in controlling and disciplining the local phone monopoly? Some would say that Verizon and others are employing a Brer Rabbit strategy today with the Department and the FCC, saying: throw me in the briar patch and let those oh so powerful regulators do enforcement." Does the Antitrust Division appreciate that the antitrust savings clause was written to assure that regulators would not be on their own and that the more powerful antitrust tool backstops the regulatory efforts to open the local market to competition and curb market power?

__Answer__: The Department agrees that the Telecom Act clearly contemplates that the antitrust laws will continue to apply fully, and the *Trinko* decision made that clear. Antitrust enforcement will continue to protect competition and consumers in telecommunications markets. The Department takes its role seriously and devotes significant resources to reviewing competitive developments in this industry. As part of its analysis, the Department will consider the impact of any regulation on the likely competitive effects of the particular conduct or proposed merger under investigation.

__Question 4__: What message do you think that a monopoly who may be evaluating whether to violate the Telecom Act in a serious way that advantages itself but harms competition is getting from the DOJ position in *Trinko*? Are you not significantly increasing the risk that they will engage in anticompetitive behavior by reducing the probability that they can be held accountable for it under the antitrust laws?

__Answer__: If the conduct in question advantages the monopoly telecommunications carrier precisely *because* it harms competition, that conduct may well be actionable under the standard we advocated in our amicus brief. If the conduct advantages the telecommunications firm independently of its adverse effect on competition, then it follows that the firm has a legitimate incentive to engage in the conduct that would exist even apart from any adverse effect on competition. It is the essence of the standard we advocated in our amicus brief, and the precedents and principles on which that standard is based, that it should not constitute unlawful monopolization under section 2 of the Sherman Act for a firm to pursue pro-competitive aims.

RESPONSES TO POST-HEARING QUESTIONS FROM ALFRED C. PFEIFFER

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February 18, 2004

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Attn: Robert Tracci, Esq.

Re: Saving and Savings Clause: Congressional Intent, the Trinko Case, and the Continued Application of the Antitrust laws in the Telecom Sector

Dear Chairman Sensenbrenner and Ranking Member Conyers:

I appreciate your invitation me to provide responses to post-hearing questions from the Committee on behalf of the Association for Local Telecommunications Services ("ALTS") and the CompTel/ASCENT Alliance, following up on the Committee's November 19, 2003 hearing, "Saving and Savings Clause: Congressional Intent, the *Trinko* Case, and the Continued Application of the Antitrust laws in the Telecom Sector". My responses to your questions are attached. Please don't hesitate to let me know if you have any further questions. Thank you.

Sincerely yours,

Alfred C. Pfeiffer, Jr.

Enclosure

Responses to Post-Hearing Questions

1. ***If competitive switches were available, do you think the Bells presently have the capacity to cut-over smoothly and quickly to those switches the several million customers being served by competitors as well as the many customer who are switching their service to competitors?***

No. The Bells have more work to do before the cut-over process allows for mass migration to non-Bell switches. Local loops remain an essential bottleneck that cannot be readily replicated by a would-be competitor and must be provided to a competitor on nondiscriminatory rates, terms and conditions. The Bell Companies, in order to gain the authority to provide in-region long-distance service, established electronic processes allowing for customer migration from the Bell to a competitor via UNE-P (which uses the Bell switch). The Bells, however, did not establish similar electronic processes for transitioning customers to competitors who do not use the Bell switch.

The Bells must establish a viable process to allow for the mass migration of customers to competitors without reliance on the Bell switch. While competitors have deployed switches to serve business customers, the hot cut process remains the single largest impediment to competitors using their existing switches (and deploying new switches) to serve mass market customers. The FCC recently examined this issue and concluded that, "the overall impact of the current hot cut process raises competitors' costs, lowers their quality of service, and delays the provisioning of service , thereby preventing them from serving the mass market in the large majority of locations." *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36 (Aug. 21, 2003) ("*Triennial Review Order*") at ¶ 473. The FCC relied on a large amount of consistent evidence in reaching its conclusion. Typical of the evidence on which the Commission relied, was the observation of the New York Department of Public Service that "it would take Verizon over 11 years to switch all the existing UNE-P customers to UNE-L." Comments of the New York Department of Public Service, cited in the *Triennial Review Order*, ¶ 469, n. 1440.

In short, the FCC, the New York Department of Public Service, and virtually every other regulator to have examined this issue, agree that the Bells currently lack the ability—despite their representations to the contrary—to efficiently cut over the volume of hot cuts that would be generated by the conversion of existing mass market loops, new growth, and churn (ordinary customer switching between carriers) from UNE-P to competitive switches.

It seems like the ability of competitors to satisfy their customers and remain in business could ride on the answer if such cut-overs were required. If the Bells answer this question affirmatively and are wrong, what is the appropriate punishment?

The ability of CLECs to remain in business does indeed depend on the ability of the Bells to provide seamless customer migration. Accordingly, the appropriate punishment for inaccurate representations of the ability to do so should be two-fold.

First, pursuant to its § 271(d)(6) authority, the FCC should reexamine all prior § 271 applications that it has granted to a Bell that misrepresented its ability to provide seamless customer migration. In this mass market setting, where there is a potential for tens of thousands of transactions daily, electronic processing of orders and provisioning of facilities is a must. "[E]xcessive reliance on manual processing, especially for routine transactions, impedes the BOC's ability to provide equivalent access to [] fundamental operational support systems." *Louisiana I 271 Order* ¶ 25; *see also, e.g., Louisiana II 271 Order* ¶ 110. Indeed, the FCC previously rejected § 271 applications when the Bells did not have reliable electronic systems in place to support the pre-ordering, ordering and provisioning of UNE-P. Moreover, the FCC began to permit BOC entry into the long-distance market only *after* the Bell UNE-P processes became electronic and standardized. *See, e.g., New York 271 Order* ¶¶ 128-236 (extensive discussion of electronic OSS). The FCC rejected the Bells' applications when they relied on collocation as the sole method to combine elements because the manual processing and increased cost of providing service failed to satisfy the requirements of § 271. *See, e.g., Louisiana II 271 Order* ¶¶ 165-167; *South Carolina 271 Order* ¶ 205. The FCC required either substantial commercial usage, or extensive "stress testing" reviewed by independent third parties, before it would conclude that the Bells actually we able to provision the elements or element combinations are required by law. *New York 271 Order* ¶ 89; *Texas 271 Order* ¶ 98.

Therefore, if the Bells were able to eliminate UNE-P, based on inaccurate representations of their ability to handle mass-market volumes of hot-cut loop migrations, the essential premises of FCC's prior authorizations of long distance services would cease to be valid. To the extent that the Bells fail to open their markets to competitors and there is not a sustainable competitive market, the Bell Companies' in-region, long distance authority must be revoked. They were granted the authority to sell in-region, long distance services based on a guarantee that the local market was open to competitors. If that authority was premised on the continued ability of competitors to compete using UNE-P and ILEC-provided switches, then when UNE-P is no longer available, an adequate substitute (*e.g.*, UNE-L competition based on reliance on the ILEC-provided loop and a competitor's switch) must be in place.

Second, the Bells should face economic sanctions for misrepresenting their ability to provide seamless customer migration. Any such punishment must be more than a mere cost of business. The punishment must be strong enough to give the Bell the INCENTIVE to provide immediate connections so that consumers' telephone service is not lost if they switch to a competitor. In order to ensure that penalties are appropriately severe to compel compliance, escalating damages for continued refusal to treat their competitors as valued wholesale customers should be required. It is not enough for the Bells simply to pay the CLEC the foregone profits, or to pay the consumer for the inconvenience of a dropped call. The Bell should also be subject to punitive damages, similar to antitrust damages, in order to motivate the Bells to make the cut-over process seamless.

2. ***What has happened with regard to competition and pricing to the market for special access since deregulation?***

In the four years since the FCC deregulated special access,[1] the rates that the incumbent local exchange carriers charge for this critical service are *substantially higher* than they would have been if those rates had remained subject to FCC price caps. At the same time, the incumbents have preserved market shares well above 90%. According to the incumbents' own data filed with the FCC, they are now earning special access rates of return averaging about 40% in 2002 (with one incumbent, the combined SBC companies, earning a 55 percent rate of return) and obtaining revenues that are over $5 billion more annually than would have been allowed under the last rate of return that was prescribed by the FCC (in 1990 when capital costs were much higher). Because excessive special access rates increase prices for many of the nation's goods and services, eliminating these overcharges will benefit the national economy as a whole, increasing the gross national product by some $11.6 billion and creating some 64,000 new jobs in the first year alone.[2]

Is what occurred consistent with the FCC's expectations of deregulation?

