CHAIRMAN F. JAMES SENSENBRENNER, JR.

"TOWARD A TRULY COMPETITIVE TELECOMMUNICATIONS MARKETPLACE:

THE COMMITTEE ON THE JUDICIARY'S HISTORIC AND CONTINUING ROLE IN SECURING COMPETITION IN THE TELECOM SECTOR"

BEFORE THE PHOENIX CENTER 2003 ANNUAL U.S. TELECOM SYMPOSIUM

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Thank you for your invitation to speak at today's 2003 Annual Telecom Symposium. The Phoenix Center has served as an important catalyst for debate concerning the proper application of the antitrust laws in our free market economy. Over the last few years, the Center's focus on the role of antitrust law in promoting consumer welfare in the telecommunications sector has been particularly instructive to both legislators and regulators alike.

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 the House Judiciary Committee, I appreciate your invitation to discuss the Committee's historic and continuing obligation to secure competition in this increasingly important and dynamic sector of our economy.

Before I begin, I would like to make a broader point about what I consider to be the proper role of the antitrust laws. I believe that antitrust law can serve as a powerful bulwark against anticompetitive market behavior. Some antitrust critics contend that political conservatism and respect for the free market are somehow inconsistent with a commitment to antitrust. However, as a strong conservative who adheres to the primacy of free markets, I believe that 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 laws can advance these important goals, but they can also be misapplied in a manner that does violence to both economic efficiency and consumer welfare. As a result, we must work hard to ensure that antitrust laws do not serve as a legal weapon of choice for economic losers, or provide a refuge of last resort for those who seek to coerce economic outcomes they could never produce in a truly competitive market.

The principled application of the antitrust laws in the telecom market has produced enormous competitive benefits. Advances in competition have fostered consumer choices, reduced prices, and redefined the technological landscape of an entire industry in a few short years. This progress did not come overnight, nor did it happen by itself. Rather, over the last five decades, the House Committee on the Judiciary has played a central role in creating the legal framework that has permitted true competition to take root in this critical marketplace.

The House Judiciary Committee conducted its first formal antitrust-related telecommunications hearing nearly a half century ago. In 1957, the Committee conducted a hearing concerning the process by which the Justice Department entered into a consent decree with AT&T under which AT&T agreed to cease anticompetitive activities in the manufacture and sale of telephone equipment. While even the most optimistic observer could not have predicted that the Committee's 1957 hearing would instantly produce an open and competitive marketplace, few could have forecast how much time, effort, and travail the subsequent half century would require to realize this goal.

In 1974, the Justice Department filed suit against AT&T for violating the antitrust laws by prohibiting potential long distance competitors to connect to its local networks. In 1982, the Judiciary Committee examined the status of ongoing settlement talks between the Justice Department and AT&T. Shortly after the Committee's 1982 hearing, the parties entered a consent decree known as the "Modification of Final Judgment." The principled application of the antitrust laws provided the legal basis that created a new world in which a single monopoly no longer dominated the local and long distance telephone markets.

While the consent decree produced almost immediate competitive gains in the long distance telephone market, local service was still the exclusive province of the regional Bell companies who inherited much of the local infrastructure of the former AT&T monopoly. When the competitive panacea some had expected failed to materialize, the Committee on the Judiciary continued to spearhead efforts to ensure that the antitrust laws served as an instrument to protect against the vestiges of regional dominance of the local exchange.

Throughout the 1980s, the Committee on the Judiciary conducted extensive hearings concerning the implementation of the 1982 decree and anticompetitive aspects associated with continuing monopoly control of local service. In the early 1990s, the Committee conducted several legislative and oversight hearings concerning the market dominance exercised by the remnants of the former AT&T monopoly. In 1995, the Committee examined the Justice Department's responsibility to aggressively monitor competition in this field. While the 1982 consent decree produced a mixed record of competitive success, its failure to create truly robust competition lent impetus to congressional passage of legislation that was far more comprehensive and deregulatory in scope.

