

**TESTIMONY OF RONALD J. BINZ
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**BEFORE THE SENATE JUDICIARY COMMITTEE
ANTITRUST, BUSINESS RIGHTS AND COMPETITION SUBCOMMITTEE**

CONCERNING S. 467, THE ANTITRUST MERGER REVIEW ACT

APRIL 13, 1999

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

I. Introduction

I wish to begin by congratulating the Committee for holding this hearing to examine the process by which the FCC considers mergers of telecommunications providers. This is a most important issue. In this testimony I describe the state of local telephone competition and explain

how significant mergers between telecommunications companies may affect the health of local competition. Our conclusion is that such mergers can either hold great promise for consumers or threaten great harm to their interest. On the one hand, some mergers can actually assist competition by putting together industry players with the complementary resources needed to break into markets dominated by an incumbent or small group of service providers. Some mergers can also benefit consumers if companies are able to spread fixed costs over more unit sales, reducing costs to consumers. Such cost advantages are 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 will determine whether consumers see the promise of the Telecommunications Act of 1996.

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

But let me be clear: I am not advocating less FCC scrutiny of mergers, only that the agency focus on getting the job done quickly and efficiently. The result of this legislation should not be that the standards for merger review are lowered. Indeed, we are deeply concerned about

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

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

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

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

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

Next, I suggest some ways in which the legislation can be improved. Finally, I comment

on the competitive and consumer issues raised by the two pending mergers of large local exchange companies, SBC/Ameritech and Bell Atlantic/GTE.

II. The Status of Local Telecommunications Competition

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

- **Number of CLECs:** The number of CLECs entering the market has also grown significantly since passage of the 1996 Act. As an example, the FCC reports that there are now 146 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 has grown from 2.1 million at the end of 1997 to 4.7 million at the end of 1998. The FCC's industry analysis estimates CLECs serve between 4 and 5 million switched access lines, or about 3% of nationwide switched access lines. A recent report by Salomon Smith Barney Holdings Inc. (New York) notes that competitive service providers have surpassed the Bell Companies in growth of business access lines. The report notes the Bell Companies added 461,000 new lines in the first quarter of 1998, while competitors gained 498,000. The competitors' gains were more than triple the number of business lines they added in the first quarter of 1997.
- **CLEC Revenues:** The CLECs took in approximately \$5.4 billion (annualized) revenue in the 4th quarter of 1998, compared to \$2.8 billion in the 4th quarter of 1997.¹ This information is confirmed by a recent report issued by the FCC that estimates the revenues of the CLECs doubled from 1996 to 1997 to about \$3 billion.
- **Capital Investment by CLECs:** As reported in a telecommunications trade magazine, local competitors attracted more than \$8 billion in high-yield and equity financing, according to brokerage house Bear, Stearns & Co. Inc. (New York) in 1997 alone. That is

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

almost a sixfold increase from the CLEC capital raised in 1995 and nearly a 30 percent jump from 1996's level.²

Despite these encouraging statistics, it will be several years before the local telephone market can be said to be competitive: collectively the CLECs still serve a small percentage of the local telephone market, primarily business customers. Local competition has a long way to go. One way to illustrate the pace of its development is to consider how many access line competitors will have to gain 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 gained an estimated 670,000 lines in the third quarter of 1998, or about 10,300 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. The FCC's Role in Promoting Local Competition

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

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

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

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

- a. that the incumbent local exchange company must make its operations support system available to competitors for nondiscriminatory access to its network;
- b. that competitors should be able to purchase and assemble network elements without providing their own facilities;
- c. that network elements should be priced at their forward-looking economic costs;
- d. that competitors should be able to "pick and choose" among elements of an arbitrated agreement.

The 1996 Act and the *Local Competition Order* allows new competitors to experiment with a variety of different business models for entering the local market. As a result, some new entrants are providing service by resale, others by assembling unbundled network elements, and others by constructing their own facilities and interconnecting with the ILEC network. Some CLECs are deploying switches and reselling the ILEC loop, others are deploying fixed wireless services and interconnecting with the ILEC network to terminate calls, while others seek to lease

the ILEC loop solely to provide competitive data services.

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

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

Although the FCC has denied each of the section 271 applications filed to date, the agency is on firm grounds for its denial in each case. CPI agrees that the applicants have not met the checklist requirements, although substantial progress has been made in some states. The efforts

of some of the BOCs to work through state commission requirements on network-opening requirements, such as non-discriminatory access to operating support systems, shows that the proper enforcement of section 271 can be effective in promoting full compliance with the Act.