No. When the FCC deregulated special access, it understood that there were no alternatives to the ILECs' local "loop" connections to buildings and that alternative transport facilities were not even generally available.[3] Nonetheless, the FCC predicted that these alternative facilities would all be quickly constructed, that actual or potential competition would lead incumbents to reduce special access rates, and that market forces would enable the FCC to meet its statutory mandate of assuring the availability of this increasingly critical telecommunications service at "just and reasonable" rates. None of this occurred.[4]

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[1] In 1999, the FCC ended price cap regulation for special access services in metropolitan statistical areas ("MSAs") where the incumbent local exchange carriers ("ILECs") could show that alternative transport facilities were available in wire centers that accounted for specified percentages of special access revenues. *See, e.g., Access Charge Reform, et. al.*, CC Docket No. 96-262, et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (1999), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (2001) (*"Pricing Flexibility Order"*). By the end of 2001, ILECs were granted complete Phase II pricing flexibility in nearly half of the country, and virtually all of the largest markets.

[2] *See ex parte* Letter from Special Access Reform Coalition to FCC, dated June 12, 2003, attaching P. Rapport, L. Taylor, A. Menko, & T. Brand, *Macroeconomic Benefits from a Reduction in Special Access Prices* (June 2003).

[3] Special access is comprised of three distinct types of facilities: (i) end user channel terminations (*i.e.*, local loops), which connect individual office buildings, mobile telephone tower sites, and other end user premises to an end office node; (ii) interoffice transport facilities, which carry the traffic between the end office and one or more other wire centers of the incumbent's network, and (iii) "entrance facilities," which carry traffic over a typically short distance between the closest wire center of the incumbent (the "serving wire center") and the network of the interexchange carrier, CLEC, wireless carrier, or information service provider.

[4] Not all regulators shared the FCC's rosy view of the prospects for special access competition. At the same time the FCC was granting the incumbents pricing flexibility based on these theoretical prospects, other regulators examining actual marketplace conditions concluded that the incumbents retained "continued dominance" over special access services even in the areas of the country where competition was most developed. *See* Opinion and Order Modifying Special Services Guidelines for

The FCC had issued its *Pricing Flexibility Order* at the height of the boom in telecommunications that occurred in response to the Telecommunications Act of 1996 and the explosion of dot.coms in the late 1990s. During this era, start-up companies like Qwest, Global Crossing, XO, Adelphia, and Enron had announced plans to construct alternative networks and had raised hundreds of millions of dollars in capital. Almost immediately thereafter, the bubble burst; access to capital evaporated; and scores of firms that had announced ambitious plans to construct alternative transmission networks ceased operations or went into bankruptcy. AT&T, for instance, remains a captive customer of ILEC special access services with respect to more than *95 percent* of the nearly 200,000 commercial buildings it serves through special access,[5] despite owning one of the largest non-ILEC networks of alternative special access facilities and adhering to a policy of using its own or a competitive carrier's facilities wherever possible.

In the absence of the predicted availability of competitive facilities, the incumbents' response to the grants of pricing flexibility was also exactly the *opposite* of what the FCC had expected. Rather than reduce overall rates in each MSA where they were granted pricing flexibility, the incumbents have established that are substantially higher than they would have been if those rates had remained subject to FCC price caps. Verizon and Qwest, in fact, raised rates in every MSA in which they have received special access rate relief – including rates for services in the central business districts of large cities like New York and Boston where competition is most developed. As a result, the incumbents' rates in purportedly competitive areas where they have received pricing flexibility substantially exceed the rates in areas with rates governed by price caps: for example, Verizon's month-to-month charges for high capacity special access channel terminations where it has obtained relief exceed the rates in price-capped areas by more than 70 percent.

Not surprisingly, given the absence of meaningful competition, the incumbents' performance in filling special access orders has steadily deteriorated. The price increases and deterioration in service have also imperiled competition in other telecommunications sectors because many communications service providers (*i.e.*, wireless, broadband, CLEC and long distance) rely on special access to establish connections to their customers between various parts of their own networks. Literally, hundreds of billions of dollars of commerce is conducted over special access services. Deregulation of special access has given the incumbents the ability and the incentive to impede competition by using inflated special access rates to effect price squeezes on these competing service providers.

Is further regulation now required in the special access market?

Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, 211 P.U.R.4th 190 (NYPSC 2001). The New York Public Service Commission's review of detailed information on the deployment of special access facilities, including route miles of fiber, numbers of buildings passed and, most significantly, numbers of buildings actually connected to ILEC competitors concluded that "Verizon's combined market share data demonstrates its continued dominance in all geographic areas," even in Manhattan, the area with the most competitive activity of any in the nation. *Id.* at 7-8.

5 AT&T Reply Comments, RM 10593, filed Jan. 24, 2003, at 13-14 & Selwyn Dec. ¶¶ 9, 19-20 & Tables 6-8.

Yes. Section 201 of the Communications Act prohibits rates that are "unjust and unreasonable," and it imposes a duty on the FCC to ensure that special access and other rates are just and reasonable. *AT&T v. FCC,* 572 F.2d 17, 25 (2d Cir. 1978). It violates the Act for the FCC to permit incumbent LECs to earn excessive returns. *Illinois Bell Tel. Co.* v. *FCC,* 988 F.2d 1254, 1260 (D.C. Cir. 1993); *see also Farmers Union Cent. Exchange Inc.* v. *FERC,* 734 F.2d 1486, 1502-03 (D.C. Cir. 1984).[6] As explained above, there are virtually no competitive alternatives to incumbents' special access services in MSAs where rates have been deregulated and thus rate deregulation has produced higher rates rather than lower.

Excessive special access charges are tremendously damaging to consumers and competition. This is because, as the FCC has explained, special access has a major impact on "the United States economy as a whole." *Special Access Interconnection Order*, 7 FCC Rcd. 7369, ¶ 18 (1992); *accord, Expanded Interconnection Order*, 7 FCC Rcd. 7740, ¶ 10 (1992). Whether businesses pay for special access directly or indirectly (through their purchases of retail voice and data services provided by carriers that purchase special access from the incumbents), monopoly overcharges are passed on to consumers in the form of higher prices for everything from groceries to cars and computers and from legal advice to brokers' commissions. Those monopoly prices mean reduced output and an associated deadweight loss to society because products and services that would have been produced cannot be economically produced given the impact of special access on cost structures. Supracompetitive special access rates also necessarily reduce investment by the carriers and other service providers that must rely on special access services. As noted above, reducing special access rates to levels producing an 11.25% rate of return would increase economic activity in the nation by $11.6 billion in the first year alone.

In light of the demonstrable failure of special access deregulation, various parties have asked the FCC to revisit the order. The FCC, however, has repeatedly refused to do so. Most recently, in November 2003, representatives of long distance, CLEC, wireless, and Internet access providers jointly petitioned the U. S. Court of Appeals for a mandamus order directing the FCC to fulfill its statutory obligation under the Communications Act. *AT&T Corp., et. al, Petition for a Writ of Mandamus*, No. 03-1397, at 17, 25-28, D.C. Circuit (filed November 5, 2003). That petition is pending. We respectfully urge this Committee to exercise its oversight powers to require the FCC to proceed forthwith to reverse the damage to competition caused by its unwarranted deregulation of special access.

3. ***Has the DOJ ever won a Section 2 case where DOJ suggested, and the Court accepted, the definition of exclusionary conduct, including the sacrifice test, that the DOJ has urged in Trinko?***

To my knowledge, the DOJ has not won a Section 2 case where it suggested and the Court accepted the definition of exclusionary conduct it proposes the Court adopt in *Trinko.*

[6] *See also Potomac Elec. Power Co.* v. *Public Utils. Comm'n of the District of Columbia*, 158 F.2d 521, 523 (D.C. Cir. 1947) (when a carrier's "returns have greatly exceeded a fair percentage of return upon a fair base, it follows as a matter of law that the rates charged . . . instead of being 'just and reasonable' as the law requires them to be, have been excessive").

I know that Mr. Pate may have mentioned Microsoft, but the D.C. Circuit sitting en banc instead seemed to apply unanimously a balancing or proportionality test, correct?