The Telecommunications Act of 1996 represented the most decisive expression 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 services for American telecommunications consumers and encourage the rapid growth of telecommunications technologies."

The Act further states that Congress intended "to provide for a *pro-competitive, deregulatory* national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."

The congressional record that gave rise to the 1996 Act was shaped by four decades of Judiciary Committee involvement in monitoring the application of the antitrust laws in the telecom field. Moreover, in order to reaffirm the centrality of the antitrust laws in the liberalized regulatory regime established by the 1996 Act, the Judiciary Committee and Congress preserved an explicit antitrust savings clause in the legislation. In stark legislative language that 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 provided 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."

In order to further ensure that the plain language of the antitrust savings clause could not be ignored or misinterpreted, the 1996 Act also contained a general savings clause that stated:

"This Act and the amendment made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such act or amendments."

Anyone schooled in rudimentary statutory interpretation would have to conclude that the clarity of this language leaves very little to the imagination of a judge or regulator. However, the imaginations of judges and regulators can be far more active than we can predict, and their apparent willingness to defy the will of Congress even more blatant than could reasonably be imagined.

The savings clause in the 1996 Act was by no means the only significant antitrust provision contained in the 1996 Act. In order to promote the competition that had been absent as a result of continuing monopoly control of the local exchange, the 1996 Act rested upon a fundamental competitive compromise: local incumbents were permitted to compete in the long distance market only if Bells opened their own markets to competition.

In order to provide the statutory framework to effectively implement this policy, the Judiciary Committee played a central role in drafting Section 271 of the legislation,

which governs the entry of Bell companies into the long-distance market. Section 271 requires that the Department of Justice utilize its antitrust expertise to prospectively examine competitive conditions in Bell markets *before* the FCC approves their applications to provide long-distance service.

In the years immediately following passage of the 1996 Act, the Justice Department fulfilled its statutory obligation to review Bell applications for entry into long distance. In each of the first five Section 271 petitions filed by Bells, the Department concluded that none of the Bells met its market opening obligations under the Act. As of this date, the Justice Department has provided Section 271 comments to the FCC regarding Section 271 applications for all but one state, and the FCC has granted applications in all but six. These grants of authority are not perpetual however. Section 271(d)(6) provides the FCC continuing authority to examine the competitive conditions upon which 271 licenses were originally granted, and I have worked to ensure that the Justice Department energetically meets its continuing obligation to enforce the antitrust laws in this industry.

As I indicated to Assistant Attorney General Pate in a February letter preceding the FCC's recent Triennial Review Order, virtually all of the Section 271 applications recommended for approval by DOJ have been have been predicated upon the ability of non-incumbent carriers to reach customers via the unbundled network element platform, or UNE-P. "Unbundling" refers to a set of regulations issued by the FCC pursuant to the 1996 Act that determines the "platform" of network elements that competitive carriers can lease from incumbent monopoly networks at "wholesale" prices. Under the Act, State Public Utilities Commissions play a vital role in setting and enforcing those prices.

Non-incumbents have used UNE-P access and rates to provide both voice and broadband service to consumers and consider it an essential feature of the 1996 Act's local market opening provisions. From an antitrust perspective, unbundling provides a necessary stopgap to ensure access to essential facilities in a manner that fosters competition for local telephone and data services.

Congress and the courts have long recognized that monopolists may use their power to serve the unlawful ends of foreclosing competition or destroying a competitor in violation of the Sherman Act. Under well-established antitrust precedents, a monopolist is prohibited from using its control of essential facilities in one market to thwart competition in another market that depends upon those facilities. Common examples include electric distribution lines, local telephone lines, and railroad terminal facilities.

