



**TESTIMONY OF RONALD J. BINZ
PRESIDENT, COMPETITION POLICY INSTITUTE**

**BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY**

**CONCERNING H.R. 2533,
THE "FAIRNESS IN TELECOMMUNICATIONS
LICENSE TRANSFER ACT OF 1999"**

NOVEMBER 3, 1999

**Competition Policy Institute
1156 15th Street NW, Suite 520
Washington, DC 20005
202-835-0202**

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Mr. Chairman and Members of the Committee, my name is Ronald Binz. I am President of the Competition Policy Institute (CPI). CPI is a non-profit organization that advocates state and federal policies to bring competition to telecommunications and energy markets in ways that benefit consumers. Since 1996, CPI has participated in numerous cases before the Federal Communications Commission (FCC), state regulatory commissions and the courts. In three and a half years, CPI has made over one hundred filings at the FCC in more than sixty different matters.

My background is consumer advocacy. For eleven years until 1995, I was the state utility consumer advocate in Colorado, representing consumers before state regulators and the courts. I have served on the Network Reliability Council to the FCC and I currently serve as co-chair of the North American Numbering Council, which advises the FCC on telephone numbering policies. With this background, I am very familiar with regulatory processes and how they affect consumers and the competitive marketplace. Thank you for the opportunity to testify today on H.R. 2533, the "Fairness in Telecommunications License Transfer Act of 1999."

I. Introduction

I wish to begin by congratulating the Committee for holding this hearing to examine the process by which the FCC considers mergers of telecommunications providers. This is a most

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

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

But an expeditious review must not mean an inadequate review. Let me be clear: we do not advocate less scrutiny of mergers by the FCC, only that the agency focus on getting the job

done quickly and efficiently. If Congress acts to modify the law in this area, as this legislation proposes to do, this should not result in lower review standards. Instead, legislation should focus on ways to streamline the review process so that companies proposing to merge get timely answers from regulators. Indeed, we are deeply concerned about the rapid consolidation of major players in the telecommunications marketplace and strongly support the FCC's continued "public interest" review of telecommunications mergers through their authority over license transfers. In cases where a merger will hinder competition, we hope that the FCC will begin to say 'no' to such mergers and say it quickly.

With this important caveat, CPI supports one of the major elements of H.R. 2533. We think it is appropriate for Congress to ask the FCC to act on mergers within reasonable time frames. Ultimately this will benefit both the industry and its consumers. For that reason, we endorse the provision of H.R. 2533 that requires the FCC to adopt and abide by rules that set out a schedule for the review of license transfers that occur in the course of a merger.

However, we think two other provisions of H.R. 2533 could potentially weaken the FCC's authority to review telecommunications mergers, to the detriment of consumers. First, Congress will err if it eliminates the FCC's concurrent authority under the Clayton Act. Although the Commission has preferred to use its general statutory authority over the transfer of licenses instead of its Clayton Act authority, it may become more appropriate to use the provisions of the Clayton Act as the telecommunications industry moves away from a regulated monopoly structure. Repeal of this authority may also provide an argument against the Commission's authority to review the competitive effects of mergers. Second, we have concerns about the H.R. 2533 requirement that the Commission define by rule what it will consider in its

public interest review of a license transfer. While the Commission's public interest review should not be an *ad hoc* exercise, neither should it be made inflexible and ineffective by being shoe-horned into a detailed definition designed to cover all cases. To effectively protect consumers by promoting competition, the Commission's public interest review must be able to evolve with changing telecommunications technologies and markets. It should be, in the words of the Supreme Court, "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."

Following a review of the state of local exchange competition and the effect that mergers might have on the growth of competition, I make three points about H.R. 2533:

- It is reasonable to require the FCC to create time lines to ensure prompt consideration and resolution of merger applications.
- This legislation should preserve the flexibility needed by the FCC to conduct thorough merger reviews and impose conditions that serve the public interest. Congress should not require the FCC to specify every detail of its public interest analysis in advance since mergers vary in design and importance to competition, as will the remedies.
- Congress should not eliminate the Commission's authority under the Clayton Act, an effect of H.R. 2533 as presently drafted.

