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wife, Anna, he would work with whomever was willing to work for the public interest. Anna survives him, and I am confident she will continue to get things done, although she has lost a very, very potent partner.

Mr. President, no one, no community, can lose a friend like Armand Cocco without feeling sad, but the sadness attending his passing has an especially melancholy quality for me and many of his friends because we fear that in losing him we are also losing one of the last examples of American value and of an American personality that we can ill-afford to move on without—the public-spirited private citizen with a traditional sense of community responsibility that has historically enabled us to deal with a range of social problems that simply lie beyond the capacity of government alone to resolve. The balance between public interest and private interests, the tension between individualism and community responsibility, has been losing the equilibrium that de Tocqueville identified over 150 years ago as the secret to our American democracy.

That growing imbalance is perhaps our greatest national problem today, but it was never a problem for Armand Cocco. He was as strong a personality with a keen sense of the individual as anyone I have ever met. But he knew how to strike a proper balance between his personal aspirations and the needs of his community. He was and will always remain among all those who knew him a model of good citizenship in a democratic society, and an assurance that our democracy will survive if we take his lifelong example to heart.

Mr. President, a very personal note. He was also a loyal friend to my deceased wife. When she passed away, it was Armand Cocco who went to the citizens of that small community and asked that the park be dedicated in her name, the name of which it still carries.

And lastly, I was on my way down here to vote on Friday, but the funeral was Friday. I thought it was important to vote, but I decided—and I must say it publicly to my constituents—it was more important for me to go to the funeral because of a public man like him, who had contributed so much; so I did not come down. I went and expressed my sympathies to his wife, Anna, and to his daughter, and all of the family.

I thank the Chair for its indulgence and allowing me to speak.

THE TELECOMMUNICATIONS COMPETITION AND DEREGULATION ACT

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of S. 652, which the clerk will report.

The legislative clerk read as follows:

The bill (S. 652) to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes.

The Senate resumed consideration of the bill.

Pending:

Dorgan modified amendment No. 1264, to require Department of Justice approval for regional Bell operating company entry into long distance services, based on the VIII(c) standard.

Thurmond modified amendment No. 1265 (to amendment No. 1264), to provide for the review by the Attorney General of the United States of the entry of the Bell operating companies into interexchange telecommunications and manufacturing markets.

Mr. PRESSLER. Mr. President, we are returning to the telecommunications bill. I urge all Senators to come to the floor with their statements and amendments.

We have made good progress on the bill. We have many challenges ahead to meet.

As I have said frequently, this bill will allow all parts of the telecommunications industry to get into each other's business and allow new small businesses to get into the telecommunications area. It will open up our local telephone markets for the first time to competition. It will allow our long distance companies to get into local and vice versa.

It will move toward the deregulation of cable by encouraging competition from DBS, direct broadcast satellite television, and by giving the regional Bells video dial opportunity. There will be three or four competitors in each market, which should and will make cable prices much lower. It will mean lower cost telephone services, lower telephone rates and lower long distance rates for the average American.

Many years ago, when I was in the House, we had some great debates over the deregulation of natural gas, and people said if we deregulate natural gas, prices will skyrocket. They did not. They have come down and there is competition and natural gas prices are lower than they have ever been.

We can do our senior citizens and others a favor by getting lower prices through competition. That is what this bill will do.

This bill will also lift some regulation in the broadcast area. It will allow some of our utilities to do things they have not done before in telecommunications. It covers a broad spectrum of American life.

It is a very important bill. It is a bill we need to pass. The bill we have before us is not perfect in anyone's eyes. It is a good bill, and each Senator would write it slightly differently. Indeed, every Senator has had the opportunity to participate in the writing of this bill. It has been a long process that we held before the markup in the Commerce, Science, and Transportation Committee.

We held meeting after meeting for probably 90 days as well as meeting on Saturdays and Sundays, with Senators and staffs being invited who wished to participate. We came to the Commerce Committee with this bill and received all except two votes. We are very proud of the bipartisan effort that we have made and that will remain bipartisan.

I want to pay tribute to my colleague, Senator HOLLINGS, who has done such an outstanding job, and to all the Republicans and Democrats who have worked hard on this bill.

This bill will provide a roadmap for us into the wireless age. It will provide a roadmap for investors to invest in creative and competitive enterprises. It will also help consumers because it will mean more services at lower prices. If we look at what has happened in the computer industry, every 18 months their equipment is virtually obsolete, there is so much competition and so much innovation. I would like to see the same thing in the telecommunications area, and I think we can see that in the next 10 years if we pass this bill.

We still have a long way to go. We have to pass the bill in the Senate and in the House, we have to have a conference, and the President has to be able to sign it. I hope the White House will help us out.

I began this process by going to the White House with a copy of the chairman's discussion draft and talking to AL GORE, trying to get his support. We hope the White House will be supportive of this process, because, if we can pass this bill, I frequently say, it will be like the Oklahoma land rush for the American consumers. Right now, many of our telecommunications areas are in economic apartheid; they are limited just to one group. If we could get them deregulated and competing, there would be an explosion of new investment, an explosion of new services, and a explosion of opportunities and employment.

Presently, many of our largest telecommunications companies have to invest abroad if they want to manufacture, for example, because the regional Bells are prohibited. Others invest abroad because they cannot get into other areas. This will let everybody into everybody else's business. It will allow competition, as it should.

In the future, whether it is 5 or 10 or 15 years from now, we will be in the wireless era. That may well be an opportunity for even more competition because presently you have to unbundle or interconnect with someone else's wires to get access to local telephone service, for example. But we hope that is changed and will be changed by this bill.

I know there are many amendments pending, and I hope Senators will bring their amendments to the floor this afternoon. I plead with Senators to allow us to have some time agreements at some point so we can debate these amendments on both sides. It is not my intention to discourage any Senator from offering an amendment. We are working with staff, trying to get time

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agreements on some of these amendments so we can move forward.

I have asked Senator DOLE and Senator DASCHLE for their cooperation in finishing this bill, and I think it is very, very important. As has been pointed out repeatedly, this bill will affect every household in America. If we fail to act this year, it will fall over to 1997 because next year, being a Presidential year, such a controversial bill probably will not be able to pass.

This is one of the most controversial and complicated bills to come to the Senate floor. I think we are on the way to passing it. But we will need the cooperation of all Senators. I have frequently said this is not the sort of bill that any one Senator can take credit for, or the lead. It takes every Senator. We all have to be involved. Because in the telecommunications field, any one group can checkmate, almost, the progress of a bill. We hope that does not happen.

It is very important. It will affect a third of our economy. It will create jobs. As we read in the newspapers about some of our mature, aging industries, as they lay people off, we need to have new, creative areas to create jobs. We have done that in the computer industry. We have done it in some of our other growth industries. This will make us competitive internationally also. It will affect our exports and our balance of payments.

This bill also includes reciprocity for investors from abroad so we treat them as they treat us. The public interest review by the FCC is preserved.

So, I urge Senators, come to the floor and offer amendments. I ask respectfully that we be able to get some time agreements on some of these controversial amendments that will be coming. It is not our intention to shut anybody off. We want people to have their vote. But we must proceed.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. FRIST). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DORGAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1295, AS MODIFIED

Mr. DORGAN. Mr. President, the matter pending before the Senate is now a second-degree amendment by Senator STROM THURMOND to a first-degree amendment that I offered last week dealing with the issue of the role of the Justice Department in the telecommunications legislation.

I would like to describe where we are and how we reached this point, and why I think this set of amendments is an important discussion for the Senate.

First of all, the Senator from South Dakota, Senator PRESSLER, described a few moments ago the importance of this bill for virtually every American. There is no doubt about that. The issue of communications and telecommunications is one that will affect every single American. You cannot escape the impact of this legislation. We have seen an explosion of technology, an explosion in communications in this country in computers, telephones, cable, and broadcast, and we are seeing capabilities in this country today for every American, no matter where they live, that were only dreamed of several years ago.

The question before the Senate is what kind of rules shall exist for the competition between various types of communication in our country? The last set of rules was a set of rules in 1934 established to try to govern the circumstances of operations in the communications industry in which we had a regulated monopoly. Phone service was a monopoly. Of course, we did not have computers then, we did not have cable television then, but we had phone service. Communications back then was a regulated monopoly.

Now, in 1995, we are moving toward a deregulated set of circumstances in the telecommunications industry. The question is how do we structure the rules so that you get deregulation with fair competition and at the same time have the buildup of the infrastructure so that communications is not something that exists only where you have affluent neighborhoods or high concentrations of people.

Many of us believe that the issue of communications is universal. It does not matter how big a town you live in or where you live in this country. Your ability to use a telephone or use a computer or access any number of devices in the telecommunications industry and be a part of the information superhighway—your interest and your need for that—is just as intense and important if you come from a town of 300 people in southwestern North Dakota as it is if you live in downtown Manhattan in New York City.

So many of us feel as we deregulate we must make sure there are safeguards in this legislation so that the buildup of the infrastructure, so the building of the information superhighway, reaches, yes, even the rural areas of our country.

As we do that we understand that there is a fundamental tension between deregulation and the search for profits and opportunities by companies who will go to the densely populated areas of our country and the need to try to provide the same kind of service and the same capabilities in rural areas in our country. That is the purpose of this legislation, at least as far as I am concerned.

Some see this legislation simply as opening the door and unlocking the forces of competition. That is part of it. I understand that. I accept that. I think competition can provide enormous benefits for our country. I happen to think that the Bell operating companies are good companies. I met a couple of CEO's of Bell operating companies in recent months who have come to my office. I am most impressed. They are good companies with good growth and plans for the future that are interesting and stimulating.

I also happen to think that we have long-distance carriers in this country that are new, vibrant, and growing, and do a lot of interesting things. In the long-distance area, of course, we have had competition. As a result of that competition with hundreds of providers of long-distance services fighting for the consumer's dollar, we have seen a substantial decrease in the rates for long distance service.

We have not seen a similar circumstance in local service, and this bill will lead to a similar circumstance, some say, in local service, where we open local service to competition.

Well, when we do that, when we open local service exchanges to competition, then the Bell operating systems will want to go out and compete in the long distance market, and this piece of legislation sets the conditions under which that will be possible.

Now, Senator THURMOND and I introduced amendments which said the question of when real competition exists and when the baby Bells or the Bell operating companies shall be permitted to go off and compete in the long distance arena, that is a very critical area in this bill because if the Bells are free to go compete in long distance before there is true competition in the rural areas, you have the makings of a real mess and the makings not of deregulation and not of unleashing the forces of competition for the benefit of the consumer, but instead you have the prospect of once again establishing monopoly forces in the marketplace.

So it is very important to have the right kind of ingredient in this legislation that serves the interest of competition, when you are opening the door to have the Bell operating companies move into the long distance service.

Both Senator THURMOND and I have offered amendments that describe a role for the Justice Department in those determinations. The legislation that came out of the Commerce Committee had a role for the Justice Department that was simply consultative. In other words, the FCC, the Federal Communications Commission, would essentially make the determination of the public interest standards with their checklist about when certain conditions were met and when the Bells would be moving into long distance service and when there was real competition in the local exchanges. And the Justice Department was simply consultative.

We have had some experience on deregulation with respect to consulting the Justice Department. I remember that we deregulated the airline industry and what we had in the airline industry was with respect to mergers and

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acquisitions the Department of Transportation would provide its approval and the Justice Department would be consulted.

Well, what has happened since the deregulation of the airline industry is pretty clear. What is happening is we now have five or six very large airline carriers in this country that have bought up their competition and they are getting bigger. Why? Because that is the way the market system works if it is not checked with respect to competition and what we will have is competition among four or five or six behemoths in this country in the airline industry.

Now, the Department of Justice on a number of occasions said, well, we do not think this acquisition makes sense. That is our judgment. The Department of Transportation says it does not matter; we are going to allow it to proceed anyway.