That is correct. In its decision, the D.C. Circuit set forth and applied a balancing test that took into account the anticompetitive effects of the conduct at issue as well as any purported business justification for the conduct:

> The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it. . . . From a century of case law on monopolization under § 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. . . . Second, the plaintiff, on whom the burden of proof of course rests, [citations], must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. . . . Third, if a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. . . . Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. . . . Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.

U.S. v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001). In *Trinko*, however, the DOJ urged the Supreme Court adopt a "demanding standard" for the determination of exclusionary conduct in claims alleging a refusal to deal. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner ("US/FTC Brief"), *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, On Writ of Certiorari to the United Sates Court of Appeals for the Second Circuit, No. 02-682, p. 17 (May 2003). That standard imposes a predatory pricing requirement – "a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power" – before a monopolist may be found to have engaged in actionable refusal to deal. *Id.*, p. 16.

How hard would it be for the government to prevail in a Section 2 case under the DOJ's Trinko standard and would that constitute a departure from existing precedent?

The DOJ admits its test is "demanding". *Id.*, p. 17. Indeed, the rubric proposed by the DOJ would immunize conduct recognized by established antitrust principles as anticompetitive and therefore represent a radical departure in antitrust law. While courts "have recognized that conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power," *id.* p. 16, that is not the *only* form of conduct that qualifies as exclusionary under established antitrust precedent. Section 2 jurisprudence recognizes that "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58. Courts analyzing claims of exclusionary conduct focus on the "anticompetitive effect" of the challenged conduct, *id.*, including whether the conduct "harms the competitive process." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.); *see also Microsoft*, 253 F.3d at 58.

The DOJ's demanding standard, therefore, exempts from liability any anticompetitive conduct that does not involve the sacrifice of profits. One example of conduct immunized under the DOJ's standard is the attempt to destroy competition by raising rival's costs, a primary mechanism by which ILECs have destroyed competition. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Cost to Achieve Power Over Price*, 96 Yale L.J. 209, 224 (1986) ("Raising rivals' costs can be a particularly effective method of anticompetitive exclusion. This strategy need not entail sacrificing one's own profits in the short run . . . ."); *see also* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 318-23 (2001) (discussing economic logic behind raising rivals' cost theory); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339-40 (7th Cir. 1986) ("When a firm finds a way to confront its rivals with higher costs, it may raise its own prices to consumers without drawing increased output from them."); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997), *aff'd*, 525 U.S. 299 (1999) (reversed summary judgment; policy raised factual question of whether conduct raised competitor's costs); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (raising rival's costs "would qualify as anticompetitive conduct unless [defendants] could demonstrate a legitimate business justification for it").

4. ***Do you think the suit brought by the Government that resulted in the break-up of the Bell system might have proceeded differently if the Trinko standard was the law then?***

Yes. The break-up of the Bell system probably would not have happened had the government then employed the standard it now urges the Court adopt in *Trinko*. In the United States' antitrust suit against AT&T, the government alleged AT&T had used its local network monopoly to stifle competition in other, related markets, like long distance, that depended on access to the local network. *See United States v. AT&T*, 552 F. Supp. 131, 139 (D.D.C. 1982), aff'd sub nom., *Maryland v. United States*, 460 U.S. 1001 (1983). The government argued, among other things, that "whether or not the Specialized Common Carriers decision authorized the provision of FX and CCSA service under the Communications Act, AT&T was still obligated to provide interconnection for such services under the essential facilities doctrine and the antitrust laws." *United States v. AT&T Co.*, 524 F.Supp. 1336, 1355 n.79 (D.D.C. 1981); *compare* US/FTC Brief, p. 10 (the Sherman Act does not "expressly mandate[] the sharing of an incumbent firm's facilities"). In denying the defendants' motion to dismiss, the Court used the essential facilities doctrine, the "applicable legal standard," to evaluate the government's claims that the Bell system violated the antitrust laws by "restricting interconnection to the local facilities." *Id.*, at 1352-53 ("Long distance and other intercity lines are essentially useless unless they can be connected to the local switches.") (*citing United States v. Terminal R.R. Assn. of St. Louis*, 224 U.S. 383 (1912); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

The Court applied a balancing test finding that the government had shown "that AT&T and its subsidiaries discriminate[d] between Long Lines and non-Bell carriers with regard to access to Bell System facilities" and that the discrimination was "anticompetitive in its effect", and shifting the burden to the defendants "to show why, despite that anticompetitive impact, such unequal treatment is reasonable." *Id.*, at 1361. The profit-sacrifice test proposed by the government in *Trinko* is, therefore, significantly different from the analysis applied in the break up litigation.

5. ***Do either of you have a view on whether a Bell refusal to sell DSL to consumers who wish to switch their voice service to a Bell competitor who uses unbundled elements, would constitute an illegal tie-in?***

Whether the conduct is characterized as a "refusal to deal" or a "tying arrangement," it is anticompetitive and illegal. A tying arrangement exists when a defendant can "induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 n.20 (1984). It is irrelevant whether the Bell considers its DSL product to be "more competitive" or "less competitive" than its local phone service. All that is relevant is that the Bell company has sufficient market power in the DSL market "to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *United States Steel v. Fortner Enters*, 429 U.S. 610, 620 n. 38 (1977). Under the facts proposed in the Committee's question, this test is clearly satisfied, given that when consumers do have a choice of DSL provider—such as Covad Communications—they often choose competitive voice providers. It would be unusual if those consumers with access to only Bell DSL had any different preferences regarding access to competitive choice in the local voice market.

Similarly, the conduct described is also a refusal to deal. The Bell refuses to deal with existing customers because they customers prefer a different vendor for a service where competitive choice is available. Indeed, the fact that the Bell company refuses to deal with *customers* that would deal with the Bell company's competitors raises very serious concerns. Where "a monopolist refuses to deal with customers who deal with its rivals," such "behavior is inherently anticompetitive [and] . . . is illegal." *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir.1979) (summarizing *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), and its progeny). Leading antitrust commentators agree:

> Extraction of an agreement not to deal with any competitor – or the equivalent, refusing to deal with buyers who do – can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service. We see no convincing justification for a requirement that a customer not deal with a particular rival.

IIIA Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 768e6 (1996).

Notably, the scenario proposed by the Committee even meets the government's "demanding standard" for refusals to deal. US/FTC Brief, p. 7. To the extent the Bell refuses to provide DSL service if the customer elects a competitor for voice services, the Bell has chosen to "sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); US/FTC Brief, p. 16.

6. ***Does it seem odd to you that the standard urged by the DOJ in Trinko apparently does not require any weighing of the anticompetitive impact of the conduct? Is that the right approach?***

Yes it does seem odd, given that established antitrust precedent counsels in favor of balancing anticompetitive impact against procompetitive benefits. *See* Responses to Questions 3 and 4, above. The government, however, proposes a test for exclusionary conduct that "does not entail open-ended 'balancing of social gains against competitive harms'". US/FTC Brief, p. 14 (quoting 3 P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶¶ 651a, 658f, at 72, 131-32, 135 (2d ed. 2002)). Because the government's approach does not reach anticompetitive conduct, such as raising rivals costs (see Response to Question 3, above), that harms competition, I do not believe it is the right approach.

7. ***What impact, if any, do you think it would have on Bell behavior if they win Trinko on the merits and get a new Section 2 standard adopted by the Court, perhaps the standard urged by the DOJ?***

A Bell win in *Trinko* will, undoubtedly, lead to a further reduction of competition in the telecommunications industry and the Bells will continue to reap monopoly profits from that diminished competition. Despite the pro-competition goals of the 1996 Act, the Bells have managed to impose significant entry barriers on CLECs and reap exorbitant monopoly profits in the process.[7] Without the antitrust laws and remedies to police ILEC conduct, the situation will only become more difficult for competitors attempting to enter (or survive) in Bell-dominated markets. In addition, the Bells will expand their monopoly hold into related telecommunications markets in which competitors rely on access to the local Bell network in order to provide services. Indeed, with the possibility of antitrust liability looming, the Bells managed to eliminate competitors, injure others, and expand the scope and reach of their monopolies.[8] One can only imagine what they can achieve when their conduct is unchecked.

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[7] In Bethesda, Maryland, for example, Verizon billed collocating CLECs more than $320,000 in *deposits* (i.e. 50% of the collocation price) while incurring only $62,389 in costs. Verizon could achieve such profits only due to its monopoly over the local telecommunications facilities. Brief of Covad Communications Company, Inc. as Amicus Curiae in Support of Respondent, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, On Writ of Certiorari to the United States Court of Appeals for the Second Circuit, No. 02-682, p. 12 (July 25, 2003).