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

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

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

Since passage of the 1996 Act, the FCC has been presented with four major mergers among large incumbent local telecommunications providers: SBC/Pacific Telesis, Bell Atlantic/

NYNEX, SBC/Ameritech and Bell Atlantic/GTE. The last two mergers are now pending; the FCC approved the first two mergers with only a few conditions attached. There is now considerable controversy whether the merger partners have met the conditions attached to their merger approval.

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

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

Unfortunately for consumers, the FCC chose not to require this suggested pre-condition to approval of the Bell Atlantic/NYNEX and SBC/Pacific Telesis mergers. In our view, the Commission missed a substantial opportunity to pry open local markets, bringing more competitive choices to consumers. In a different context, the efforts of the New York Public

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

Service Commission to achieve market-opening results with Bell Atlantic in New York illustrates how regulatory leverage can be applied. As I discuss later, the two pending mergers again offer the FCC the ability to require full compliance with the 1996 Act.

IV. The Antitrust Merger Review Act

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

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

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

State regulatory agencies typically operate under similar time lines for cases that approach or exceed the complexity of large telecommunications merger cases. Although state commissions now consider cost-of-service cases less frequently than before, it is common to find requirements that they act in such cases within fixed time lines. For example, the Colorado Public Utilities Commission is permitted 210 days to conduct investigative hearings on a utility's request to change rates. While I have not conducted a recent study, I know that similar requirements apply to many state regulatory commissions. In multi-party litigation before state PUCs, these time lines have the effect of sharply focusing the parties' attention on the rate application, shortening discovery 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. Ultimately, it is difficult for regulators to be creative by using regulatory delay. It is far preferable for consumers and telecommunications providers alike if regulators make the hard choices and make them expeditiously.

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

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

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

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

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

It is not clear at this point how productive this new process outlined by Chairman Kennard

will be and whether it will be applicable to other mergers.⁵ Similarly, it is not clear whether this “negotiation” (together with the FCC’s standard merger review process) could be completed within the time frames in the legislation. However, it is clear that the Committee should factor such questions into its analysis. Later in the testimony, we suggest a modification to the bill that addresses this issue.

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

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

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

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

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

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

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

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

Third, CPI recommends an amendment to paragraph (k)(5)(A) of the Act. This paragraph provides that, in cases where the Commission has not requested additional information from the applicants, it must act on an application within 30 days of receiving an application. We suggest, instead, that the FCC be given a reasonable amount of time to act on the merger following its decision not to require additional information. Since the Commission has 30 days to decide whether to ask for information, our suggestion would mean that the Commission would have, for example, a total of sixty days to approve or deny an application for which it has not required

additional information. Without this modification, the legislation may give the Commission the wrong incentive: to seek information from the merging companies merely to extend the time in which the Commission must act.

V. Concerns About Pending ILEC Mergers

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

Before turning to the evidence specific to these mergers, we should recognize that these mergers occur against the backdrop of significant legislation and a fundamental shift in the nation's telecommunications policy. While Congress did not specifically indicate that mergers such as the pending ILEC mergers were contrary to its intent, it is clear that the pending mergers upset the careful balance Congress fashioned in passing the Act. In particular, Congress assumed that the BOCs would remain independent competitors.⁶

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

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

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

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

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

The applicants claim that these mergers will result in substantial efficiency gains. Even if

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

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

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

For these reasons, CPI suggests that the FCC say "no" to the proposed mergers unless and until the merging companies have complied fully with the requirements of the

Telecommunications Act of 1996 to open their networks to competition. Over three years ago, Congress directed all large incumbent local exchange carriers to provide interconnection on a nondiscriminatory basis to other competing LECs. To our knowledge, none of the merger partners has successfully complied with these requirements in a single state. Under these circumstances, CPI recommends that the FCC decline to approve the merger with “post-approval” conditions attached. Instead, we think the FCC should deny the mergers with clear language setting out the terms under which approval might be considered: i.e., after all necessary market-opening steps have been taken.

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

Second, denial of the proposed mergers will give the companies a greater *incentive* to

open their markets to competition. The theory of the 1996 Act was that interLATA relief would be the “carrot” that would induce the RBOCs to open their markets to competition. After three years in which the BOCs have made limited progress toward this goal, it now appears that the prospect of long distance entry may not be a strong enough motive for the BOCs to open their markets. If withholding long distance entry is not enough to induce them to open their networks, perhaps denying their mergers will be.

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

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

VI. Conclusion

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