So we have seen some experience with having the Department of Justice in a consultative state, and frankly I think it does not work in this area of deregulation. I want the Department of Justice to have a full role with respect to its antitrust activities and its ability to evaluate when these kinds of activities are in the public interest. I do not want the Department of Justice to become a set of human brake pads so that you have a bunch of lawyers down there who simply put their foot in the door and say we are not going to make any decisions; we are not going to let anything happen. I do not want the Department of Justice to be a brake, but I do want the Department of Justice to be a full participant and a full partner in this judgment about what is in the public interest: when does competition really exist? When do you potentially threaten a now competitive set of circumstances with the potential for concentration that diminishes competition?

So that was the point of my amendment. My amendment used a standard, the VIII(c) standard it is called, and would give the Justice Department a role in those circumstances with a time requirement by which they must act. And Senator THURMOND, feeling I think the same way, that the Justice Department should have a role, introduced an amendment but his amendment uses a different standard, the Clayton 7 standard.

We have worked over the weekend, and Senator THURMOND, I understand, will be coming to the floor in the next half-hour or hour. I believe he is at the White House for a meeting. But we have worked over the weekend with Senator THURMOND and have reached agreement on a modification of his amendment which provides some language that I have suggested and retains the core standard in his amendment, and that is an approach I think both of us support, both of us think advances the interests that we are attempting to advance with our amendments, and I hope when Senator THURMOND comes to the floor and modifies his amendment and discusses it, we would be able to move forward.

It will be a common amendment that both of us will support. We have been working since late last week and worked through the weekend on it, and I think it does advance the interests both of us attempted or wanted to advance with respect to the role of the Department of Justice.

When Senator THURMOND does come to the floor and offers such a modification, I know the managers want to proceed to set a vote on an amendment of this type, and I have no objection to that at all. I know the majority leader has indicated that we would not have record votes today before 5 o'clock. On the question of whether a vote is set on this evening or first thing tomorrow morning, I would be happy to work with Senator THURMOND and with the chairman of the Commerce Committee, the majority leader, the ranking member, and others. It seems to me that is something we can work out in the coming hours. I think there is really not much need to spend a great deal more time.

There are a number of others who want to discuss this subject this afternoon, and we certainly need to allow time for that. The Senator from Nebraska, Senator KERREY, who has been intensely interested in this subject and been active and involved in the discussions about it I know also will be interested in the conditions under which a vote is held.

I think this is one of the most important amendments we will be voting on dealing with this legislation. Frankly, there are not many people who even understand it very much. I understand that this is not a very sexy issue; it does not generate a lot of public interest. It is not something that is easily understood. It is not something, the impact of which will be readily known even as we vote on this legislation, but I am convinced that as we tackle the changing of the rules for an industry that is one of the largest industries in this country and as we talk about where we move in the future with that industry, if we do not provide for the public interest by establishing more than a consultative role for the Department of Justice to assure that the forces of competition exist, then I think we will not have done a service with this legislation.

I know this will likely be a close vote, but I do hope that those who study this issue and who really want to deregulate but to retain as we deregulate the safeguards of making certain that competition exists in real form and that the American people have the benefits and bear the fruit of that competition, I think they will want to vote with Senator THURMOND, myself, Senator KERREY, and many others who feel very strongly about the role of the Department of Justice in providing us those guarantees.

Mr. President, with that I yield the floor.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, I rise again to discuss this bill and to discuss the amendment offered by the Senator from North Dakota, as well as the amendment offered by the senior Senator from South Carolina, to give the Department of Justice a role in what is essentially an amendment of the 1934 Communications Act which will again move us in the direction, further in the direction of competition, further in the direction of deregulation than the modified consent decree which was filed in August 1982 has done over the past 13 years.

The central question I think for colleagues as they consider this amendment ought to be whether or not the Department of Justice can perform a role in promoting competition. Indeed, I believe that the Department of Justice is the only agency in Washington, DC, with any experience or any demonstrable success at moving us from a monopoly situation, in this case in the communications industry, to a competitive arena.

Let me point out, I appreciate very much what the chairman and the ranking member have done thus far. I believe there had been a number of significant victories that have occurred thus far in the debate important to identify because we have taken a bit more time than was originally anticipated, but I think it has been time well spent.

First, we were successful in defeating an effort to strike the language that the chairman and the ranking member made certain was in the bill that gives preferential rates to education, libraries, and to health care facilities. It is very important, particularly in the area of K–12 education, that we provide those preferential rates.

I know some will argue it runs at odds with what we are trying to do. Indeed, I must confess, it essentially does run, in many ways, at odds. The problem is our schools, particularly in the K–12 environment, are not market operations, they are government operations. If we do not carve out and provide a special opportunity for them to get access, it is highly unlikely they are going to be able to take advantage of the communications revolution that I think this legislation is apt to set off, at least accelerate. And if they do not take advantage of it, our test scores are not going to be affected by technology. The capacity of our students to do well and prepare themselves either for the work force or college will be significantly diminished. That was a big victory in beating back an effort to strike that language, essentially what would amount to the new section 264 under the 1934 Communications Act.

Second, there was an effort to strike what has been described as the public interest, necessity, and convenience

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test. This is a longstanding test that has been applied by the Federal Communications Commission to determine how it is that we regulate. It seems like it is a relatively small effort, but it is a very large victory for American consumers, and I appreciate my colleagues' support in keeping that language in here.

In the managers' amendment offered earlier, the managers changed the regulations as it affects in-area acquisition of cable, which I think is going to be terribly important to maintain a competitive environment. Personally, I believe strongly, at least in the short term, unless households have two lines coming in—a telephone line and a cable line—it is not likely that you are going to get that kind of competitive situation. This in-area acquisition amendment was an extremely important amendment to get attached.

There was a joint marketing provision for small companies that was added. I appreciate very much that being added. I believe that promotes competition and allows the smaller entities—I say again for emphasis, that is likely to be where the jobs are going to be created subsequent to this legislation—it allows smaller companies to do joint marketing. It is a very important procompetitive change that was made in the bill.

The legislation has very strong language making sure the system is interoperable, though it does not establish, as I think it should establish, the Government's role in setting de jure—that is, legal standards. The markets should be in a de facto way establishing those standards. Nonetheless, the legislation directs the FCC to put interoperability very high on the agenda and has a mechanism for making sure we have interoperability in the system. It is a very important procompetitive step and a very significant victory, in my judgment.

The bill already had very good rural provisions in there. The managers' amendment, as well as Senator DOLE's and Senator DASCHLE's amendment, strengthened the protection for rural communities, and we have thus far been successful at preserving the universal service fund.

The distinguished Senator from Alaska—I believe it was the first amendment placed on the bill—made certain there would not be any budget point of order by placing an amendment on here that provided the money that CBO says we are going to need to pay for this universal service fund. Even though the bill results in a $3 billion reduction in the cost of the universal fund, CBO, in their own mysterious ways, came up with the $7 billion mark, and the Senator from Alaska changed the bill to provide the money to get that done.

Mr. President, this is a very difficult piece of legislation because it is difficult to try to assess what the impact is going to be, what will it do for the households, the voters, the consumers in your district and your State. It is undoubtedly a question that more and more Members, I hope, are beginning to ask and attempt to answer. It is not an easy question to answer.

The chairman and the ranking member of the committee have attempted to draft legislation that would move us very carefully from a monopoly situation to a competitive situation. The question, though, is, Will competition produce something that makes my consumers happier? Will my taxpaying citizens 1 year, 2, 3, 4, 5 years from now say, as I believe they do in a number of other areas, including the watershed divestiture that occurred starting in 1982, This has been good for me. I have gotten a reduction in price, I have gotten an increase in quality coming as a consequence, Senator KERREY, of a piece of legislation you voted for way back there in 1996.

The bill is divided up into three sections. It attempts to describe in general terms what it is that we are trying to do. It is important, I think, for all of us to try to examine each one of these little words inside of 146 pages, now a bit longer as a consequence of amendments that have been attached, because each one of them could potentially be the tripwire that sets off an explosion at home. Each one of them could at the same time add unnecessary regulation, for all we know. We are attempting to balance the need to move to a competitive environment with the need to preserve some regulation in order to make certain that this transition is smooth.

The first section is one that will have an impact immediately. What will happen is you will see companies—I would guess mostly long distance companies, although it could be any number of other companies—coming into the local area asking permission to interconnect, asking permission from the local telephone company to interconnect and begin to provide local telephone service.

The company basically controls that. There is a checklist in there, but the company basically controls the flow of that decision. There is no Department of Justice role there. The FCC is involved in that decision. There are enforcement mechanisms in there. That is where the universal service description is maintained. There are separate subsidiary requirements to protect against cross-subsidization that might make it difficult for competition to occur. There is language in there—I do not know how you describe it—that allows foreign companies to come in and buy American telecommunications companies, but only if their nations reciprocate by changing their laws. It has a snap-back provision. If their countries do not change their laws, they would not be allowed to come in and make investments in local or any other telecommunications carriers.

There is language in there—very important language in there—for infrastructure sharing. But in that first section perhaps most important is a checklist that says here are the sorts of things that have to occur in order to provide that interconnection, in order to give that interconnection opportunity, for, as I said, it is either going to be a long distance company consumers are likely to see or it could be some company you never have seen before that tries to come in and provides local competition.

These requirements, in what would become section 251, are different than the interconnection requirements that you find in title II. Title I is called transition and competition. Title II is the removal of the barriers to competition. There are two subtitles there. The biggest one is a lengthy description of how we are going to try to remove the barriers to entry. There are lots of important detail in that particular section.

The new section 255 is the one that we are addressing with the Department of Justice role. That is where you have a checklist. If your local phone company wants to get into long distance, they then go to the Federal Communications Commission and present evidence that they are allowing local competition.

As I said, it is significantly different than the language in 251. I for one have not been able to determine whether 255 preempts 251, whether the checklist in 251 is preempted in short by the language of 255. I suspect it is an important question that I have not been able to answer to my own satisfaction.

Nonetheless, the company then comes and says, "I met the checklist required in the language." There is a consultative role for the Department of Justice, and the Federal Communications Commission has a prescribed period of time in which it has to make a decision about whether or not to let that company get into interLATA or basically get into long distance service.

Mr. President, the Department of Justice has a longstanding role in our lives in making sure, with its Antitrust Division, that we have competitive marketplaces, not just in telecommunications but in every other area of economic life. The larger a business gets and the more of the market a business controls, the more likely it is, the more chances and opportunities there are for that business to say, we are going to disregard what the consumer wants, we do not really care what the consumer wants because, frankly, we control so much now of the market that we do not really have to discover what the consumer is willing to pay. We will tell the consumer what they are going to go pay because we control such a large share of the marketplace. There really is no competitive choice.

Well, that is the way it is for most local telephone companies. There is some local competition but not significant local competition. It is also true for many cable companies. They have been given a monopoly franchise, and

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there is not much competitive choice. That is why we are suggesting with this language—whether it is the Thurmond language or the Dorgan language—a stronger role for the Department of Justice in making certain that we do have a competitive environment before that permission is granted to get into long-distance service.

That is the carrot that is being offered. We say to the local company you can either negotiate to provide interconnection, or you can provide the interconnection requirements that are in 251. Or if you want to present that you have done all of that, we have a separate section that says you come and present that to the FCC, but the Department of Justice is engaged in a consultative way. We are saying with this amendment—and again whether it is the VIII(c) test of Senator DORGAN or the Clayton test of Senator THURMOND, it is very important to describe the roles of both of these regulatory agencies and set a time certain for the approval so you do not get into the problem of unnecessary delay and duplication of bureaucratic oversight.

Mr. President, the Department of Justice was instrumental in shattering the Bell system's monopoly grip on long-distance and equipment manufacturing markets in bringing competition to those markets. Colleagues, again, are wondering why the Department of Justice should be given a role. The reason is that they are the ones with the most experience, the ones that have the capacity to make this thing happen. Competition has resulted as a consequence of the MFJ that was filed in August 1982, and that competition has made possible the communications revolution that is changing the lives of all Americans.