II. The Status of Local Telecommunications Competition

Before turning to the specifics of H.R. 2533, I would like to review the status of local exchange competition. To see why the review of telecommunications mergers is important to competition and consumers, we must size up the emerging competitive markets. Consider these facts:

- **Number of CLECs:** The number of competitive local exchange carriers (CLECs) entering the market has grown significantly since passage of the 1996 Act. As an

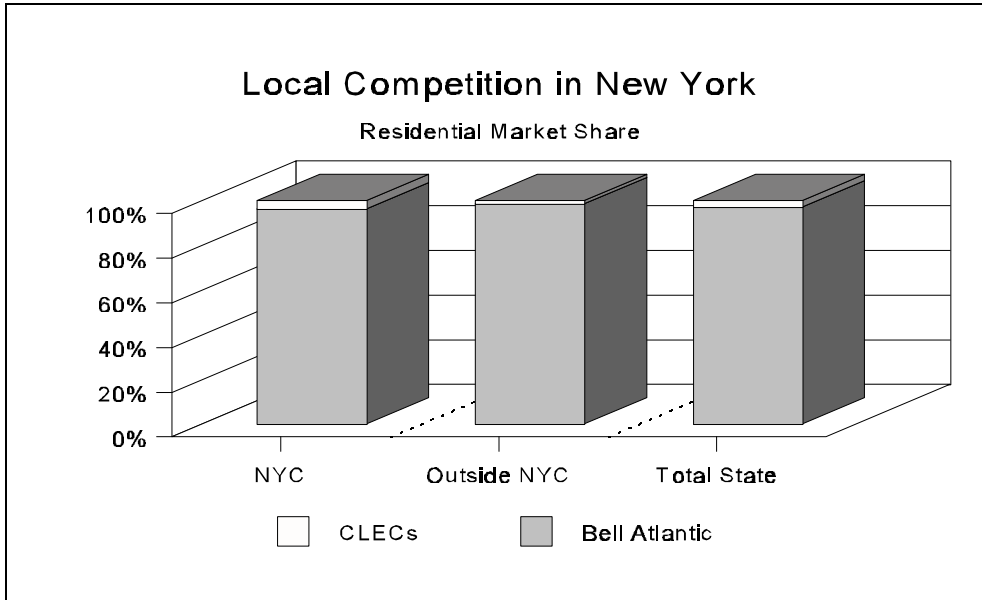
example, the FCC reports that there are now 158 CLECs holding telephone numbering codes, compared with only 13 at the end of 1995.

- **Access Lines Served by CLECs:** Merrill Lynch estimates that the number of access lines served by CLECs grew from 1.9 million at the end of 1997 to 6.2 million in July 1999. This equates to a market share of 3.4%. The FCC's industry analysis division reports similar estimates of market share.
- **CLEC Revenues:** At the end of 1998, the FCC estimates that CLECs had revenues of approximately \$3.6 billion, constituting 3.5% of the local exchange market. On a different basis, Merrill Lynch estimates CLECs have won about \$3 billion of the \$109 billion local market, or about a 2.75% share of local exchange revenues.

There is good news and bad news in these numbers. Local telephone competition is growing steadily and it appears that it will continue to expand in the next few years. This means that the local competition goals of the Telecommunications Act of 1996 are beginning to be met, albeit slowly. On the other hand, these statistics show that competitive carriers have just barely made a dent in the local exchange market. Despite the encouraging growth, it will be at least several more years before the local telephone market can be said to be competitive; collectively the CLECs serve a small percentage of the local telephone market, primarily business customers.

Local competition has an especially long way to go for residential customers. For example, in New York state, arguably among the most competitive local markets in the country, competitors today serve only about 3 percent of the state's residential access lines. Outside the New York City metropolitan area, this percentage plunges to about 1.5%.¹ Here is a graphical presentation of that data:

¹These percentages were derived from information filed with the FCC by Bell Atlantic in support of its application for authorization to provide interLATA service in New York.



Another indication that the residential market does not yet offer consumers a competitive choice for local service comes from results of a survey of 1000 New York consumers conducted recently by CPI. In that survey, nearly two-thirds of New Yorkers reported either that they have only one choice of local carrier or that they did not know if a competitive carrier was available; of those who said they had a choice of more than one local carrier, 40% could not name a competitor to Bell Atlantic. These results are even stronger outside of the New York City area: 81% of New York residents outside of the New York City area were unaware of a CLEC in their area; of those who said that a CLEC served them, more than half could not name a competitor to Bell Atlantic.²

Another way to illustrate the pace of local competition nationally is to consider how many

²The *New York Telephone Competition Survey* is available on CPI's website, www.cpi.org.

access lines competitors will have to gain each day in order to make significant inroads into the incumbents' market share. CPI estimates that **CLECs will need to win 42,000 new customer lines every business day for the next five years simply to capture just 30% of the nation's access lines.** This is a tall order. According to Merrill Lynch, CLECs added an estimated 920,000 lines in the second quarter of 1999, or about 14,000 lines per business day. This means the CLECs are far behind the 42,000/day pace needed to secure just 30% of the local market within five years.

III. Consumer Concerns About Mergers

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

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

Since passage of the 1996 Act, the FCC has been presented with four major mergers

among large incumbent local telecommunications providers: SBC/Pacific Telesis, Bell Atlantic/NYNEX, SBC/Ameritech and Bell Atlantic/GTE. This last merger is now pending; the FCC approved the first two mergers with only a few conditions attached and recently approved the SBC/Ameritech merger with additional conditions.