[8] *See* Jason Krause, *Dawn of the Big Bells*, The Industry Standard, April 20, 2001, available at http://www.thestandard.com/article/0,1902,23871,00.html ("What's left of Ma Bell's progeny – BellSouth, Qwest, SBC, and Verizon – have maintained their lock on local phone service and driven most of their newfangled rivals to the hills. They've moved successfully into new markets like wireless and broadband Net access."). The ILECs reduced not only the ranks of their competitors, but their own ranks, via merger thereby enhancing their already enormous monopoly power. The 1984 break-up of AT&T resulted in seven Regional Bell Operating Companies ("RBOCs," i.e. ILECs); now, as a result of several recent mergers, there are only four: Verizon (the largest), SBC, Ameritech, and Qwest. *See Big is Better*, The Investment Dealer's Digest, November 19, 2001, at 30-35.

8. ***Are you surprised that the RBOCs virtually do not compete via wireline for either voice or data services in regions controlled by other RBOCs? To what do you attribute that?***

Yes. Considering, the Bells allege that UNE prices are so low that they are essentially giving away their network to their rivals, it is certainly surprising that the Bell Companies are not seeking such "below-cost" access in other Bell territories. The Bell Companies are better situated than any start-up and certainly should be attempting to increase their revenue and customer base via allegedly cheap UNE entry. Unless, of course, UNE rates are not below cost.

Rather than compete head-to-head in each others regions, the Bell Companies' have extended their reach through horizontal mergers. To get approval of several of these mergers, the Bells have been "compelled" by negotiated settlement with the FCC, DOJ and state regulators to compete out of region. However, to date, the Bells have done the bare minimum to satisfy, at best, the letter but not the spirit of any out-of-region merger conditions.[9] For example, SBC established 30 collocations out of its region without providing any service to customers out of region and claimed to the FCC that it was providing out-of-region competition. Verizon claimed that its $150 million failed investment in Northpoint (which Verizon ultimately helped to force out of business thereby eliminating a competitor) satisfied an out-of-region commitment. Verizon never used Northpoint or its assets to compete out-of-region.

The Bell Companies' continued refusal to compete head-to-head evidences, at least and most innocently, a fear of having to compete where they do not maintain monopoly control over the essential facilities. The Bells are well aware of how they treat their wholesale customers and competitors, and would never want anyone else to be able to treat them so abysmally. The Bell Companies' refusals to compete out of region raises the issue of whether there is a tacit understanding that they will not compete against one another and will make life as difficult as possible for anyone that dares to compete on their home turf.

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[9] The intense consolidation of the RBOCs (from seven to four, *see* n. 8, above) was permitted only on the premise of the ILECs' ongoing obligations to open their networks to competition under the 1996 Act and further obligations assumed by the merging ILECs to compete with one another. *See* David Rohde, *Bells Are Failing to Compete As They Promised*, Network World, Inc., Mar. 5, 2001, at 1, available at http://www.nwfusion.com/news/2001/0305bellcomp.html. None of this promised competition has materialized. *See id.*; *see also* Krause, *Dawn of the Big Bells.*

9. ***Would the standard of exclusionary conduct articulated by the DOJ eviscerate the essential facilities doctrine and the congressional intent underlying the antitrust savings clause in the 1996 Act?***

Yes. The standard of exclusionary conduct articulated by the DOJ eviscerates the essential facilities doctrine, long standing antitrust precedent, and the congressional intent underlying the antitrust savings clause of the Telco Act. *See* Responses to Questions 3 and 4, above. Local telephone monopolists, like BellSouth, have long been required to provide competitors full access to their local networks, through a process called interconnection. *See In re the Matter of Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Service in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, 29 F.C.C.2d 870, 940 (1971). Courts found that duty, in part, via application of the essential facilities doctrine. *United States v. AT&T Co.*, 524 F.Supp. at 1352-53; *see also MCI Comms. Corp. v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1983) ("Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on non-discriminatory terms.").

The government's approach effectively eliminates antitrust liability for conduct that was, prior to the Telco Act, illegal simply because that conduct also violates the Telco Act.[10] That result, is contrary to express Congressional intent that the antitrust laws remain in full force:

> "the provisions of this bill shall not be construed to grant immunity from any future antitrust action against any entity referred to in the bill." S. Rep. No. 104-23, at 17 (1995) (R2-7-A18)
>
> "Antitrust law is synonymous with low prices and consumer protection -- and that is exactly what we need in our telecommunications industry . . . the bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws. . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers." 142 Cong. Rec. H1145-06 (daily ed. February 1, 1996) (Statement of Rep. Conyers) (R2-7-A132-33)
>
> "The second important antitrust issue in this legislation is the unequivocal antitrust savings clause that explicitly maintains the full force of the antitrust laws in this vital industry. Today we take for granted that the antitrust laws apply to the communications sector. . . . Application of the antitrust laws is the most reliable, time-tested means of ensuring that competition, and the innovation that it fosters, can flourish to benefit consumers and the economy."

[10] The attached chart illustrates this point.

142 Cong. Rec. S711 (daily ed. February 1, 1996) (Statement of Sen. Thurmond) (R2-7-A136)

"I firmly believe that we must rely on the bipartisan principles of antitrust law in order to move as quickly as possible toward competition in all segments of the telecommunications industry, and away from regulation. Relying on antitrust principles is vital to ensure that the free market will work to spur competition and reduce government involvement in the industry." 141 Cong. Rec. S18586-01 (daily ed. December 14, 1995) (Statement of Sen. Leahy) (R2-7-144)

10. *How do you explain the apparent change in the DOJ's definition of exclusionary conduct?*

That is a question that I cannot answer. The Government's positions on this issue are completely irreconcilable.

In its early interpretations of the 1996 Act the FCC established that its regulations did not provide the "exclusive remedy" for anticompetitive conduct. First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325, 1999 WL 452885, 11 FCC Rcd 15499 (Aug. 8, 1996), ¶¶ 124, 129 ("we clarify . . . that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws.").

Subsequently, in two separate amicus curiae briefs submitted to the Eleventh Circuit, the DOJ and FCC opined to the Court of Appeals that CLECs had stated antitrust claims by alleging violations of Section 251 of the 1996 Act. *See* Brief for the United States and Federal Communications Commission as Amici Curiae in Support of Appellants, *Intermedia Communications, Inc. v. BellSouth Telecommunications, Inc.*, No. 01-10224-JJ (11th Cir. filed Mar. 28, 2001) at 25-26 ("failure to provide reasonable interconnection" under the 1996 Act sufficiently "allege[d] exclusionary conduct by a firm with monopoly power that lacks business justification and that harms competition."); Brief for the United States and Federal Communications Commission as Amici Curiae *Covad Communications Company v. BellSouth Telecomms., Inc.*, No. 01-16064-C (11th Cir., filed Dec. 17, 2001) at 11 ("It is not true that, as BellSouth apparently argued below, an incumbent monopoly provider of local telecommunications services cannot, as a matter of law, violate the antitrust laws by refusing to provide rivals access to its network on reasonable terms.").

However, in *Trinko*, the government repudiated its earlier views, and opined that violations of the access duties imposed by the 1996 could never, as a matter of law, give rise to antitrust liability. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (Supreme Court, filed May 2003) at 18 ("But where, as here, Congress enacts a regulatory structure that imposes affirmative obligations to assist rivals and expressly disclaims any intent to "modify * * * the applicability of any of the antitrust laws," 47 U.S.C. 152 note, it is clearly inappropriate for a court automatically to perceive antitrust consequences from regulatory violations.").

11. *If the heightened standard for refusals to deal is embraced by the Court, will this have an impact on the application of the antitrust laws in other markets?*

Yes. If the government's proposed "demanding" standard for exclusionary conduct in refusal to deal cases is embraced by the Court, it will become the standard for exclusionary conduct in all refusal to deal cases regardless of the market involved. The government did not limit its call for the more demanding predatory pricing standard to cases involving conduct governed by the Telecommunications Act or to the telecommunications industry generally. Indeed, the government purports to draw its heightened standard from the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* which involved the marketing of ski locations in Aspen, Colorado. 472 U.S. 585 (1985). Illegal refusals to deal have been found in a variety of contexts including, for example, sale and service of photocopiers and parts[11], the licensing of pharmaceutical drugs[12], retail and wholesale distribution of periodicals[13], newspaper and radio advertising[14], among others. And although refusals to deal or not new to the telecommunications industry, see e.g. MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir.), *cert denied*, 464 U.S. 891 (1983), they are not unique to that industry either.