The telecommunications legislation should take advantage of the Department of Justice's profound expertise in telecommunications competition to ensure that deregulation leads to real competition, not unfettered monopoly. Again, the potential for monopoly is already there. Since we are beginning with a monopoly situation, the potential for a monopoly situation adverse to the consumer would produce a very unhappy consumer, taxpayer, and citizen out there. And we are, with our amendment, suggesting that the best way to ensure that that does not happen is to provide the Department of Justice with what fairly, I think, is described as a limited role in assisting the Federal Communications Commission in making a decision about whether or not to allow a local company to get into long-distance, and whether or not the company has, in short, provided a competitive opportunity at the local level—because that is the question.

The question is whether or not to grant long-distance competitive opportunity, and that question is answered by determining whether or not there is competition at the local level. The bill, as I said, has two sets of tests, one in section 251, that could occur almost immediately, and 255, which is the question at hand, when a company is trying to prove that they have local competition by providing the 14-point checklist, as required by this legislation to the FCC.

The Department of Justice has effectively enforced the antitrust laws in the telecommunications industry on a completely bipartisan and nonpartisan basis throughout this century. It sued the Bell system in 1913 and in 1949. Both times the Department of Justice succeeded in obtaining consent decrees and sought to protect competition. But that allowed AT&T to continue participating in local, long-distance, and equipment manufacturing markets.

In the mid-1960's, Mr. President, it filed comments with the FCC arguing that the Bell system should not be allowed to use its local telephone monopoly to force consumers to buy their telephone sets from it. Although the FCC agreed that customers had the right to choose among competitors, the Bell system succeeded in using its local monopoly bottleneck to impose such burdensome conditions on the interconnection of competitors' equipment to the local network that evidence of those conditions was an important part of the monopolization case that the Justice Department then presented in 1981. Open competition in so-called customer premises equipment did not become a reality until after the breakup of the Bell system in 1984.

The Department of Justice, Mr. President, initiated its third major investigation of the Bell system in 1969 during the Nixon administration. In 1974, during the Ford administration, the Department filed its historic suit against AT&T charging that the vertically integrated Bell system illegally used its monopoly control over local telephone service to thwart competition in long-distance and equipment manufacturing. Over the course of the next 7 years, through the end of the Ford administration and into the Carter administration, the Department litigated the case vigorously, filing and organizing the complex evidence that showed how the Bell system used the local monopoly to hurt competition in other markets. In January 1981, at the beginning of the Reagan administration, trial of the case began.

The Department of Justice offered in court almost 100 witnesses and thousands of documents as it systematically laid out the facts that demonstrated how the Bell system unlawfully used the local monopoly bottleneck to hurt competition in other markets.

In negotiations to settle the case, President Reagan's Assistant Attorney General, E. William Baxter, insisted that the only way to protect competition in the long-distance and equipment markets was to separate those markets structurally from the local telephone bottleneck. Unless the local monopolist was prevented from participating in other markets, it would always have the incentive and ability to hurt competition in those markets. At first, the Bell system refused even to consider such a settlement. After hearing the Government's case, and presenting about 90 percent of its own case, 250 witnesses, and tens of thousands of pages of documents, the Bell system relented and agreed to settle the case based on a consent decree that dismantled the vertical monopoly. After it was approved by Judge Harold Greene, the modification of final judgment—which is referred to often as the MFJ—required the Bell systems to split itself into AT&T and the seven regional Bell operating companies now called the Bell companies. AT&T retained the long-distance and manufacturing operations. The Bell companies, independent of each other and of AT&T, retained monopolies over local telephone service in vast geographic expanses, subject to the requirement that AT&T, along with competitors, have equal nondiscriminatory access to customers through the local networks.

The key point of the MFJ was that it removed the Bell companies' incentive to use the local monopoly to hurt competition in long-distance and equipment manufacturing by prohibiting them from entering these markets. By the same token, AT&T no longer had the ability to hurt its competitors in those markets because it no longer controlled the local monopoly. The restrictions on the Bell company grew directly out of the fact noted by Judge Greene that "the key to the Bell system's power to impede competition has been its control of local telephone markets."

Section VIII(c) of the MFJ—modified final judgment—the language that is in the Dorgan amendment provides that the line of business restrictions can be waived if a regional Bell operating company shows that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

Removing the restrictions under any other circumstances would give the local telephone company the incentive and ability to recreate the vertical monopoly that the Department of Justice and many others worked so long and hard to dismantle.

Since the entry of the MFJ in 1982, the Department has assisted Judge Greene in administering its terms—in Republican and Democratic administrations alike. It has been dedicated to ensuring that the line of business restrictions hinder the RBOC's only to the extent necessary for protecting competition in other markets.

The Department has supported waiver of the restrictions when it has concluded that Bell companies' entry into other markets presented no substantial possibility of impeding competition in those markets. The Department now has over 50 professionals—lawyers, economists, and paralegals—who are

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dedicated and experienced in telecommunications competition issues, and who understand the complex markets and technologies involved.

The Department, therefore, is uniquely positioned to assess what is actually happening in the market and whether there is a danger that entry by the Bell companies could impede competition. That is exactly the task that has been performed since the entry of the MFJ over a decade ago.

Mr. President, the competition long-distance and equipment manufacturing unleashed by the MFJ has benefited the United States of America and its citizens and consumers enormously. MCI, Sprint, and hundreds of smaller carriers buy from AT&T to provide long-distance service.

Prices have dropped and quality has improved, with the result that Americans are talking to each other via long-distance more than ever before. Americans have not been shy about exercising the right to choose that the MFJ guaranteed.

The New York Times reported that 25 million people changed their long-distance carrier in 1994. In an article, "No Holds Barred for Long Distance Call," Edmond Andrews, the New York Times, January 21, 1995, describes the competition that exists in long-distance, and describes who was benefiting from that competition.

Similarly, businesses and consumers enjoy lower prices, more choice, better quality, and communications equipment, as competition has eroded AT&T's power in that market and forced it to compete for customers.

Mr. President, that is at the heart of what this legislation is attempting to do: Force existing monopolies to compete for customers. If that competition occurs, the competition for your business—you as a customer—will force the company to pay more attention to quality, giving not just the quality that you want but give you competitive price, knowing that if either the quality or the price are not what you like, you will see a competitive alternative.

These benefits stem directly from the strict separation of the local monopoly from other markets. Although it now appears possible that the local markets can be opened up to competition, they are not natural monopolies any longer. Removing the separation between the local markets and other markets without ensuring that the Bell companies cannot use the local monopoly to hurt competition and long-distance could squander the gains of the past decade.

The expense of the Bell system in the years before the MFJ, when it frustrated consumer choice and actual competition, long after competition and long-distance service and communications equipment became technologically and economically feasible, counsels against allowing the Bell companies into other markets before determining, based on actual marketplace facts, the effect it will have on the market.

Again, there are two places in this legislation that I call to my colleagues' attention who are trying to figure out what to do with this legislation, whether to support this amendment. There are two sections in this legislation that talk about interconnection. The first will be the new section 255 of the 1934 Communications Act, and the second, the one we are talking about now, the interconnection requirements prior to getting into long-distance that are described in the new section 255.

The fundamental goal for all should be to allow the Bell companies into any market they choose to enter as soon as such entry does not threaten to impede competition in the other markets.

That is the success that we have had to date, Mr. President. By ensuring that there is competition, the consumer has benefited, and it has been the Justice Department that has managed that effort.

The simple fact, however, is that telecommunications networks are so complex that the RBOC's ability to frustrate viable competition exceeds the ability of legislators and regulators to specify the steps necessary for opening local markets.

As was the integrated Bell system before the MFJ, the Bell companies today are in a position to ensure that every step forward is accomplished by a step backward, preserving their local monopoly as they race into long-distance with the advantage of the monopoly still intact.

The way to overcome this ability of the RBOC to thwart the open local markets is to give them a positive incentive to cooperate in the development of competition. The RBOC's will have such incentives when the specified steps for opening the local markets are supplemented by a process that ensures analysis of actual marketplace facts before the RBOC's are allowed to enter long-distance. That is what both the Dorgan amendment and the Thurmond amendment attempt to do.

As I said, Mr. President, we have been through this bill a number of times, and there are places in this bill where I believe the Bell companies make a good case. We may have regulatory requirements that are unnecessary that may, in fact, impede the development of competition.

I am prepared to entertain discussion of regulation that is still required in this bill that may, in fact, impede competition, that may provide an unnecessary burden for the regional Bell operating companies unnecessarily, at least that they cannot be defended in what they provide for the American consumers.

Both the chairman and the ranking member of the committee, as they have said on many occasions on this floor, are attempting to create a structure where we can, first of all, begin the process of competition, initiate competition at the local level, then move to end many of the barriers that currently exist to entry into these markets and finally, in section 3, come to an era of substantial deregulation where price will be determined by competition, not by regulatory fiat.

The Department of Justice role in promoting competition has been historically not only bipartisan but also nonpartisan. As I indicated earlier, the antitrust investigation against the Bell system was initiated in the Nixon administration.

The antitrust case against the Bell system was filed in 1974 in the Ford administration. Litigation continued through the Carter administration, into the Reagan administration. The case was settled by requiring divestiture during the Reagan administration. The Department of Justice assisted Judge Greene administering the consent decree throughout the Bush and the Clinton administrations.

The decisionmaking process of the Department of Justice has not been a partisan issue. It was approved last year by the House, with over 420 votes. It was approved last year by the Senate Commerce Committee by an 18-to-2 vote and supported by President Reagan's Assistant Attorney General for antitrust, Prof. William Bater, Judge Robert Bork, a letter from a bipartisan group, and a former member of the House of Representatives, Vin Weber, in a piece he wrote in the Washington Times.

The role for the Department of Justice is not being suggested as a consequence of concern for one sector of the economy or the other. It is the suggestion—recommended change in this law—based both upon what politicians themselves have concluded in the past was necessary, as well, mostly based upon evidence at hand of the Justice Department's capacity to manage what will be an unprecedented transition from a regulated monopoly situation to a competitive environment.

It seems to me, Mr. President, quite appropriate to be calling upon the Justice Department to once again do more than be a consultant in this matter, much more than just in the end, during the 90-day period during which the FCC will make its determination.

It is better to have a parallel process going on with the Justice Department, where they will be making determinations as to whether or not competition exists; again, whether it is the VIII(c) test of no substantial standard possible, or the Clayton test, which I will get to later.

The Justice Department is the agency that understands the markets, that knows whether or not there is competition, and it is the agency that I believe we need to turn to if we are concerned about what kind of response it is going to be from our consumers, our taxpayers, and voters.

Procedures for the Bell operating company's entry into long-distance over the Dorgan or Thurmond amendment does not represent unnecessary duplication. The idea that we will get a

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lengthy process, in fact, is just the opposite of what will occur without this amendment.

What happens is the Bell operating company would file an application for entry into long-distance. The Justice Department and the FCC would review and proceed simultaneously. The Bell operating company would have an answer within 90 days after application, in accordance with a date certain, established by Congress. This procedure is fast. It takes 90 days.

The standard for the Justice Department review will be clear, again, whether it is Clayton or VIII(c). The test has been litigated many, many times in the past. It is not a difficult standard for the Justice Department to apply in either case, in either the Dorgan or the Thurmond case. The procedure will reduce litigation, will reduce the likelihood of subsequent antitrust suits.

Mr. President, I will get into that later, but one of the things, if Senators are concerned about what this will do after a person votes "aye," what final passage will do, what changing the law will do, one question to answer is, Is this process going to take a long time? Is it going to be slow? Can the existing companies in here sort of drag this thing out for a long period of time?

One of the reasons we need a Department of Justice role is to reduce the possibility of litigation, to reduce the opportunity to drag this thing out in the courts, and to increase the date when real competition will begin to produce benefits for the consumer.