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

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

We took a similar position on the SBC/Ameritech merger, asking the Commission to deny the merger until the company had complied with the market-opening requirements of section 251 of the Communications Act. Unfortunately for consumers, the FCC chose not to require this suggested pre-condition to approval of the Bell Atlantic/NYNEX merger or the two SBC

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

mergers. In our view, the Commission missed a substantial opportunity to pry open local markets, bringing more competitive choices to consumers.

IV. The “Fairness in Telecommunications License Transfer Act of 1999”

In this context of a nascent local exchange market and increasingly large mergers of telecommunications companies, we now discuss this proposed legislation. H.R. 2533 would have these three major effects:

- The legislation would require the Commission to adopt time frames within which it would act on applications for transfer of licenses needed to accomplish a merger between telecommunications companies;
- H.R. 2533 would require the FCC to define in advance by rule the meaning of the “public interest” standard used to review mergers;
- The legislation would strip the Commission of its concurrent authority with the Department of Justice under the Clayton Act.

A. It is reasonable to require the FCC to adopt workable time lines to ensure prompt consideration and resolution of merger applications by the FCC.

As stated earlier, CPI supports the first feature of H.R. 2533. The changing telecommunications marketplace argues strongly for regulation that is as efficient and effective as possible. H.R. 2533 requires the FCC to adopt rules that set out time lines within which the FCC must act to approve or reject the transfer of licenses necessary to complete a merger. CPI agrees that both the merger applicant and other interested parties should have a predictable schedule on which they may assume the Commission will make its decision in the case.

State regulatory agencies typically operate under similar time lines for cases that approach or exceed the complexity of large telecommunications merger cases. Although state commissions now hear cost-of-service cases less frequently than before, it is common to find requirements that

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

While many state regulators conduct some of their processes under time lines, competition requires state regulators to move even more quickly to resolve issues that are central to the development of telecommunications competition. In many cases, the old deadlines are not sufficient for the realities of the competitive marketplace. Competition can be damaged substantially, for example, if new competitors must wait extended periods of time for resolution of complaints alleging discrimination in access to essential systems. Recently the Telecommunications Committee of the National Association of Regulatory Utility Commissioners solicited recommendations for regulatory "best practices." CPI submitted the following recommendation:

The role of telecommunications regulators is changing from an arbiter of rates to that of an umpire on the field of competition. Because successful inter-carrier transactions are so important to competition, regulators should modify their practices for handling complaints among telecommunications providers. Commissions should modify traditional procedures to try to limit litigation and produce a decision in such cases much more rapidly.

*This suggestion entails several possible elements, including: 1) a “quick look” process in which a complainant and respondent are advised by a settlement judge of the likely outcome of their case; 2) **sharply expedited procedures to arrive at a decision**; 3) mandatory mediation for complaints; 4) the ability of a commission to award litigation costs to a prevailing party; and 5) the ability of a commission to sanction parties if it determines that a complaint or response constitutes harassment.*

*The basic suggestion is that commissions “think different” about their process of these complaints. While regulatory lag might have provided some correct incentives during cost-of-service regulation of a monopoly, it is injurious to competition. **Incumbents and new entrants alike prefer the certainty of a quick decision, since competitive market conditions change rapidly.***

*The practice would likely unburden state commissions’ dockets, speed up the resolution of certain carrier-to-carrier complaints, reduce legal costs and sharpen the incentives of regulated companies to comply with contracts, arbitrated agreements, and commission rules. **Most importantly, it would provide competing companies with a timely outcome of a complaint, reducing risk and uncertainty for carriers and their customers.***⁴

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

B. Congress should not tie the FCC’s hands by inappropriately limiting its “public interest” standard in reviewing proposed mergers.

H.R. 2533 requires the FCC to adopt rules defining the terms “public interest,” “public convenience and necessity” and “public interest, convenience and necessity” when applied to

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

proceedings in which the FCC considers the transfer of licenses or the acquisition and operation of lines necessary to accomplish a merger. While there may be some merit in the agency describing the general scope of its intended public interest review before a case is brought before the Commission, there are clear limits to the applicability and usefulness of this exercise. We are concerned that this statutory requirement might, in practice, severely limit the FCC's ability to scrutinize mergers.

There are several reasons why a complete "definition" of the public interest standard may not be possible. First, mergers differ widely in their structure and their effects on competitive markets. A merger of a two wireless carriers presents different issues than a merger between two wire line carriers. Similarly, the merger of two long distance companies presents different issues than a merger of two local exchange companies. It is difficult to imagine how a single definition of "the public interest" can cover all such cases.