At the present time, access to the local loop controlled by Bell companies may be viewed as an essential facility necessary to sustain local telecom competition. The FCC's Triennial Review Order of February 20, 2003, focused primarily upon UNE-P and "line sharing," both of which govern the type and cost of access for nonincumbents to the local exchange. Line sharing refers to a subset of "unbundling" regulations which

primarily allow for the practice of competitors offering high-speed broadband to share the incumbent's local loops.

The Order sustained the unbundling requirement for basic voice and data capacity and re-confirmed the authority of states to enforce those requirements. At the same time, the FCC voted to eliminate the Bell companies' obligation to unbundle most types of broadband capacity. As a result, this segment of the telecom market requires additional scrutiny by antitrust enforcement agencies and the FCC.

Since passage of the Act, millions of households have availed themselves of services provided by a number of local and long distance telephone subscribers. Today, over 14 million households are exercising their right to choose local telephone and data service. In my home state of Wisconsin, over 350,000 households enjoy nonincumbent voice and data services. Last July, the Committee conducted an oversight hearing of the antitrust enforcement priorities of the Department of Justice and the Federal Trade Commission that examined current telecom enforcement initiatives as well as telecom enforcement goals in a post-Section 271 era.

While the last few years have seen impressive strides toward competition, the competitive outlook for the telecom industry and the historic role of the antitrust laws in promoting market-based competition is under assault. Last month, the Supreme Court heard oral arguments in the case of *Verizon Communications v. Law Offices of Curtis Trinko.* This case concerns the continued application of the antitrust laws in the telecom market.

Given the clear language contained in both the specific and general savings clauses of the 1996 Act, judicial confusion about the continued applicability of the antitrust laws in the telecom field strains the bounds of credulity. Moreover, given the historic practice of the Department of Justice in zealously defending the applicability of the antitrust laws it implements, I was surprised that the DOJ's *Trinko* brief redefined exclusionary conduct in a manner that would undermine the savings clauses in the 1996 Act and alter the application of the antitrust laws in the telecom field.

The antitrust laws are designed to provide relief to competitors when a monopoly maintains its position by inflicting significant and sustained injury or destruction to a competitor. When that significant and sustained anticompetitive injury arises from violations of the Telecom Act, that anticompetitive conduct clearly implicates the antitrust laws. In passing the 1996 Act, Congress emphatically did *not* intend to create an "antitrust safe harbor" in which monopolists could violate the antitrust laws with impunity.

Rather, the antitrust laws and 1996 Act are parallel, complementary, and mutually-reinforcing remedial systems. While the outcome of the *Trinko* case is not certain, judicial circumvention of the antitrust savings clause in the 1996 Act will necessitate a swift and decisive legislative response from the Judiciary Committee and Congress.

Over the last five decades, the Judiciary Committee has promoted competition in the telecom market by securing passage of market-opening legislation, by conducting

rigorous oversight of the state of competition in this sector, and by ensuring that the antitrust agencies, particularly the Justice Department, forcefully assert their antitrust primacy in formal proceedings and informal contacts with the FCC. The Committee will continue to take a proactive role in ensuring that antitrust considerations are properly weighed in Triennial Review and TELRIC proceedings.

As part of this continuing commitment, the Committee has scheduled an antitrust oversight hearing that will examine the state of competition in the telecom field, the responsibilities of the Department of Justice in utilizing its enforcement authority to ensure effective telecom competition, and explore the legal implications, possible impact, and likely legislative responses to the *Trinko* case before the Supreme Court. Assistant Attorney General Hew Pate will testify at the hearing, as will representatives from the telecom industry.

While it is difficult to imagine what the next 50 years have in store for the telecommunications industry, you can be sure the Judiciary Committee will continue to play a key role in ensuring competition in this field.

By working with the Department of Justice and continuously monitoring competitive developments in the telecom market, the Judiciary Committee will continue to discharge its historic obligation to ensure that the antitrust laws are utilized in a manner that produces the irreversibly open telecommunications markets that we all seek.

Thank you for your invitation today.