Mr. President, the VIII(c) test is pretty well established. I want to talk now about what the language of the Thurmond amendment does. I believe that it is likely to be that test which we will be deliberating, that Members will have to decide whether or not they approve or want the Clayton standard.

First of all, the Clayton Act was passed in 1914 and it was passed to prevent mergers that may substantially lessen competition or create a monopoly. That standard has been applied to every industry, not just to telecommunications. It is applied to mergers with critical national importance such as defense industry mergers like Martin Marietta and Lockheed, applied to mergers in other high-technology industries, software industries, the recent case of Microsoft and Intuit, applied to mergers, long distance mergers in the telecommunications industry like AT&T-McCaw and British Telecom-MCI mergers.

The standard is a known quantity. It is a known quantity and it has been developed through 80 years of litigation under that standard.

If the Bell operating companies want to enter into long distance by buying a long distance company, this is the standard that would be applied. It is logical to apply the same standard if they want to enter long distance in other ways under the unique circumstances of this bill superseding an antitrust consent decree with the intention of creating competition.

The Thurmond amendment, the Clayton language, makes entry dependent on passing the Clayton Act test. This test is normally applied to mergers that would be applied to the RBOC's, even in the absence of this amendment, if they propose to acquire a long distance company. The Clayton Act test would apply to RBOC entry unless the effect of such entry may be substantially to lessen competition or to tend to create monopoly.

This is exactly what we want. We want an agency that is experienced with measuring that question engaged in the process of saying to the American people, if you pass that test, there is no substantial possibility to lessen competition or create a monopoly. We see a competitive marketplace there, and we give permission and a date certain, a time certain. That should remove any doubt about whether or not this thing is going to be dragged on for a long period of time.

Under such a standard, the Department of Justice would consider whether allowing an RBOC, that is a local telephone company, to provide long distance service would give it the ability and incentive to use its monopoly power in local exchange services substantially to lessen competition in the long distance market and raise prices for consumers.

At the end of the game, that is what we are talking about. If you have a monopoly, you have the possibility of raising prices regardless of what the consumers want. You can ignore the consumer if you control a large enough portion of the market share. What we want to make sure is you have competition. With that competition, whether it is coming from below or coming from above, regardless of where it is coming from, give that consumer choice in the household and the consumer will benefit as a consequence of lower prices and higher quality.

The RBOC's could meet such a test and be allowed to enter the long distance market in any one of three ways.

First, if competition has developed in local exchange services so there is no longer a local monopoly that could be used substantially to lessen competition in long distance, or second, if, even absent local competition, safeguards or other constraints would prevent the RBOC's from using their local monopoly to substantially lessen competition in long distance. A very important point, Mr. President. It may be that local competition does not develop immediately. We should not say to a RBOC, you cannot get into long distance under that circumstance. The Department of Justice has experience in making sure that the negative impacts of lack of competition do not occur at the local level, thus actually saying to a Bell operating company, here is a way for you to get into long distance interLATA businesses even faster than what might otherwise be possible.

Third, if some one combination of alternatives to the telephone company local exchange services, safeguards, and other factors should prevent the telephone company from substantially lessening competition in long distance service. More competition would require fewer safeguards, and obviously the opposite is the case as well. Fewer safeguards will be likely. As we get competition in these local markets, we are going to need less and less and less.

In several acts in the telecommunications industry, the Department of Justice has carefully considered the competitive risk of allowing firms that dominate a market to enter into a closely related market through mergers and joint ventures. Based on the facts of those particular cases, the Department of Justice concluded that under certain market conditions it is not necessary to prohibit entry by a provider of local exchange services into long distance services. But the Department of Justice has required structural separation and other safeguards in the anticompetitive areas to protect the public interest in competition, for example the GTE's 1983 acquisition of Sprint; again the AT&T-McCaw merger and the British Telecom-MCI joint venture.

Mr. President, I would like to now try to give Members—I see the distinguished Senator from Vermont is here.

Mr. LEAHY. Mr. President, I would like to speak on the amendment, but I do not want to interrupt the distinguished Senator from Nebraska. I enjoyed listening to him, but if he did want to take a break, I would be happy to express some views on this.

Mr. KERREY. Mr. President, let me shorten this by a couple of sections here and then regain the floor at a later time since this debate probably will be going on for some time before we actually vote.

One of the questions, again, I know I have asked myself that I think it is important to answer is whether or not giving the Department of Justice a decisionmaking role in this is going to cost the taxpayers more money. Many have argued against this and implied it is going to increase taxpayer requirements, it is going to result in more and more litigation. The ominous thought of more litigation and more taxpayer cost sort of hangs over the argument.

But a Department of Justice role would avoid complex and expensive antitrust suits in the future by making sure that competition is safeguarded in the first instance. These suits would consume resources better spent on competing to offer American businesses and consumers lower prices and higher quality. I can, and will at a later time, go through many examples where that in fact is the case.

If you go back and look at the situation prior to the filing of the MFJ by the Department of Justice, that is exactly what was happening. It has also

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happened since that time during the years that these suits would be litigated. The American economy would suffer from the effects of lessened competition and higher prices. Before the MFJ broke up the Bell system, there were dozens of private antitrust suits against the system ongoing in courts across the country at any given time. AT&T's 1977 annual report said that some 40-such private suits were then pending against it. Asking for more of those suits would be a giant step backward.

Mr. President, I say with respect that without either the Thurmond or Dorgan language here, that is precisely what we are doing. We are inviting suits in the absence of the Department of Justice moving at the same pace, the same 90-day period. It is not an additional 90 days, not an additional 180 days. During the same 90-day period during which the FCC is examining the merits of the application, determining whether or not the intersection requirements of section 25(a) have been satisfied, during that same 90-day period the Department of Justice would be doing an analysis of whether or not competition exists at the local level or whether or not the negative impacts of monopoly were not likely to risk higher prices for the consumer at the local level.

At the end of the 90-day period, just as would occur at the Federal Communications Commission, the Department of Justice would have to make its ruling. You have a simultaneous process.

I say to my colleagues, if you are trying to reduce bureaucracy, if you are trying to reduce the potential for lawsuit, then either the Dorgan or the Thurmond amendment is something you must be for.

The opponents of the Thurmond and Dorgan amendments argue that all we need to do is allow the Department of Justice to bring lawsuits after competition has been harmed. They never explain how an after-the-fact antitrust case will solve the problem. It took 10 years of litigation to resolve the Government's case against AT&T. Years of litigation is not a solution.

That is a problem we should avoid. Again, either the Dorgan or the Thurmond language—either the no substantial possibility language of VIII(c) or the well-litigated 80-year test of Clayton—would suffice, in my judgment, to make certain we avoid the kind of litigation that I believe both the chairman and ranking member and other advocates of not having the Department of Justice in here are trying to avoid.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I favor the Dorgan amendment, and I wish to commend Senator DORGAN and Senator THURMOND for what they have done. I believe, and I have stated before, here and in the Judiciary Committee, that we have to allow the Department of Justice, our most expert competition agency, to play a more significant role, not just consulting, in deciding whether a Bell company entry into long distance or manufacturing threatens competition in those markets.

Go back to the 1982 consent decree that broke up Ma Bell and separated the Bell companies from AT&T. That took 10 years to litigate and conclude. The decree, the modified final judgment, took all these years of antitrust litigation, required a restructuring of the market, and led to significant consumer confusion.

Rather than relegate the Justice Department to a consulting role, if we design a proper role for that expert agency up front, we can avoid this kind of costly and time-consuming litigation from happening again. Let us handle it right from the start and not come in after the fact when the cure can sometimes create a new set of problems.

What this bill does, unless amended, is say, "We hope the checklist of unbundling and interconnection requirements works to unlock the local loop to competition." We all hope that. But what if it does not work? What if the checklist is not long enough to ensure that the local monopoly power of the Bell companies is broken and competition can develop?

If the checklist does not work, under the bill the Justice Department has to clean up the mess. They have to clean it up after the fact, instead of having any say before the fact—after the Bell company has already gotten into long distance and used its monopoly power to stifle potential competitors who need the Bell companies' pipeline to our homes and businesses.

The cleanup after the fact could take years of litigation, just as the prior case that ended with the MFJ took years. The cleanup may require a restructuring of companies, just as the prior case against Ma Bell resulted in spinning off AT&T from the Bell companies. Then, of course, the cleanup could well confuse consumers. I well recall the press and the outrage in the public when they questioned the wisdom of what Judge Greene did in 1982 and whether the breakup would hurt the public and our telephone service.

We have the opportunity to avoid the mess.

As former appellate judge, Robert Bork, recently pointed out, without a Justice Department role in applying a "standard with teeth," allowing the Bell companies into long-distance service and equipment manufacturing, taking the course envisioned by this bill "would result in even more litigation and regulatory disputes than there were prior to the decree."

We are sometimes accused of passing a lawyers relief act in some of these pieces of legislation which we consider. This bill, if passed without the amendment, would certainly be a bonanza for lawyers and economists as regulatory disputes proliferated before State and Federal agencies and lawsuits were filed charging discrimination, theft of intellectual property and predation in violation of section 2 of the Sherman Act. I think Judge Bork is right on this.

We should minimize this litigation quagmire by having the Justice Department, with its 25 years of expertise, look at the competitive impact of Bell company entry into the long-distance and manufacturing markets.

The MFJ left the Bell companies with local exchange monopolies, which persist today. To protect consumers, those Bell company monopolies are regulated. Line-of-business restrictions were imposed on the Bell companies. This was to make sure they did not use their controlling monopoly over the local phone service and the pipeline to the home to harm consumers or to gain unfair advantage over the competitors in the long-distance, manufacturing, and information services markets. Any of those regulations could be removed upon a showing by the Bell company that there is no substantial possibility that it could use its monopoly power to impede competition in the particular market it is seeking to enter. This is the so-called VIII(c) test.

The test has been tried, and it actually works. The Bell companies, of course, have their own reasons to believe VIII(c) is overregulatory. But they have been able to satisfy the test in the past and get into information and other services, and do so without harming consumers.

The MFJ's VIII(c) test is not even as strong as another test to which one Bell company agreed in March of this year. Ameritech reached a landmark agreement with the Justice Department, and they agreed to an actual competition test. We ought to look at that. Ameritech thought this was an appropriate test for a temporary trial waiver of the long-distance restriction. We are not talking about anything temporary here in this bill, but legislation with a far greater degree of permanence.

In discussions in which I have been involved, our colleagues are working out the differences so the Thurmond-Dorgan amendment can protect competition. I think that is important because the amendment provides a certainty that the Bell companies claim they want.

Having the Justice Department apply the Clayton Act test that is going to be outlined in the amendment, I believe, would complement the competitive checklist in the bill. The Justice Department would make sure that, in addition to the checklist being met and the Bell companies having taken the basic steps necessary to permit local competition to develop, in fact, those steps are working.

The bottom line is that with the existing monopoly hold that the Bells still have on local exchanges, the Department of Justice should review the competitive impact of Bell company entry into long distance. Otherwise, the choices that consumers have in

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services provided over their phoneline may go down, but the prices they pay for those services may go up. We should make sure that this legislation does not produce that kind of result.

Let us have a competitive environment in telecommunications and take steps to deregulate.

Mr. President, we have had remarkable changes in telecommunications just in the years that I have been here in the Senate. I have seen changes from competition which has brought down prices of long distance.

We have witnessed competition that we did not use to see, which now allows anyone who wants to go and buy equipment off the shelf—equipment for everything from teleconferencing to video conferencing, that we were told by the telephone companies, when they had a complete monopoly, was not available—to do so. It was available in every other country. It just was not available in the United States. Once we started to get some real competition, all of a sudden it started showing up here.

We do conference calls from home. We have automatic dialing in our equipment. We have speaker phones. We own our equipment. We do not have to go to one telephone company to buy it or rent it month by month anymore. It was competition that did that.

Rather than encouraging monopolies, we should ensure the competition that will help all of us.