12. *If the Court holds that the 1996 Act supersedes the antitrust laws, how can Congress remedy this development?*

If the Supreme Court holds that the 1996 Act supersedes the antitrust laws or otherwise limits application of the antitrust laws to conduct that is also regulated by the 1996 Act, Congress may employ any of the following to remedy the issue:

1) Enact legislation that expressly repeals the Court's decision;

2) Enact legislation that expressly provides for antitrust enforcement of the 1996 Act's duties;

3) Enact legislation that provides that antitrust claims may be based on § 251 of the 1996 Act;

4) Enact legislation that provides for a private right of action under the 1996 Act to allow private parties to enforce the Act and its duties; and/or

5) Enact legislation specifying that the intentional violation or, or reckless disregard for, a non-antitrust extrinsic legal duty can form the basis of a monopolization claim, assuming that the violation of the extrinsic obligation assists in the maintenance or acquisition of market power that the extrinsic legal obligation was designed to mitigate.

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11 *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 472 U.S. 451 (1992)
12 *See Bloch v. SmithKline Beckman Corp.*, No. Civ.A.82-510, 1988 WL 117927 (E.D. Pa. Nov. 1, 1998).
13 *See Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979)
14 *See Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)

RESPONSES TO POST-HEARING QUESTIONS FROM JOHN THORNE

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February 9, 2004

The Honorable F. James Sensenbrenner – Chairman
✓The Honorable John Conyers, Jr. – Ranking Member
The Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers:

Enclosed please find my responses to the post-hearing questions following your November 18, 2003 oversight hearing on "Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Continued Application of the Antitrust Laws in the Telecom Sector."

It was a pleasure to appear before your committee to discuss this important subject. If you have further questions, please feel free to call me at 703 351-3900 or you may contact Kathy Zanowic in Verizon's Government Relations office at 202 515-2561.

Sincerely,

John Thorne

cc: Robert Tracci
Stacey Dansky

Answers to questions submitted by Chairman F. James Sensenbrenner, Jr.

1. Do you believe that failures to comply with the obligations contained in the 1996 Act can also form the basis, or a partial basis, of a Sherman Act claim?

In *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, No. 02–682, 540 U.S.______ (Jan. 13. 2004), the Court held that the 1996 Act does not immunize incumbent local exchange carriers from antitrust scrutiny; at the same time, the Court also held that the regulatory duties imposed under the 1996 Act are not incorporated into the antitrust laws. The Court thus held that the "antitrust-specific saving clause" in the 1996 Act—which provides that nothing in the Act "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws"—preserves those claims that "satisfy established antitrust standards." Slip op. at 6 (internal quotation marks omitted); *see id.* at 7.

The Court then held that "alleged insufficient assistance in the provision of service to rivals"—as required by the 1996 Act—"is not a recognized antitrust claim" under the Supreme Court's existing precedents. The Court also noted—applying established antitrust principles—that antitrust analysis must take account of regulatory context and the degree to which regulation addresses anticompetitive concerns. In the case of the 1996 Act, the Court held that "[t]he regulatory framework that exists . . . 'significantly diminishes the likelihood of major antitrust harm.'" *Id.* (quoting *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990)).

2. As a legislative drafting matter, how do you think Congress could have been more clear in asserting its intent that the antitrust laws should continue to apply in the telecom sector?

3. Could the Trinko case undermine the clear intent of Congress in that regard?

The Court's opinion in *Verizon* v. *Trinko*, quoting from the antitrust-specific saving clause of section 601(b)(1) of the 1996 Act, affirmed that telephone companies "are not shielded from antitrust scrutiny. . . ." Slip op. at 6. Thus, the Court agreed with the Federal Communications Commission that "the saving clause preserves those claims that satisfy established antitrust standards." *Id.* (internal quotation marks and citation omitted). The Court left no doubt that the antitrust laws continue to apply in the telecom sector.

4. Do you support the Seventh Circuit Court of Appeals' analysis in *Goldwasser* v. *Ameritech*? Please explain if and how you disagree with this decision.

I believe that the case was correctly decided. The Seventh Circuit held that the antitrust laws had never before required companies to dismantle themselves at discounted prices for the benefit of their competitors—a holding that the Supreme Court now has affirmed. In response to the further question of whether the 1996 Act should change this analysis, the Seventh Circuit found that to expand antitrust laws to cover the same area as the 1996 Act would be a mistake, not only because excessive forced sharing risks deterring the independent competitive efforts that antitrust promotes, but also because any benefits of antitrust expansion are less apparent in an area already subject to the 1996 Act duties and because expanding antitrust could in fact interfere with the 1996 Act.

5. Would it violate Section 2 of the Sherman Act if Verizon denied competitors access to local loops or interconnection, because doing so would enable Verizon to make more money than it would by complying with regulatory requirements? Do you think loops and interconnection are essential facilities, and if not, what essential facilities do you think Verizon controls if any?

I do not believe that loops are essential facilities for reasons more fully explained in response to Ranking Member Conyers's second question, below.

The obligation that Verizon has under the 1996 Act to provide competitors access to local loops or interconnection at cost-based rates is a regulatory obligation that does not exist under the antitrust laws, for the reasons explained in *Verizon* v. *Trinko.*

It is worth emphasizing that if a denial of loops or interconnection were to occur, the 1996 Act guarantees a fast, judicially reviewable agency determination. And, if either party to an interconnection agreement or the regulators believe it advisable, the agreements can provide for expedited nonjudicial enforcement mechanisms. In the *Verizon* v. *Trinko* case, the specific service problem identified in the complaint, a flaw in new software to confirm that Verizon had fulfilled the orders which had been placed, was resolved promptly, with compensation paid to CLECs who experienced the problems. The Supreme Court reviewed this history in some detail in concluding that "the regime was . . . effective. . . ." Slip op. at 14.

6a. Does Verizon sell DSL to consumers who buy voice services from a competitor that uses unbundled elements? If not, does that mean that a customer who has Verizon DSL can't switch their voice service to a competitor and keep Verizon DSL? 6b. Not all competitors who sell voice even sell DSL, so couldn't such an approach deter the customer from buying voice from a competitor and tend to preserve Verizon's local market share?

Please refer to my response to Ranking Member Conyers's third question.

6c. Wouldn't Verizon be sacrificing profits gained from the DSL sale (which has been asserted by RBOC witnesses before Congress to be a more profitable offering currently and in the future than voice service) simply to deny the competitor a voice customer?

For Verizon to offer DSL on a stand-alone basis would require development of new systems and processes and would negate the efficiencies of offering a joint service. Thus, the additional costs associated with offering DSL service on a stand-alone basis would likely require Verizon to charge a significantly higher price for the product than it charges for DSL service offered over the same telephone line that Verizon uses to provide voice service. Moreover, the market for broadband service is extremely competitive. Accordingly, offering a higher-priced stand-alone DSL service would likely be neither profitable for Verizon nor good for consumers.

Verizon is currently in discussions with CLECs to see whether they would be interested in reaching an agreement with Verizon to provide DSL service to their voice service customers. Those commercial discussions are continuing and have not yet produced an agreement. Whether such a service would be profitable depends upon the agreement that the parties reach about price and other terms.

6d. As a legal matter, could Verizon rightfully refuse to sell DSL service to anyone who purchased wireless service from a Verizon competitor?

To my knowledge, this issue has never arisen. The closest legal authority I am aware of is the decision of the United States District Court for the Southern District of Florida which recently rejected claims that either antitrust or the general provisions of the Communications Act required BellSouth to sell stand-alone DSL service. *Levine* v. *BellSouth Corp.*, Order on Defendant's Motion To Dismiss, No. 03–20274–CIV–GOLD/SIMONTON (S.D. Fla. Jan. 27, 2004). The fact that Verizon does not have market power in either broadband or wireless service makes legal compulsion in this area unlikely.

7a. Does Verizon have a copy of the USTA documents prepared in connection with the closed-door dinner your CEO and other Bell CEOs had with the CEOs of manufacturers and, if so, could you share a full copy since one page is missing from the copies that many of us have seen?

I understand that there is no missing page. Rather, the page that appears to be a continuation of something new is missing a single word, as was the original.

7b. Did Mr. Seidenberg obtain antitrust advice in connection with the October 31 CEO dinner before attending?

Mr. Seidenberg obtains antitrust advice from Mr. William Barr, Verizon's General Counsel, and his staff.