Second, telecommunications technologies are changing rapidly, causing the definitions and boundaries of telecommunications markets to change. A definition with any specificity would quickly be out of date. Third, the differences in mergers will also cause differences in the ameliorative conditions necessary (say) to promote competition in different telecommunications markets. Once again, a single definition of the public interest could not be expected to translate into a fully predictable set of outcomes for merger applicants. On the other hand, it is very easy to imagine how an attempt to operate with a single definition will lead to prodigious amounts of litigation when the FCC attempts to apply the definition in disparate fact situations.

In reviewing the Commission's application of the public interest standard in past cases, the courts have placed boundaries on the Commission's public interest consideration, but have also

stressed the importance of flexibility in using this standard. First, the Supreme Court requires that the FCC implement the public interest test in a manner consistent with “the purposes that Congress had in mind when it enact[s] legislation.”⁵ This means that Congress can be assured that the FCC will not wander too far afield when applying the public interest test to mergers. In particular, its merger reviews must promote the “pro-competitive, deregulatory” purposes of the Telecommunications Act of 1996. Second, the Court has stressed that the Commission must be permitted to use the public interest standard in a way that examines all factors relevant to the matter before the Commission.⁶ Further, in applying the public interest test, the FCC can accord greater weight to some factors than to others.⁷

While it may be argued by telecommunications carriers that “fair play” requires the Commission to nail down in advance what it will consider in determining whether the public interest is served, there are clear limits to the Commission’s ability to set out such ingredients beforehand in detail. We agree that regulators should not use their broad public interest authority to move the goal posts or create a regulatory trap. On the other hand, this aspect of regulation is anything but mechanical and is not susceptible to a formula or algorithm. We respectfully recommend that Congress not require the FCC to define the public interest in any significant

⁵ See, *NAACP v. FPC*, 425 U.S. 662, 670 (1976); see also, *Western Union Div. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949) (“The standard of ‘public convenience and necessity’ is to be so construed as to secure for the public the broad aims of the Communications Act.”), *aff’d* 338 U.S. 864 (1949).

⁶ *FCC v. Pottsville B. Co.*, 309 S.S. 134 (1940) (The public interest “serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.”) See also, *FCC v. WNCN Listeners Guild*, 450 582, 593 (1981)

⁷ See, *FCC v. RCA Comm., Inc.*, 346 U.S. 86,90 (1953) (“The statutory [public interest] standard no doubt leaves wide discretion and calls for imaginative interpretation.”).

amount of detail. We think that the combination of legislative direction in the substantive law, existing administrative procedural requirements and the oversight of the courts provides an appropriate check on the Commission's discretion in applying the public interest standard in these cases.

C. Congress should not eliminate the authority of the Federal Communications Commission under the Clayton Act.

Under current law, the FCC has concurrent jurisdiction with the Department of Justice under the Clayton Act to bring an action against a telecommunications provider that it believes has violated section 13, 14, 18 or 19 of the Clayton Act. H.R. 2533 eliminates that jurisdiction, in the process restoring the concurrent jurisdiction to the Federal Trade Commission.

It would be hard for a telecommunications provider to claim the FCC has abused this authority under the Clayton Act since apparently the agency has never used that authority. For purposes of merger reviews, the Commission has preferred to use its authority granted in the Communications Act.⁸

There are several reasons why Congress should not act to eliminate the FCC's jurisdiction under the Clayton Act at this time:

- 1) Like the other agencies accorded concurrent jurisdiction with the Department of Justice under the Clayton Act (the Surface Transportation Board, Secretary of Transportation, Federal Reserve Board of Governors), the FCC is an expert agency that is best equipped to assess the state of competition in the markets it regulates.
- 2) While the Clayton Act authority has not been used previously by the FCC, the changing nature of the telecommunications industry may make its use more appropriate in the future. As the telecommunications industry moves from regulated monopoly structure to an unregulated competitive one, the elements of the Clayton Act may become relatively

⁸See, for example, the Commission's discussion of its authority in its decision approving the Bell Atlantic/NYNEX merger.

more useful to the FCC in performing its role.

- 3) Eliminating the Commission's Clayton Act authority may provide a telecommunications provider with a legal argument that the FCC can no longer consider the competitive aspects of mergers. This unintended effect would work against the interest of consumers in such proceedings as the Commission has just completed involving mergers of large incumbent local exchange companies. This would be especially damaging at this stage of development of local competition.
- 4) There has not been a problem with the concurrent jurisdiction to date and hence no reason for changing current law.

VI. Conclusion

CPI appreciates the opportunity to testify in this hearing on H.R. 2533. We believe that it is good regulatory practice and good law for regulators to perform their functions as quickly and as efficiently as possible. While this has always been true, it is especially important now, as we move from an era of regulated industries into one in which market forces will be relied upon to constrain prices and provide consumers with choice.