I use the Internet all the time. I will be speaking about an aspect of that a little later on. But I use the Internet all the time. I do town meetings on the Internet. I have a home page. My State uses it. I have one petition that involves legislation of mine which got 10,000 or 20,000 names and electronic letters from all over the country in a matter of days.

These are the things that we did not have just a few years ago. They are extremely important to all of us. I know the distinguished Presiding Officer uses the Internet. We have various services now that provide access to it. We should be encouraging that kind of thing.

Can you imagine, Mr. President, had the Internet, for example, been controlled by just one source, one company, one gatekeeper? Does anybody believe it would have advanced as far as it has, even with its problems? Some parts of it have worked very well, and some parts do not work very well. It would not have happened, had we not had openness and competition.

By the same token, do you think any one of us who have in-the-home telephones and can program numbers into it and have automatic dialing or speaker phones or call forwarding built into our phones would have them without competition? That is what this is all about.

I commend the Senator from North Dakota and the senior Senator from South Carolina and all others who have worked on this important amendment. I am glad I have had a chance to work with them. I think we are going to have a decent solution and a good compromise in the amendment.

With that, Mr. President, I do not know who else may be seeking the floor, so I am going to yield the floor in just a moment.

I see the Senator from Nebraska on his feet. I will yield the floor.

Mr. KERREY. Mr. President, again, the question for colleagues is whether or not the Department of Justice can perform a role that would be useful, that would enable us, 50 years from now, to say we have, as again the chairman and ranking member have attempted to do in this legislation, created a structure under which we will go from a monopoly situation at the local level to a competitive environment for all telecommunications services.

One of the statements that is very often made is that, well, there have been lengthy delays. You will hear people say there are a lot of delays over at the Department of Justice. A triennial review that was required has not been done, or, well, the SEC can do it just as well; they will just hire some more people over here in this area and they should be able to handle it very well.

Mr. President, what I would like to do is cite a couple of instances to give you an example, and they illustrate the kinds of things that are going to occur, the kinds of questions that are going to be raised when businesses try to do things that the current law prevents them from doing. Basically, that is what we are talking about here. Telecommunications corporations that are prevented from doing something will be allowed to do it with this legislation.

It is not just the common carriers, by the way. We are allowing cable companies to price differently. We are deregulating them substantially. We are changing the laws for broadcast ownership. There are lots of changes in this bill besides just having to do with common carriers, but it is the common carriers we are dealing with in this particular amendment.

The case of GTE is very instructive, Mr. President. In this case, what you had was a company, GTE, with a local exchange monopoly in markets that were scattered around the country, and Sprint, a long distance company, recently established. What the Department of Justice did was to write up and get both parties to agree to a consent decree that was filed in court that prevents further litigation requiring separate subsidiaries and equal access for other long distance companies to make sure that GTE customers would have the benefits of long distance competition. The Department of Justice ensured that there was competition. They promoted and allowed the businesses to merge, in this case GTE and Sprint.

One of the things this bill does is it sets aside that consent decree. I believe it was in one of Senator DOLE's amendments earlier. So now this original consent decree that was filed on behalf of a merger and on behalf of consumers to make sure that you still have competition at the local and at the long distance level.

An even more difficult one was the merger of AT&T and McCaw that my colleagues might recall happened, I guess, about a year ago now in 1994. AT&T, obviously, by far the largest of the long distance carriers, was attempting to acquire initially, I think, 50 percent, eventually 100 percent of the larger cellular provider, providing not just long distance but local telephone service as well. There was vertical integration involving two companies with substantial market power. AT&T was dominant in both long distance and manufacturing of cellular equipment used by McCaw's competitors. The question was whether or not by acquiring McCaw, AT&T was going to restrict competition from competitors who were buying equipment that AT&T was manufacturing. McCaw, on the other hand, has only one competitor in each of the markets it has been given by the Federal Communications Commission.

So what happened? The Department of Justice intervenes. They work with both companies. They negotiate between both companies. They declare what it is they are going to be filing, and they file a consent decree which required separation and nondiscrimination safeguards so that McCaw customers will have equal access to long distance carriers and cannot be required to buy long distance from AT&T, and cellular rivals to McCaw that want to use cellular equipment will continue to have access to necessary product and will be free from interference of AT&T should they wish to change suppliers. AT&T and McCaw will not misuse confidential information obtained from AT&T equipment customers or McCaw equipment suppliers.

Those are the kinds of questions, Mr. President, that will occur on an increasingly frequent basis. Who knows? There may be hundreds of these applications that are going to fall into the lap of the Federal Communications Commission solely unless, again, either the VIII(c) test of the Senator from North Dakota or the Clayton test of the Senator from South Carolina is adopted and the Department of Justice is given a parallel, simultaneous role; not a new role, a historic role; not an unprecedented role but a role consistent with the unprecedented nature of this legislation itself.

The third example that I would cite was a very complicated one involving a foreign company, British Telecom, that had proposed to acquire a 20-percent stake in MCI.

Here again the question was that you were dealing with a company with substantial vertical integration, with substantial market power, and once again the Department of Justice comes in and says, well, here is what we are

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going to do. We are going to put a consent decree together establishing separation together with nondiscrimination safeguards so that public disclosure of rates, public disclosure of terms and conditions under which MCI and the joint venture gain access to BT's network is required.

Second, British Telecom is barred from providing the joint venture with proprietary information about their American competitor. .

Again, Mr. President, I do not expect my colleagues, I do expect myself, to understand exactly what all this means but what it establishes is that the Department of Justice has experience in making certain there is a competitive environment so that neither the providers nor the consumers who are out there trying either to sell or to buy are affected in an adverse way as a consequence of mergers, as a consequence of new lines of business that are developed as we lower the barriers to entry, as we decrease the regulatory burden and increase the extent to which competition is going to be used to determine our prices and quality of our goods.

Now, as to the question of whether or not the Department of Justice has failed to fulfill its obligation to review the need for continuing the MFJ's line of business restriction—that is a statement that is made relatively frequently—well, I think this criticism is not terribly valid. There was a triennial review that was done in 1987, 3 years after the breakup of the Bell system, but the suggestion that because there has been only one triennial review, there has not been a constant review, I think that suggestion does not stand up in the face of the evidence of what Judge Greene has been instructing the Department of Justice to do, it does not stand up in the face of the enormous volume of waiver applications that has been coming up and *what has been effectively a de facto* situation of constant reviewing of the line of business restrictions, and it does not stand up in the face of the current review leading to recommendations on line of business restrictions.

Experience demonstrated that triennial reviews by the Department of Justice were not necessary to achieve the intended goal of ensuring review of the need for the MFJ's line of business restrictions. Judge Greene himself explained why DOJ should have complete discretion as to whether or when to file additional triennial reviews. In his language:

> The Court and the Department envisioned a comprehensive review every 3 years interspersed with occasional waiver requests. What has occurred, however, is the process of almost continuous review generated by an incessant stream of regional company motions and requests dealing with all aspects of the line of business restrictions.

Let me read that again for emphasis, Mr. President, because those who very often criticize the Department of Justice for not doing a sufficient amount of review are the very companies that have created a constant review as a result of their application for waiver and the motions that they are filing in Judge Greene's court.

The original intent was for triennial review, Mr. President, because the court and the Department envisioned a comprehensive review every 3 years, kind of quiet period of time, interspersed with an occasional waiver request.

So when the consent decree was filed originally breaking up AT&T, the idea was, "Well, we will get a few waiver requests here and an occasional motion, but it will not be very often. Because there are not very many waivers or motions, we will do a triennial review."

The situation was just the opposite: Constant motions, constant waiver applications and, thus, no need for a triennial review and, thus, it does not stand up to criticize the Department of Justice and say, "See, don't give them a role in this matter because they didn't do what they were originally supposed to do."

They did not do what they were originally supposed to do because circumstances developed precisely the opposite of what both Judge Greene and the Department expected to have happen in 1981 and 1982 when this decree was being negotiated between AT&T and the United States people through the United States Department of Justice.

Judge Greene further explained why he did not require further triennial reviews. He said, with the stream of waiver requests, he "repeatedly considered broad issues regarding information services, manufacturing and even long distance."

Mr. President, basically he is saying that though this thing did not develop as was expected—long periods of quiet time interrupted by triennial reviews—the waivers and the motions have enabled us to constantly review the line of business restrictions and determine whether modifications need to be made.

The judge also explained that "as soon as there is a change, real or imaginary in the industry or other markets, motions are filed and all aspects of the issue are reviewed in dozens of briefs."

These observations are still valid. In the life of the MFJ, Bell companies have filed an average of one waiver every 2 weeks. In fact, what amounts to a triennial review is underway right now as the Justice Department investigates a motion to vacate the entire decree pursued by three Bell operating companies. This investigation will culminate with a report to Judge Greene in the next few months, and that report will be a comprehensive review of the need for continuing the line of business restrictions. It is likely the recommendations that are going to be made at that time will support most, if not all, of the changes that are being recommended in this legislation.

Let me talk about this purported delay. You hear, "Well, the Department of Justice takes a long time; this waiver process takes a long time." Typically what is done is a statistical analysis is used of the average age of pending MFJ waivers; that is to say, the request for waiver of the consent decree. There was a consent decree filed in the court. Judge Greene is administering that consent degree on behalf of American consumers who benefited enormously as a result of that Department of Justice action and what Judge Greene has done.

The statistical analysis, in my judgment, is a red herring. This argument that is used against DOJ decisionmaking is that you will see an unnecessary delay as a consequence of this statistical analysis, to back up the assertion this analysis purports to show that a Department of Justice role will cause a long period of time for decisions to be made.

Again, two things argue against that. *One is what I will get to here in a* minute. The other is in the language of the amendment, either as modified by the Senator from South Carolina or as originally contained in Senator DORGAN'S amendment. It is a review process that takes place simultaneous in the Department of Justice and in the Federal Communications Commission. Both have a date certain of 90 days. Only with the Department of Justice role, in my judgment, are you going to limit it to 90 days. Without that Department of Justice role, I stand here and predict you are going to have substantial litigation and the very delay we all seek to avoid.

Congress can and should require the Department of Justice to make this determination by a date certain. It is as simple as that. That is what the amendment does. That is what either one of these amendments, in fact, would accomplish.

The amendments guarantee the Bell companies will get an answer on long distance entry by a date certain. The legislation will replace the waiver procedure with specific deadlines. You eliminate the waiver procedures included in the 214 waiver procedures that are in current law under the 1934 Communications Act. The Department of Justice review cannot possibly slow Bell company entry into long distance unless such entry would be harmful to competition and, thus, undesirable for American consumers and businesses.

Under that situation, you want the Department of Justice to slow it down if, in their reasoned judgment, based upon the experience that they have had, it is going to restrict competition. They are the ones with the experience. You do not want this process to end if the Department of Justice, before granting permission, interprets the proposal to mean less choice, less competition, because in a monopoly situation, with all the other things that we are doing with this legislation, you are unquestionably going to get increased prices and marginal, if any, improvement in quality.

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Entry will be permitted to occur as quickly as possible, consistent with the appropriate entry tests that have been established by Congress in this legislation.

But there is a follow-on question, which is, does the MFJ waiver process show that the Department of Justice has been a barrier to greater competition by unnecessarily delaying waiver requests that are eventually approved? No, the users of that argument imply the Department of Justice review of waiver request has been worthless because the Department of Justice has supported and the district court has approved some 95 percent of those requests.

Mr. President, that examination, that figure of 95 percent does not tell all the story. A typical pattern is for one or more of the Bell companies to file an overbroad waiver request seeking relief that could not possibly be consistent with section VIII(c) of the MFJ. These unreasonable requests evoke extensive public concern and comment. The Department of Justice then has two choices: Recommend denial when the request is made, which would be relatively quick, or work with the Bell company or companies to fix the request so that it satisfies the requirements for approval.

Fixing the request is harder and takes much longer than just saying no. But the Department of Justice has committed itself to this harder course because it believes that the cause of competition is better served by taking the time to negotiate a reasonable request than by merely opposing an unreasonable request itself.