7c. Has Verizon had any follow-up discussions with USTA, any manufacturer, or other Bell company since October 31 concerning contributions or support by manufacturers for the Bell position and, if so, what was the content of those discussions?

USTA and its members, including its manufacturer members, regularly discuss regulatory reform proposals.

8. What impact on facilities-based competition is there from the Bells usually having access to most multi-tenant office and residential buildings for free while competitors are denied access altogether or, when it is available, often have to pay significant sums to get it?

The premise of the question is incorrect. Bell companies do not have access to multi-tenant office and residential buildings for free while competitors are denied access altogether or have to pay significant sums to gain access. A comprehensive survey by the Real Access Alliance and available at http://www.realaccess.org/, prepared in response to the FCC's request for market information in *Competitive Networks Order*, 15 FCC RCD 22983, 2000 FCC Lexis 5672 (released October 25, 2000), found that there were multiple telecommunications providers for tenants in almost all of the multi-tenant buildings surveyed, with an average of 4.5 providers for small buildings, 2.8 providers for medium buildings, and 2.9 providers for large buildings.

Second, in many states like New York, Verizon has made a significant investment in house and riser cable in multi-tenant office and residential buildings. Thus, it often incurs significant costs over and above the costs incurred by competitors to serve such buildings. Also, as the "provider of last resort," Verizon is often required to incur expenses to serve buildings and market segments that its competitors deem financially unattractive.

Finally, it is clear that landlord access charges have not affected facilities-based competition in Verizon's favor. For example, in New York, a large proportion of the population works and lives in multi-tenant office and residential buildings. Despite Verizon's supposed advantage in such buildings, as of June 2003, incumbent telephone companies in New York had lost 3.5 million lines (28%) to competitors. Nationwide, incumbent telephone companies had lost 26.9 million lines (15%) to competitors. *See* FCC, *Local Telephone Competition: Status as of June 30, 2003*, Tables 6, 7, 8 (Dec. 22, 2003), at http://www.fcc.gov/Bureaus/Common—Carrier/Reports/FCC-State—Link/IAD/lcom1203.pdf

9. If the standard of exclusionary conduct articulated by the DOJ and Verizon in its amicus briefs had been adopted before the 1982 consent decree, would Verizon even exist, would the breakup of AT&T have been possible?

The Supreme Court's decision in *Verizon* v. *Trinko* makes clear that the standard of exclusionary conduct that it applied reflects traditional antitrust principles. Conduct that violated the antitrust laws before the 1996 Act was adopted continues to violate the antitrust laws.

In this regard, Verizon has taken pains to distinguish the conduct at issue in the AT&T cases from the conduct alleged by the plaintiff in *Verizon* v. *Trinko*. For example, in *MCI Communications Corp.* v. *AT&T Co.* 708 F.2d 1081 (7th Cir. 1983), AT&T had denied telecommunications services that it voluntarily provided to others (presumably at a profit) to certain long-distance competitors for the purpose of protecting monopoly profits in the long-distance market. As the Court made clear, nothing of a similar nature was alleged in *Verizon* v. *Trinko.*

Notably, the Seventh Circuit in *MCI Communications Corp.* v. *AT&T Co.* 708 F.2d 1081 (7th Cir. 1983), rejected antitrust claims that are comparable to the claims rejected in *Verizon* v. *Trinko*. The court of appeals rejected MCI's demand that AT&T be required to allow MCI to buy and resell AT&T's long distance service in order for MCI to fill out its new long-distance network; instead, to compete MCI had to build its own network. 708 F.2d at 1148–49. As the Seventh Circuit later explained, "AT&T's refusal to voluntarily assume 'the extraordinary obligation to fill in the gaps in its competitor's network did not suffice to support a finding that it was trying to maintain its monopoly of long-distance service by anticompetitive means." *Illinois ex rel. Burris* v. *Panhandle Eastern Pipe Line Co.,* 935 F.2d 1469, 1484 (7th Cir. 1991).

10. As you know, the essential facilities doctrine recognized by all circuit courts of appeal imposes an affirmative obligation upon monopolists to make facilities deemed essential to competition available to competitors. Do you believe that the standard that DOJ articulates in its brief would affect the application of the essential facilities doctrine?

The premise of the question is incorrect. Essential facilities liability has not been found "by all circuit courts of appeal," and the Supreme Court had never embraced the doctrine. Instead, courts have repeatedly found limitations that have led to the rejection of virtually every claim. For example, a defendant need not transform its business from a service business to a facilities rental business (*Laurel Sand & Gravel Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 544–45 (4th Cir. 1991)), and need not abandon its facilities or cease using them (*MCI*, 708 F.2d at 1133). Other courts have found that a defendant has not denied access, but rather has provided unsatisfactory accesswithout creating liability. *Ideal Dairy Farms, Inc.* v. *John Labatt, Ltd.*, 90 F.3d 737, 748 (3d Cir. 1996). Still other cases involve joint denial of access to a facility or collective activity, and hence are not unilateral refusals to deal at all. *Hecht* v. *Pro-Football, Inc.,* 570 F.2d 982 (D.C.Cir. 1977).

11. In your testimony, you discuss some of Justice Breyer's observations concerning the confluence of regulations and statutes. Do you think that the 1996 Act and antitrust laws are not coterminous remedies for anticompetitive harm?

The 1996 Act and the antitrust laws are very different. "The 1996 Act is in an important respect much more ambitious than the antitrust laws" in that it attempts to *"eliminate the monopolies"* of incumbent LECs; Section 2 "seeks merely to prevent *unlawful monopolization*." Slip op. at 16 (internal quotation marks omitted). For example, the 1996 Act, as implemented, prescribes low prices for forced sharing to attract entry, whereas "the antitrust laws . . . permit firms to charge whatever prices they can obtain in the marketplace." Solicitor General Brief in *Trinko* v. *Verizon Communications, Inc.*, 2002 U.S. Briefs 682, 18 (citing *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979) and other cases); *see also* FCC, *August 2003 Local Competition Order* ¶ 107 (in the 1996 Act "Congress chose to use a different standard" from the "essential facilities doctrine").

12. Does the 1996 Act provide standing to consumers harmed by the anticompetitive conduct of RBOCs or other telecom providers?

It would depend on the nature of the claim. If the claim is like the plaintiff's in *Verizon* v. *Trinko*, that the defendant breached a duty owed to another telecom firm, and that as a result, the consumer suffered injury, then the consumer's injury is derivative of the alleged injury to the other telecom firm. In these circumstances, standing should be denied. "[A] plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes* v. *Securities Investor Prot. Corp.,* 503 U.S. 258, 268–69 (1992). Although the Court did not reach this issue, three concurring Justices wrote that plaintiff lacked standing under this principle.

Answers to questions submitted by Ranking Member John Conyers, Jr.

1. Verizon and the other Bells are required in Section 271—the provision pursuant to which DOJ has evaluated long-distance entry applications—to maintain compliance with its terms once they gain long-distance entry at the risk of having that long-distance authority rescinded. Is it true that Verizon has asked the FCC to relax the provisions of the competitive checklist, which is a core part of Section 271, now that it has gotten long-distance entry?

Verizon petitioned the FCC to forbear from imposing unbundling obligations under Section 271 for those network elements that the FCC had already determined do not have to be unbundled under Section 251. Verizon subsequently narrowed its request for forbearance and is not currently seeking relief with respect to narrowband network elements, and is now prosecuting the application only with respect to broadband elements, such as fiber-to-the-premises loops, packet-switched features, functions and capabilities of hybrid loops, and packet switching.

In the *Triennial Review Order*, the FCC found that imposing unbundling obligations on broadband facilities is both unnecessary, because competing providers do not need access to those facilities, and affirmatively harmful, because it would "undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." Report and Order and Order on Remand and Further Notice of Proposed Rulemaking ("Triennial Review Order"), *Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers*, CC Docket Nos. 01–338 et al., FCC 03–36 (rel. Aug 28, 2003) ¶ 3. The Commission also found that "relieving incumbent LECs from unbundling requirements for those networks will promote investment in, and deployment of, next-generation networks," and "[t]he end result is that consumers will benefit from this race to build next generation networks, and the increased competition in the delivery of broadband services." *Id.* ¶ 272.

2. Do you think loops and interconnection are essential facilities and, if not, what essential facilities do you think Verizon controls?