Of the waivers approved by the courts in 1993-1994 that were not mere copies of other waivers, fully 60 percent were the product of negotiations between the Department of Justice and the Bell companies that resulted in a modification of the original waiver request. That is the bottom line analysis, Mr. President: Fully 60 percent with the product negotiations between DOJ and the Bell companies that resulted in a modification of the original waiver request. Thus, the approval rate to which opponents refer is, in large part, a testament to DOJ success in preserving competition while working to minimize the burden of MFJ's line of business restrictions.

Another argument that is very often thrown up in this debate is that you are seeing an increase in the age of pending waiver applications. The timetables for waivers under the present court-administered consent decree is irrelevant. The Thurmond and Dorgan amendments require that the Department of Justice render its determination no later than 90 days after receiving an application for long distance entry.

So, to refer to the current delays and say, here is the problem and this is going to be perpetuated by either the Thurmond or the Dorgan amendment is wrong, Mr. President. These amendments specify 90 days of parallel processing during which both the FCC and the Department of Justice will consider an application by a local telephone company to get into long distance service.

Mr. President, there is, by the way, some reasons why these waiver requests are pending with the Department of Justice and why they have increased since the early years of the MFJ. I would like to go through one or two of them. But, again, I am actually offering some examples of why the Department of Justice is more competent than they might appear, if this is your only method of evaluation.

I am not offering these to try to persuade any colleagues that this is why you should trust that the process is not going to take very long. The amendment itself says 90 days. There is a date certain in the amendment. Do not worry about this dragging on forever, the law does not allow it.

Well, again, opponents have compared and taken to resolve waiver requests in the early years of the modified final judgment and the time taken more recently and asserted from the Department of Justice fails to deal with requests in a timely manner. But this comparison is simplistic and ignores fundamental changes in the character of waiver requests. It is worth noting that when you compare the age of waivers in 1984 to the age of waivers in 1994, it is not surprising that the average age of waivers in 1984 would be low, since they could not even be requested before that year. Why would they not be low then? A filed waiver application in 1984 is a year old. It is understandable and logical and indeed would be surprising if the opposite was the case if these waivers would not age the longer the consent decree is in place.

More recent waiver requests require more time, as well, to evaluate for several additional reasons. I think it needs to be understood. They are not illegitimate reasons. If they are not legitimate fines, that is fine. But do not come and say merely that we have one single statistic that shows in 1984 here is the age of the waiver application, and in 1994, here is the age of the waiver application and say, see, that justifies the conclusion that the Department of Justice should not be given a role.

Again, there are two reasons why that argument does not stand up. One is a fact I will isolate it in a minute. The other is that both the Thurmond and Dorgan amendment say a 90-day time certain. The recent waiver requests, however, deal almost entirely with lifting the MFJ's core business restrictions—that is, inter-exchange, information services, manufacturing—while early request waivers were primarily for the local company entry into the nontelecommunications business—a much easier waiver to grant. When you get into the core business application, the waivers are more difficult to grant and assess and thus take more time to either approve or to deny. They also evoke more public concern and comments. It is a tough deal when a person comes up and says, "A company has applied for a waiver, and I do not like it."

One of the reasons the Department of Justice has taken longer is that you have an increase in the numbers of public comments and expressions of concern. For example, of waivers filed with the Department of Justice in 1993 and 1994, the Department receives nearly six times as many comments per waiver as in the 1984 to 1992 period. So just in the last 2 years, you have had a substantial increase in the number of public concerns and comments which are made on the waiver applications that are put to the Department of Justice. The recent waiver applications present broader and more complex issues. A number of waivers still considered pending are actually subsumed within broader requests that have already been addressed by the Department of Justice.

Despite these challenges, the Department of Justice succeeded in speeding up the waiver review process. In 1994, DOJ disposed of 43 percent more waiver requests than in 1993, while the average age of pending waivers decreased by 17 percent. So if you are looking for how they are doing over there, the 900 or so employees in the Antitrust Division of the Department of Justice who have the responsibility for assessing concentration in the meat packing industry and concentration in all other industries—they have the responsibility for antitrust action in all sectors of the U.S. economy, these 900 employees—if you are looking for facts as to how well they are doing, I urge my colleagues to look at the progress they have made from 1993 to 1994. Look at the complexity of the cases, and look beyond merely an examination that says from 1984 to 1994 in the cases the age of the waiver applications has been lessened. For all kinds of reasons, it is understandable, and it does not indicate that the Department of Justice is incompetent or unqualified. If that does not persuade you, look at the language of the Dorgan amendment and the Thurmond amendment, because they remove all possibility of this thing being delayed for a long period of time by putting a 90-day time certain, a date certain in the law.

Mr. President, the Department of Justice is the agency with the expertise in the competition and telecommunications markets. The Department of Justice has had an unwavering focus on the protection and promotion of competition. All facts support that conclusion. No facts that I have heard support the conclusion that the Department of Justice does not have the capacity to assist the people of the United States of America, as we the Congress attempt to move this local

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monopoly into a competitive environment. They have promoted competition in telecommunications on a nonpartisan and bipartisan basis throughout this entire century.

The Department of Justice has deepened its expertise in telecommunications competition over the past quarter century by investigating the Bell system's monopoly, suing to break up the monopoly, and allow competition in long-distance and equipment markets to flourish, and in assisting the Federal district court in administering the modification of final judgment, the consent decree that dismantled AT&T. The benefits to the Nation from the Department's role in promoting competition have been more jobs, more exports, greater innovation, and more products available to businesses and consumers at lower prices than at any time in our history.

I see that the Senator from South Carolina is here.

I yield the floor.

The PRESIDING OFFICER. The Senator from South Carolina is recognized.

AMENDMENT NO. 1265, AS FURTHER MODIFIED

Mr. THURMOND. Mr. President, I have a modification at the desk.

The PRESIDING OFFICER. The Senator has the right to modify his amendment.

The amendment is so modified.

The amendment (No. 1265), as further modified, is as follows:

Strike all after the first word of the pending amendment and insert the following:

(2) Section 309(d) (47 U.S.C. 309(d)) is amended by inserting "(for subsection (k) in the case of renewal of any broadcast station license)" after "with subsection (a)" each place it appears.

SUBTITLE B—TERMINATION OF MODIFICATION OF FINAL JUDGMENT

SEC. 231. REMOVAL OF LONG DISTANCE RESTRICTIONS.

(a) IN GENERAL.—Part II of title II (47 U.S.C. 251 et seq.), as added by this Act, is amended by inserting after section 254 the following new section:

"SEC. 255. INTEREXCHANGE TELECOMMUNICATIONS SERVICES.

"(a) IN GENERAL.—Notwithstanding any restriction or obligation imposed before the date of enactment of the Telecommunications Act of 1995 under section II(D) of the Modification of Final Judgment, a Bell operating company, or any subsidiary or affiliate of a Bell operating company, that meets the requirements of this section may provide—

"(1) interLATA telecommunications services originating in any region in which it is the dominant provider of wireline telephone exchange service or exchange access service to the extent approved by the Commission and the Attorney General of the United States, in accordance with the provisions of subsection (c);

"(2) interLATA telecommunications services originating in any area where that company is not the dominant provider of wireless telephone exchange service or exchange access service in accordance with the provisions of subsection (d); and

"(3) interLATA services that are incidental services in accordance with the provisions of subsection (e).

"(b) SPECIFIC INTERLATA INTERCONNECTION REQUIREMENTS.—

"(1) IN GENERAL.—A Bell operating company may provide interLATA services in accordance with this section only if that company has reached an interconnection agreement under section 251 and that agreement provides, at a minimum, for interconnection that meets the competitive checklist requirements of paragraph (2).

"(2) COMPETITIVE CHECKLIST.—Interconnection provided by a Bell operating company to other telecommunications carriers under section 251 shall include:

"(A) Nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating company's telecommunications network that is at least equal in type, quality, and price to the access the Bell operating company affords to itself or any other entity.

"(B) The capability to exchange telecommunications between customers of the Bell operating company and the telecommunications carrier seeking interconnection.

"(C) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates where it has the legal authority to permit such access.

"(D) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

"(E) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

"(F) Local switching unbundled from transport, local loop transmission, or other services.

"(G) Nondiscriminatory access to—

"(i) 911 and E911 services;

"(ii) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

"(iii) operator call completion services.

"(H) White pages directory listings for customers of the other carrier's telephone exchange service.

"(I) Until the date by which neutral telephone number administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

"(J) Nondiscriminatory access to databases and associated signaling, including signaling links, signaling service control points, and signaling service transfer points, necessary for call routing and completion.

"(K) Until the date by which the Commission determines that final telecommunications number portability is technically feasible and must be made available, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with final telecommunications number portability.

"(L) Nondiscriminatory access to whatever services or information may be necessary to allow the requesting carrier to implement local dialing parity in a manner that permits consumers to be able to dial the same number of digits when using any telecommunications carrier providing telephone exchange service or exchange access service.

"(M) Reciprocal compensation arrangements on a nondiscriminatory basis for the origination and termination of telecommunications.

"(N) Telecommunications services and network functions provided on an unbundled basis without any conditions or restrictions on the resale or sharing of those services or functions, including both origination and termination of telecommunications services, other than reasonable conditions required by the Commission or a State. For purposes of this subparagraph, it is not an unreasonable condition for the Commission or a State to limit the resale—

"(i) of services included in the definition of universal service to a telecommunications carrier who intends to resell that service to a category of customers different from the category of customers being offered that universal service by such carrier if the Commission or State orders a carrier to provide the same service to different categories of customers at different prices necessary to promote universal service; or

"(ii) of subsidized universal service in a manner that allows companies to charge another carrier rates which reflect the actual cost of providing those services to that carrier, exclusive of any universal service support received for providing such services in accordance with section 214(d)(5).

"(3) JOINT MARKETING OF LOCAL AND LONG DISTANCE SERVICES.—Until a Bell operating company is authorized to provide interLATA services in a telephone exchange area where that company is the dominant provider of wireline telephone exchange service or exchange access service, a telecommunications carrier may not jointly market in such telephone exchange area telephone exchange service purchased from such company with interLATA services offered by that telecommunications carrier.

"(4) COMMISSION MAY NOT EXPAND COMPETITIVE CHECKLIST.—The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist.

"(c) IN-REGION SERVICES.—

"(1) APPLICATION.—Upon the enactment of the Telecommunications Act of 1995, a Bell operating company or its affiliate may apply to the Commission and the Attorney General for authorization notwithstanding the Modification of Final Judgment to provide interLATA telecommunications service originating in any area where such Bell operating company is the dominant provider of wireline telephone exchange service or exchange access service. The application shall describe with particularity the nature and scope of the activity and of each product market or service market, and each geographic market for which authorization is sought.

"(2) DETERMATION BY COMMISSION AND ATTORNEY GENERAL.—

"(A) DETERMINATION.—Not later than 90 days after receiving an application under paragraph (1), the Commission and the Attorney General shall each issue a written determination, on the record after a hearing and opportunity for comment, granting or denying the application in whole or in part.

"(B) APPROVAL BY COMMISSION.—The Commission may only approve the authorization requested in an application submitted under paragraph (1) if it—

"(i) finds that the petitioning Bell operating company has fully implemented the competitive checklist found in subsection (b)(2);

"(ii) finds that the requested authority will be carried out in accordance with the requirements of section 252; and

"(iii) determines that the requested authorization is consistent with the public interest, convenience, and necessity. In making its determination whether the requested authorization is consistent with the public interest, convenience, and necessity, the Commission shall not consider the antitrust effects of such authorization in any market for which authorization is sought. Nothing in this subsection shall limit the authority of the Commission under any other section.

If the Commission does not approve an application under this subparagraph, it shall

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state the basis for its denial of the application.

"(C) APPROVAL BY ATTORNEY GENERAL.—The Attorney General may only approve the authorization requested in an application submitted under paragraph (1) if the Attorney General finds that the effect of such authorization will not substantially lessen competition, or tend to create a monopoly in any line of commerce in any section of the country. The Attorney General may approve all or part of the request. If the Attorney General does not approve an application under this subparagraph, the Attorney General shall state the basis for the denial of the application.

"(3) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (2), the Commission and the Attorney General shall each publish in the Federal Register a brief description of the determination.

"(4) JUDICIAL REVIEW.—

"(A) COMMENMCEMENT OF ACTION.—Not later than 45 days after a determination by the Commission or the Attorney General is published under paragraph (3), the Bell operating company or its subsidiary or affiliate that applied to the Commission and the Attorney General under paragraph (1), or any person who would be threatened with loss or damage as a result of the determination regarding such company's engaging in the activity described in its application, may commence an action in any United States Court of Appeals against the Commission or the Attorney General for judicial review of the determination regarding the application.

"(B) JUDGMENT.—

"(i) The Court shall enter a judgment after reviewing the determination in accordance with section 706 of title 5 of the United States Code.

"(ii) A judgment—

"(I) affirming any part of the determination that approves granting all or part of the requested authorization, or

"(II) reversing any part of the determination that denies all or part of the requested authorization,

shall describe with particularity the nature and scope of the activity, and of each product market or service market, and each geographic market, to which the affirmance or reversal applies.

"(5) REQUIREMENTS RELATING TO SEPARATE AFFILIATE; SAFEGUARDS; AND INTRALATA TOLL DIALING PARITY.—

"(A) SEPARATE AFFILIATE; SAFEGUARDS.—Other than interLATA services au-".

Mr. THURMOND. Mr. President, I rise today in support of the Thurmond-D'Amato-DeWine-Inhofe amendment which will protect competition and consumers by providing that antitrust principles will be applied by the Department of Justice in determining when the Bell operating companies should be allowed to enter long distance.

I wish to explain a modification which I have made to this amendment. With this modification, which clarifies the separate roles of the FCC and the Department of Justice, Senator DORGAN has agreed to support my second degree amendment and not to seek a vote on the Dorgan first-degree amendment. I have appreciated working with Senator DORGAN, Senator LEAHY, and their staffs, and wish to thank them for their cooperation and assistance in this important matter.

The second degree amendment that I introduced last Thursday contained language to ensure that there is no duplication of functions between the Department of Justice and the FCC. This was accomplished in the amendment by limiting the public interest analysis of the FCC so that the Commission shall not consider the antitrust effects of entry. Analysis of the antitrust effects of Bell entry into long distance should only be conducted by the Department of Justice, the antitrust agency with great expertise and specialization in analyzing competition.

The modification that I have made today clarifies that this restriction of the FCC applies only to FCC's public interest analysis of Bell entry into long distance. This clarifies the FCC public interest in a way that is entirely consistent with the original goals and purposes of my amendment and ensures that there is no duplication of functions. Although the FCC may appropriately consider competition in other aspects of its analysis, this specialized antitrust analysis prior to Bell company entry is to be conducted solely by the Department of Justice.

Under my modified amendment, the antitrust standard applied by the Justice Department remains the Clayton section 7 standard. The standard is whether Bell company entry would substantially lessen competition or tend to create a monopoly. This is the standard applied to every merger and acquisition in order to determine whether companies can expand or move into new lines of business. That is the issue that requires analysis before Bell companies enter long distance markets.

One issue I wish to emphasize is that my amendment is necessary to reduce duplication in the telecommunications legislation. Currently, S. 652 provides that the FCC will conduct a public interest analysis of Bell entry into long distance, with consultation by the Department of Justice. This results in both agencies being involved in antitrust analysis, which is wasteful and inefficient. The Department of Justice—and not the FCC—has developed special expertise and specialization in antitrust analysis during the past 60 years.

I would also note that the language we are using from section 7 of the Clayton Act also appears in section 2 and section 3 of the Clayton Act. These sections deal with price discrimination and exclusive dealing arrangements which may harm consumers by inhibiting competition in the marketplace. Thus, not only is this standard familiar because of the experience and case law under section 7 of the Clayton Act, but also because of sections 2 and 3.

We all strongly support competition. We all support competition replacing regulation. The question is how to make sure competition exists, and whether competition is achieved by a fixed list of rules or by flexible antitrust analysis.

Mr. President, the bottom lime is whether we believe the antitrust laws are the means by which we protect competition or not. It is that simple. If we believe in the antitrust laws—which have protected free enterprise for over 100 years—then we should pass the Thurmond - D'Amato - DeWine - Inhofe amendment.

For all of these reasons, I urge my colleagues to support this amendment.

Mr. President, I ask unanimous consent to add Senator DORGAN as a cosponsor of my second-degree amendment, as modified. Additionally, I ask unanimous consent to add Senator KOHL as a cosponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KERREY. Mr. President, I ask unanimous consent that I be added as a cosponsor to the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

PRIVILEGE OF THE FLOOR

Mr. HOLLINGS. Mr. President, I ask unanimous consent that Laura Phillips, a fellow in the office of Senator LIEBERMAN, be permitted privilege of the floor during consideration of the bill.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. PRESSLER. Mr. President, I would like to respond to some of the remarks made here today, in part, to say that we already do have antitrust laws that will continue to exist.

We have the Sherman Antitrust, the Clayton Act, and the Hart-Scott-Rodino Act, which will remain in full application.

I would like to go through the regulatory safeguards that already exist in S. 652, to break up local Bell monopolies without a new Department of Justice bottleneck.

It is my strongest feeling that having the Department involved as a decisionmaker here is a mistake. The Department is already involved. The Department can be a party to any case on appeal from the FCC. Under the Hobbs Civil Appeals Act, it involved the Department as an independent party in all FCC appeals.

The point is, the Department has an antitrust role. It has a role as an independent party in all FCC appeals. It can use the Sherman antitrust standard or it can use the Clayton, or indeed the Hart-Scott-Rodino can be used when there is an application for a merger.

Now, we already have several safeguards in the process. We do not need bureaucracy. Having the Department do the same thing, basically, that the FCC is already doing is a mistake. I might say that even if they do it, it will take them a long time.

My friends have said we will put a time certain. The legislation already requires the Department to try to act within 30 days. That is a requirement that is already on them.

Presently, the appeals last up to 3 or 4 years. I have a chart. I will show how long the appeals last. They already have a 30-day requirement that they have not been meeting.

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I want to go through some of the regulatory safeguards in this bill. First of all, the State certifies compliance with market requirements. The State has to act on this. That is a safeguard. That is a check.

Second, the FCC affirms public interest. That is also public interest, convenience, and necessity.

That means that the FCC can look at this from the traditional public interest, convenience, and necessity standpoint. We had a discussion about that here on the floor of the Senate. There was an effort to repeal that by some Members of the Senate who feel that the public interest gives the FCC too much latitude, too much power.

Next, the FCC certifies compliance and requests a 14-point checklist. The FCC has to go through a 14-point checklist to certify that the regional Bells have acted. I have the 14 points on another chart. I will go through that.

The Bell companies comply with separate subsidiary requirement. They must have a separate subsidiary in a certain period of time in many areas. Nondiscrimination requirement. They cannot give all the business to one long distance or one subsidiary. They have to act in a nondiscriminatory way.

There is a cross-subsidization ban.

Fifth, FCC allows the Department full participation in all its proceedings. The Department of Justice will be there as the FCC proceeds. Indeed, the bill, as written, gives the Justice Department a role.

Next, the Bells must comply with existing FCC rules in rigorous annual audits; elaborate cost accounting; computer-assisted reporting, and special pricing rules.

Seventh, there will remain the full application of the Sherman Antitrust, the Clayton Act, and the Hart-Scott-Rodino Act. This is very important.

It is not as though, if we defeat the Dorgan-Thurmond amendments, that the Justice Department will have no role. They will have a very active role as they have had in the past. I think that that is something to remember. Again, the Hobbs Civil Appeals Act lets the Department of Justice participate as an independent party in all FCC appeals.

Let me go over here to the competitive checklist, if I may. This is S. 652's measure to assure breakup of local Bell monopolies.

First, access to network functions and services. The interconnect requirement is on the checklist. I think everybody in the Chamber has been in on drawing up this checklist. It is a checklist that the FCC will have to go through before a Bell company is certified that it has met the requirements. This is a definite checklist. It is something that we have worked on around here since January in meetings every night and on Saturdays and Sundays.

Next, capability to exchange telecommunications between Bell customers and competitors' customers;

Third, access to poles, ducts, conduits, and rights of way;

Fourth, local loop transmission unbundled from switching;

Fifth, local transport from trunk side unbundled from switch;

Sixth, local switching unbundled. These are the so-called unbundling portions of it, whereby a company will have to open up and unbundle its codes so that competitors can come in. It is only once they form a small telephone company that there is interconnection and unbundling available.

Next, access to 911 and enhanced 911, directory assistance and operator call completion service;

Next is the white pages directory listing;

Next is access to telephone number assignment;

Tenth, access to data bases and network signaling;

Eleventh, interim number portability;

Twelfth, local dialing parity;

Thirteenth, reciprocal compensation;

Fourteenth, resale of local service to competitors.

Mr. President, this is the competitive checklist, the 14 points that must be met first of all to be certified by the FCC. Then we also have the so-called public interest requirement. We also have State certification.

What I am saying is, here we have a carefully crafted bill that already requires much review, and what is being proposed in the Thurmond and Dorgan amendments is that, when we finish all this with the State and the FCC, then we go over to the Justice Department and start all over again with another decisionmaker.

The Justice Department is not supposed to be a decisionmaker in this sense. The Justice Department is not a regulatory agency. It has become one under Judge Greene's rules, but those attorneys theoretically respond to Judge Greene from the district court. They have gotten in the habit over there of having several hundred lawyers who are basically regulators. As, for example, in the Ameritech case, they are even approving phone books and things of that sort over at the Department of Justice.

The Department of Justice is supposed to deal with antitrust issues and the Sherman Act and the Clayton Act and go act as an independent party under the Hobbs Appeals Act. They are supposed to be lawyers bringing cases and lawyers giving interpretations and antitrust rulings and so forth.

What the Justice Department, like so many departments in Washington, wants to do is become a regulator, to have a permanent staff of people who regulate and make decisions. That is supposed to be done over at the FCC.

So I say to my friends who propose this change that, if they want another standard of regulation, let us do it at the FCC where it is supposed to be. Why go over here to the Department of Justice—which has its role, which has its traditional role, and a good role, let me say.

We have read a lot in the paper about the Hart-Scott-Rodino rulings of this year and the Clayton Act standard, which is in the proposal of Senator THURMOND. And, of course, the Sherman Antitrust Act, which started all this, in Judge Greene's decision. The point is the Department of Justice already has a role and will have a role without adding another layer of bureaucracy.

The Dorgan-Thurmond amendment or variations thereof, is the opposite of proconsumer legislation. Consumers want wide open competition. They want lower costs. They want more and better services, and they want these without delay.

The Department of Justice, in carrying out the MFJ, is now averaging nearly 3 years. I believe I have here a list of small charts which show the average time, "Average Age Of Waivers Pending Before the District Court." In 1993 it is 1,600 days, is the average age of the waivers. That is how long it takes to get a decision out of the Department of Justice, 1,600 days.

The "Waivers Disposed Of Through the District Court," that is through the Justice Department, has declined in 1993. It reached a height in 1986 but they are doing less, even slower, even more slowly.

The average age of waivers pending before the Department of Justice year-end is 1,200 days. This is in a Department that in present law says it will endeavor to get these done within 30 days. They have completely ignored that.

Next we come to "Waivers Disposed Of By DOJ." It has dropped to an all-time low in 1993 for some reason.

The point I am making—requests filed with the DOJ hit an all time low in 1992, again in 1993—is people have given up. If they have to wait 3 years or more, it is too frustrating, too futile. I think that is something we should think about very carefully before we add another layer of bureaucracy.