No. Everything in the local exchange network is being duplicated by at least five classes of competitors: cable companies; wireless companies; former interexchange carriers, such as AT&T and MCI; CLECs; and other incumbent telephone companies. These firms in various ways purchase their own switching and transmission equipment, modify existing networks to offer telecommunications services, purchase rights of way on telephone poles or electric lines for building new connections, and use wireless equipment. The 1996 Act removed all legal barriers to local service competition, and guaranteed the right of interconnection, so that there is no need to build a network that reaches each and every customer in order to compete. With over 6 million independent loops (see FCC, *Local Telephone Competition: Status as of June 30, 2003* (December 2003), http://ftp.fcc.gov/Bureaus/Common—Carrier/Reports/FCCState—Link/IAD/lcomm1203pdf, Tables 3, 10), 147 million wireless lines (*Id.*, Table 13) and substantial independent investment in other facilities, such as switches (see FCC, *August 2003 Local Competition Order*, FCC 03–36, 436), it cannot be claimed that the incumbents' networks are essential.

Two recent developments emphasize this point. The first is the FCC's adoption, in November 2003, of intermodal local number portability ("LNP"), which requires local exchange carriers to transfer customers' land-line telephone numbers to wireless carriers. The second is the announcement by each of the major cable companies of their offering of "Voice over Internet Protocol" or VoIP telephony. With VoIP, customers use cable company lines for voice telephone service. Every function provided by the local network—including the transmission path to the home—is subject to multiple competitive supply and cannot be considered essential.

Moreover, as a matter of antitrust doctrine, the Supreme Court in *Verizon* v. *Trinko* rejected the possibility that the "essential facilities" doctrine might provide a basis for a claim of rivals to use the incumbents' networks. The Court noted that "the indispensable requirement for invoking the doctrine is the unavailability of access" to the essential facility and held that "where a state or federal agency has effective power to compel sharing and to regulate its scope and terms" there can be no "essential facilities" claim. *Id.* (internal quotation marks omitted).

3a. Does Verizon sell DSL to consumers who buy voice services from a competitor who uses unbundled elements? If not, does that mean that a customer who has Verizon DSL can't switch their voice service to a competitor and keep Verizon's DSL?

Currently, Verizon sells voice and DSL on a single phone line. A customer desiring to purchase DSL on that line also purchases Verizon's basic dialtone service on that line. The customer is free to deal with as many other voice providers as are desired on other phone lines, and Verizon has no policy of refusing to deal with customers who purchase voice services from other providers.

3b. Not all competitors who sell voice even sell DSL, so couldn't such an approach deter the customer from buying voice from a competitor and tend to preserve Verizon's local market share?

No. Competitors who wish to offer both voice and broadband services are free to do so. Voice CLECs have reached arrangements with DSL CLECs to offer combinations of such services. Cable companies offer both voice and broadband services as a package. The FCC has specifically found that forcing Verizon to provide DSL service to competitors' voice customers would be *anticompetitive*, because it would discourage competitors from developing competing combinations of voice and data services.

In the recent Triennial Review proceedings, CompTel (the Competitive Telecommunications Association) asked the FCC to require ILECs like Verizon to provide DSL service on the same line on which CLECs were providing voice service. The FCC rejected CompTel's request, explaining that that there is no impediment to competition once competitors have the ability, as they do, to lease the entire loop and make both voice and DSL service available over that loop, either alone or with another firm: voice CLECs can "take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer [. . .] DSL service." Triennial Review Order, *op. cit.*, ¶270. Requiring ILECs to supply DSL service to voice CLECs would be harmful to competition because it "may skew competitive LECs' incentives" and thus discourage development of "bundled voice and [. . .] DSL service offering[s]." Id. "[S]uch results would run counter to the goal of encouraging competition and innovation." Id.

4. Has Verizon entered the market and competed on a large scale against other Bell companies in territories adjacent to areas where Verizon is the incumbent carrier?

Verizon is actively competing in the home markets of other Bell companies, and has, for many years, been competing across the country against other incumbent local carriers in both the traditional local telephone market and in the wireless and long distance markets. Verizon's predecessor company, Bell Atlantic, was the first of the post-divestiture Bell companies to begin offering services outside its territory. *See United States* v. *Western Elec. Co.,* 797 F.2d 1082, 1089–90 (D.C. Cir. 1990).

In the past three and a half years, Verizon has spent well over $500 million to allow it to compete in providing both narrowband and broadband services in out-of-region areas. Pursuant to the terms of the FCC order approving the merger of Verizon and GTE in 2000, the company committed to spending at least $500 million. A September 2003 FCC order has confirmed that Verizon has not only satisfied the merger commitment, but has greatly exceeded it.

Verizon continues to compete actively in other Bell company markets. For example, Verizon Avenue provides a broad range of telecommunication services to multi-tenant unit facilities both inside and outside of franchise; our Enterprise business unit has instituted a program—Enterprise Advance network—which offers a robust portfolio of voice/data network services to large business customers who are located out-of-region; we have also served large business customers in near out-of-region areas in Washington State, Texas, and California in competition with other RBOCs for years; and the company has begun to offer voice over internet protocol service to small business customers out-of-region.

Verizon's wireless service is aggressively marketed nationwide and competes directly with other Bell companies' own landline local and long distance services. Most of Verizon Wireless's customers are located outside its affiliated ILEC territories.

5a. How has Verizon done as a long-distance carrier? How many lines does it serve and what sort of long distance market shares has it generated?

As of the end of the fourth quarter, 2003, Verizon had 16.6 million long distance access lines in service. Verizon Press Release, *Verizon Reports Solid Overall Fourth-Quarter Growth and Year-End Results, Based on Strong Fundamentals* (Jan. 29, 2004). There are approximately 185,700,000 access lines in the United States. *See* FCC, *Trends in Telephone Service*, Table 7.1 (Aug. 7, 2003), at http://www.fcc.gov/Bureaus/Common—Carrier/Reports/FCC-State—Link/IAD/trend803.pdf

5b. Has it sold long-distance aggressively out-of-region, or primarily in-region, and why?

Verizon is selling long distance service both in and out of region, in connection with its local services, its wireless services, and its enterprises services.

5c. Does Verizon have its own long-distance network that it uses to provide long-distance service or does it lease facilities from other carriers?

Verizon has its own network and also leases from other carriers.

6. What percentage of the wireless market for residents and for businesses does Verizon estimate it has in the areas where it is the incumbent local wireline service provider? What about in areas where Verizon is not the incumbent RBOC?

Verizon does not exchange the type of information with its competitors that would enable it to calculate shares in this fashion.

7. Has CLEC competition affected the prices and bundles offered by Verizon and, if so, how?

Verizon's service offerings in the marketplace are driven by an understanding of our customers' requirements as well as responses to the offerings of all of our competitors. These competitors can be facilities based and other local exchange companies, wireless providers, cable companies, long distance companies, or the next generation of VoIP competitors that provide voice communication services by riding "on top" of a customer's existing broadband connection.

Based on customer requirements and competitive offerings, Verizon tries to provide a variety of alternative offerings to our customers that will cause our customers to stay with us, and cause those who have left us to return. These offerings include: customized calling plans (with or without long distance), packages of custom calling features that offer significant discounts over stand-alone rates, and bundles that provide our most attractive rates for customers who purchase combinations of local, regional toll, long distance, broadband, and/or wireless services from Verizon and demand the convenience of a single bill for these services.

RESPONSES TO POST-HEARING QUESTIONS FROM CHRISTOPHER J. WRIGHT

Thank you for the opportunity to respond to the following questions.

Questions from Chairman F. James Sensenbrenner, Jr.

1. In your testimony, you discuss the pro-competitive benefits of Section 271 of the Telecommunications Act. Please elaborate on how this provision has expanded competition and consumer choice in the telecom sector.

Section 271 has proven to be the most effective regulatory tool in opening local markets to competition. The basic problem is that, in order to open those markets to competition, the four Bell Operating Companies ("BOCs") must cooperate with their rivals. That is because the BOCs have what the Supreme Court called "an almost insurmountable competitive advantage" because of their control of essential facilities. *Verizon Communications Inc.* v. *FCC,* 535 U.S. 467, 490 (2002). Congress responded in the 1996 Telecommunications Act by requiring BOCs to lease their essential facilities to competitors.

More specifically, Congress enacted Section 271, which gives the BOCs an incentive to open their markets to competition: It replaced the judicial decree that barred the BOCs from providing long-distance service with rules providing that, after the BOCs took a series of affirmative steps to open their markets, they could provide long-distance service. Most importantly, the "competitive checklist" in Section 271 requires the BOCs to lease four network elements (loops, transport, signaling, and switching) to competitors on nondiscriminatory terms and at cost-based rates, thus establishing a "floor" that permits competitors to enter local markets on the same terms that BOCs may enter the long-distance market. In my opinion, obtaining authorization under Section 271 was the most important factor motivating the BOCs to take the steps they have taken to permit local competition to develop.

Yet the FCC recently concluded in its *Triennial Review Order* that BOCs do not have to provide *nondiscriminatory* access at *cost-based* rates to all network elements under Section 271, a ruling that competitors have challenged. *United States Telecom Association* v. *FCC,* D.C. Cir. No. 00–1012 (to be argued Jan. 28, 2004). The BOCs also asked the FCC to "forbear" from requiring them from providing access to switching. While the FCC denied that request, the BOCs have challenged it. *Verizon Telephone Companies* v. *FCC,* D.C. Cir. No. 03–1396 (to be argued Apr. 22, 2004

2. Do you think Section 271 of the 1996 is a sufficient safeguard against anticompetitive conduct in the telecom field or are the antitrust laws necessary as well?

I do not think Section 271 is sufficient by itself. In addition to the FCC's faulty implementation of Section 271 in the *Triennial Review Order* and the BOCs' forbearance request, additional remedies are particularly needed because each BOC has now obtained authority pursuant to Section 271 to provide long-distance service in each state that it serves. Although Section 271 requires the BOCs to continue to lease their essential facilities to competitors, it will be necessary for competitors to call violations to the attention of regulators and persuade them to take action, and the administrative remedy is likely to be a direction to the offending BOC to do what it already was supposed to do. (And the FCC has construed Section 271 *not* to require nondiscriminatory access at cost-based rates.) Proper application of the antitrust laws to ensure that the BOCs do not undermine the competition that has developed in order to maintain and extend their monopolies is therefore now more important than ever.

3. You mention in your remarks that the *Goldwasser* case is an unfortunate precedent. Why is this so?

In my view, there is *dicta* in *Goldwasser* that is unfortunate. I do not disagree with the *holding* of the case—that an antitrust plaintiff must show more than a violation of the 1996 Telecommunications Act. But the Seventh Circuit made some statements in a portion of its opinion that suggest that, if an action violates the 1996 Telecommunications Act, it does not also violate the antitrust laws. That is simply not compatible with the antitrust savings clause that Congress adopted.

4. You state in your testimony that competition would never take place in the telecom sector if the "profit sacrifice test" articulated by the DOJ is embraced by the Court. Can you elaborate on this point?

The government takes the position that the only way a plaintiff may show a violation of the antitrust laws in this context is by showing that it is sacrificing short-term profits. But a BOC does not need to sacrifice any profits in order to maintain and extend its monopolies. Providing discriminatory access to essential facilities will drive up competitors' costs and benefit the BOC in the short-run as well as the long-run. Contrary to the government's position, the antitrust laws do not permit monopolists to exploit their monopoly power to maintain and extend their dominance. Rather, as the Supreme Court stated in *Eastman Kodak Company* v. *Image Technical Services, Inc.*, 504 U.S. 451, 482–83 (1992), quoting long-standing precedent, "[t]he second element of a § 2 claim is the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.' "

5. Do you think the suit brought by the Government that resulted in the break-up of the Bell system might have proceeded differently if the Trinko standard was the law then?

The Bell System case illustrates the problem with the government's new standard. The Bell System could have shown that it was not sacrificing any short-term profits by providing discriminatory access to its essential facilities. Rather, the Bell System was attempting to maintain its retail dominance in the long-distance market and, of course, a retail monopoly is more lucrative than providing retail service in a competitive market. Therefore, under the government's new standard, the Bell System would not have been liable under the antitrust laws. The Bell System was attempting to foreclose competition—which, under *Kodak*, was enough to satisfy the antitrust laws—but it was not sacrificing short-term profits to do so.

Questions from Ranking Member John Conyers, Jr.

1. If competitive switches were available, do you think the ILECs presently have the capacity to cut-over smoothly and quickly to those switches the several million customers being served by competitors as well as the many customers who are switching their service to competitors?

It is absolutely clear that the ILECs are not currently able to transition residential and small business customers to competitors' switches in sufficient numbers. As the New York Commission recently told the FCC, Verizon's hot cut performance would have to increase by 4400% if competitors were required to use their own switches. It would take 11 years just to move existing customers served by competitors from ILEC switches. *See Triennial Review Order,* FCC 03–63 (Aug. 21, 2003), ¶469. If competitors are not permitted to lease switching from ILECs, residential and small business customers will have few or no competitive alternatives.

2. What has happened with regard to competition and pricing to the market for special access since deregulation? Is further regulation now required in the special access market?

Rates for special access have risen and competition has decreased. But that unfortunate result may be remedied by enforcing the provisions of the 1996 Telecommunications Act providing that any telecommunications carrier may lease network elements at cost-based rates to provide any telecommunications service, including special access. Yet in its *Triennial Review Order* the FCC denied long-distance companies the right to lease network elements to provide special access. Now that the BOCs have entered the long-distance market, that allows them to "price squeeze" long-distance companies by charging them supra-competitive rates to connect their long-distance lines to customers. The result is that competitors are unfairly disadvantaged in competing in the developing market for "bundled" telephone service, which includes local, long-distance, and enhanced services such as voicemail. Of course, consumers therefore have fewer desirable alternatives.

The competitors have challenged this aspect of the Commission's *Triennial Review Order*, and that challenge is pending. *United States Telecom Association* v. *FCC*, D.C. Cir. No. 00–1012 (to be argued Jan. 28, 2004). Further legislative action may be required if the court does not correct the FCC's error.

3. Has the DOJ *ever* won a Section 2 case where DOJ suggested, *and* the Court accepted, the definition of exclusionary conduct, including the sacrifice test, that DOJ has urged in *Trinko*? I know that Mr. Pate may have mentioned Microsoft, but the D.C. Circuit sitting en banc instead seemed to apply unanimously a balancing or proportionality test, correct? How hard would it be for the government to prevail in a Section 2 case under the DOJ's *Trinko* standard, and would that constitute a departure from existing precedent?

I am aware of no case where a court applied the government's sacrifice test and the government prevailed—and I doubt the government could prevail under the standard it proposes except in a case involving predatory pricing. In *Microsoft*, as you state, the court did not apply the sacrifice test—it analyzed "whether the monopolist's conduct on balance harms competition." *United States* v. *Microsoft Corporation,* 253 F.3d 34, 59 (D.C. Cir. 2001) *(en banc)*. Under the sacrifice test, the outcome in the *Kodak* case decided by the Supreme Court in 1992 and the Court's earlier decision in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), would have been different. In neither of those cases did the monopolist sacrifice short-term profits. Rather, as is the case in the telecommunications industry today, the incumbent monopolists were attempting to maintain and extend their dominance by refusing to deal with competitors because it would be more profitable to maintain a retail monopoly than to compete.

4. Do you think the suit brought by the Government that resulted in the break-up of the Bell system might have unfolded differently if the *Trinko* standard was the law then?

As stated above in response to the fifth question from Chairman Sensenbrenner, the Bell System would have prevailed if the standard proposed by the government in *Trinko* had been the law then. The Bell System could have successfully defended on the basis that, although it was undermining competition from would-be long-distance competitors by refusing to lease essential facilities to them on nondiscriminatory terms, it was not sacrificing short-term profits.

5. What impact, if any, do you think it would have on ILEC behavior if they win *Trinko* on the merits and get a new Section 2 standard adopted by the Court, perhaps the standard urged by DOJ?

Adoption of DOJ's standard would likely have a devastating impact on the development of competition in local telephone markets, especially since all of the Section 271 applications have now been granted. As I have stated, until the last long-distance application was approved last month, the BOCs had an incentive to provide essential facilities to their competitors on reasonable terms so that they could enter the long-distance market. Now that the BOCs have entered the long-distance market, regulators must rely primarily on remedies that Chairman Powell has repeatedly stated are ineffective. I nevertheless urge the FCC to vigorously enforce Section 271(d)(6)—which requires the BOCs to continue to provide nondiscriminatory access to their facilities. And I urge this Committee and DOJ to advise the FCC to do so and to resist the BOCs' flood of "forbearance" petitions asking the FCC to stop enforcing Section 271's requirements. But there is absolutely no question that the availability of treble damages in antitrust actions is necessary to deter the BOCs from undermining competition by refusing to deal with competitors or providing discriminatory access to their essential facilities.