I know my colleagues have the best intentions here, but I have a chart showing the "Average Age of Waivers Before the District Court Year-end." It started in 1985. They were supposed to get theirs, in the law, done within 30 days. They were supposed to get the work done within 30 days. In 1985 it took them an average of about 100 days to get the waivers issued. In 1986 it was up to about 200 days.

Anyway, to make a long story short, if you file a waiver before the Department of Justice today you will wait, on the average, nearly 1,500 days, about 4 years. That is why they dropped so much.

I say to my colleagues, do we want this extra layer of bureaucracy? Or do we really want to open up competition?

I would say it is a great mistake. We are doing all these checklists. We are doing public interest. We are having

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the States be involved. All this has to happen first. This is a formidable task. We are probably talking about delaying competition 3 years at least if this amendment passes in any form.

The way the bureaucracy works around this town—I have been around here awhile watching it—it will probably be more than that before we are through. We are probably talking about a 3- to 5-year delay.

Some of my colleagues have talked about a LeMans start—that is, just start right now, in terms of competition. We would let everybody compete. There are some problems of unbundling or interconnecting with that, but there are Members of this body, indeed we had two members in the Commerce Committee who voted against this bill who felt strongly about an immediate start. There is much merit to that.

But the bill we came up with is a balance between those two. The bill we came up with allows States to certify, then the FCC to go through a 14-point checklist, then the FCC to go through the public interest test, then competition would begin under our bill.

But under the proposal of my colleagues here today on the Senate floor, the Dorgan-Thurmond proposal, after we finished all that process and went through all those approvals and went through that checklist, then we would go over to the Justice Department and start all over again with some more regulators and they would go through yet more tests. It would take more time.

What we have here is a lawyer's dream, a lawyer's paradise.

Mr. KERREY. Will the Senator from South Dakota yield on that?

Mr. PRESSLER. I will, just as soon as I am finished. I am almost finished.

What we have here is a lawyer's paradise if this passes. It will mean the piece of regulation we have before us, which is deregulatory, will become in part regulatory. We are trying to simplify, to have less Government making approvals. This amendment would mean we would need a whole other layer of people making the same approvals. It is more regulation, in my judgment.

Let me also say that we had quite a debate in the Commerce Committee and here on the floor on this matter of public interest, convenience, and necessity. There are many in the think tanks in town who would be described as on the conservative side of things who think we should not have the standard of public interest, convenience, and necessity because, they said, that is more bureaucracy, it lets the FCC have too much power.

This Chamber and the Commerce Committee had votes on that and it was determined to leave it in, but a lot of people think that is too much regulation. These companies are going to have to go through all the checklists, the public interest test, State approval, they are going to have to go through all that. Then my friends want them to go on over to the Justice Department with their lawyers and start all over again. We should not allow that. That is my point.

Mr. KERREY. Will the Senator from South Dakota yield?

Mr. PRESSLER. Yes, I will yield.

Mr. KERREY. The Senator twice has said an applicant must go to the FCC, go through all that, and then they have to go to the Department of Justice. Will the Senator from South Dakota agree the language of the amendment calls for simultaneous application? It does not call for consecutive application, where you go to one and then have to go to another. You do not get approval at FCC and then get approval at the Department of Justice.

The Senator twice said that you get your approval at the FCC. Then you have to go to another agency. Does the Senator allow that the Thurmond-Dorgan amendment calls for a simultaneous process?

Mr. PRESSLER. If my friend will allow me, the Senators' amendment would require (that they go to two places, first of all, for sure. There is no debate about that. You have to go to two places.

Mr. KERREY. The question I am asking——

Mr. PRESSLER. Let me answer the question.

Mr. KERREY. The question is, is there simultaneous application?

Mr. PRESSLER. I do not yield the floor.

The PRESIDING OFFICER (Mr. BROWN). The Senator from South Dakota has the floor.

Mr. PRESSLER. I would like to answer that question, if I may.

First of all, the amendment would require the applicant to go to two places; actually more than that. You have to go to the State, to the FCC, and the Justice Department. It is true that the Senator says simultaneous. But, as a practical matter, most people are not going to hire some lawyers. They are going to see if they meet the public interest test and the checklist first before they go to the Justice Department, as a practical matter. But, even miraculously, if they could do both simultaneously——

Mr. KERREY. I do not give——

Mr. PRESSLER. I will not yield until I complete answering the question.

The point is, you clearly would have to go to two places. One, you have to go to the State and the FCC. Under this amendment, then, you would have to go to Justice. Even if you could miraculously get all of this done simultaneously, if you had three sets of lawyers, you go to the State. Before the FCC could really act, they would have to see the State thing. The fellows over at Justice, I guarantee you, would want to see what the guys at the State and the FCC did.

Let us say, if you had enough lawyers, they could miraculously do it all on the same day, and that each agency plus the Justice Department will not delay things for 3 years, you would still have the situation that you could need three sets of lawyers. As a practical matter, most people, if the State is not going to approve, they will not spend the money to go on to the FCC and go on to the Justice Department. The point is, if my friend will yield, he has to admit that there is one extra place you have to go. There is clearly one more place. You have to go to the Justice Department.

Mr. KERREY. I am pleased to yield.

The Senator keeps saying miraculously, and three sets of lawyers. I just do not think the facts support that. I do not think the facts support that is what a company would do, have to hire a whole separate set of lawyers or, being a miracle, that there would be simultaneous application. The application process is different at the Department of Justice because the Department of Justice is the agency that has the experience of determining whether or not there is competition. They are the ones with the experience. The FCC does not have that experience. Indeed, the checklist the Senator is referring to is the placement for the VII(c) test. The Senator voted for an VII(c) test last year. Last year, the Senator from South Dakota was quite willing to have simultaneous application then because the Department of Justice had a ruling with an VII(c) test involved.

Mr. PRESSLER. I yielded for a question. What is the question?

The PRESIDING OFFICER. The Senator from South Dakota has the floor.

Mr. PRESSLER. I will be glad to yield for a question.

Mr. DORGAN. Mr. President, I would like to ask the Senator from South Dakota if he is almost finished. Senator THURMOND has offered a modification, which has been accepted as a second-degree amendment. I would like to describe the circumstances of the bipartisan support for that modification which is the second-degree amendment to my amendment. So when the Senator is finished, I would like to do that.

Mr. PRESSLER. I will quickly wrap up in deference to the Senator from North Dakota. I have a few more things. In fact, I am trying to keep things moving along. So I will yield the floor so the Senator can do it right now.

I hope other Senators who have amendments will bring them to the floor so we can get some amendments stacked up. We are trying to move this. I will demonstrate an eagerness to move things forward by yielding the floor right now.

Mr. DORGAN. Mr. President, it was not my intention to ask the Senator from South Dakota to discontinue if he was not finished. I appreciate very much his courtesy. Again, I think he and the Senator from South Carolina have done a real service in bringing this legislation to the floor, and while we disagree on parts of it, disagree strongly on this part of it, I, nonetheless, admire the work that both managers have done.

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But let me describe where we are. We worked over the weekend with Senator THURMOND and his staff, and Senator KERREY and his staff were apprised. We now have an agreement. Senator THURMOND's second-degree amendment was modified a half hour or so ago. That modification includes some additional language that was agreed to this weekend so that we retain the standard proposed by Senator THURMOND in his second degree. We add some additional language that we wanted to be included, and it now represents in my judgment a satisfactory resolution on the question of the role of the Justice Department. I, therefore, will be supportive by voting yes on a motion that is offered in the second degree. It represents something that Senator THURMOND, myself, Senator KERREY, and others agree with and think will advance the interests of this bill.

Mr. President, while I am on my feet, I ask unanimous consent that Senator LEAHY be added as a cosponsor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DORGAN. Mr. President, I heard the description by the Senator from South Dakota. With all due respect, I disagree very strongly with the description. We are not attempting to establish new barriers. In fact, it is quite the opposite. Just exactly the opposite is happening here. We intended to, and with this amendment describe the different roles for the Federal Communications Commission and the Department of Justice. We have specifically created the circumstance where there is no overlap. That was the entire purpose of what we have done over the weekend with this amendment.

So there is no overlap. We are not talking about creating a level of complexity that will be a lawyers' relief act. In fact, the only relief the lawyers in this country will get is if this is not in the bill. If we do not include in the bill a role in the Justice Department, I guarantee you that we will have an ocean of litigation on this question forever.

So if one is interested in life and making lawyers happy, one would I suppose vote against this because it will result in an ocean of litigation. We have very carefully—and I think in a considered way with Republicans and Democrats—crafted something that says here is the role for the Federal Communications Commission, here is the role for the Department of Justice, and they do not overlap but they are both essential roles. And they are both important, in any judgment, in making sure that as we move this forward, we do in fact have competition.

I am probably the last one expected to stand here and extol the virtues of lawyers down at the Justice Department involved in the antitrust business. In the House of Representatives, I went to the floor I suppose half a dozen times over the decade of the 1980's, threatening to put the pictures of lawyers down at DOJ on the side of milk cartons, because my notion was we were paying 900 or some attorneys involved in antitrust activity who essentially had vanished. They were not doing anything. So my assumption was they disappeared and that we ought to find them someplace. That was under the old scheme of a Department of Justice that really could not find any activity that they felt threatened the free market system. Any merger was just fine. Any hostile takeover was terrific. They became more like cheerleaders for concentration in the marketplace than they were the guardians of public interest with respect to competition and those who were fighting against antitrust activities.

If you care about the marketplace, then you care about what is called a free market, and a free market in which competition is a robust, dynamic force that serves the interests of the consumers. A free market requires a little care and attention on our part.

You can have your pockets picked in an economy like ours if you do not have free markets. How do people pick your pockets? The influence that can pick your pockets in a marketplace like ours is when you have concentrations, so much so that enterprises can actually fix their prices, represent anticompetitive behavior, do things in a way to extract money from the consumers in a manner that protects themselves protects the enterprises from the whims of competition. Those things are not healthy. We have been through periods in our country where we had some trust busters that had to break up the cartels and trusts. Free market systems work only when there is a free market, only when there is competition.

Our whole point about this legislation is we want there to be competition. We believe competition is good. Ancillary to that, as I also believe in my home county where you do not have very many people, there is not going to be much competition. So I ought to make sure that we provide some basic protections for those areas of the country where competition is not going to be the allocator of resources and services. Notwithstanding that, in much of our country, you will have robust competition. But the potential exists in a very substantial way for some to use market advantage to restrict competition. That is why we want to find in this amendment a mechanism by which we provide guarantees, and we provide assurances for the consumers in our country. That is what we are attempting to do.

So I understand, if I were one participant in this battle for the consumers' dollar in the telecommunications industry, I might say, "Gee, it is a real inconvenience for you all to be suggesting that the Department of Justice ought to have any more of a role than a consultative role."

This is not about inconvenience. This is about protecting the public interest and protecting the market system to make sure we have a free market with competitive forces.

Mr. PRESSLER. Will my friend yield for a question?

Mr. DORGAN. I would be happy to yield.

Mr. PRESSLER. Indeed, I have enjoyed working with my friend on so many issues, and we do have occasional disagreement. This is one of them. Let me ask a question.

Would this amendment require the Administrative Procedures Act to be applied in Justice Department procedures? What I am getting at here is the procedures at the FCC would be under the Administrative Procedures Act so there is an open process. There are ex parte rules. The Justice Department has rules over there that are prosecutorial, and they do not have to be open; they do not have to meet all of the same requirements that an administrative agency does. What is the status of the Administrative Procedures Act regarding this amendment?

Mr. DORGAN. I do not know the specific answer to the Senator's question except to say that the amendment that we have now modified establishes a Clayton 7 test which is a test below the VIII(c) test that we had in my underlying amendment, which, I might say, the Senator from South Dakota and others voted for last year as it moved out of the Commerce Committee. To whatever extent the procedure followed last year with respect to VIII(c), which is a higher threshold which would have been required, I would suggest that same procedure is now required in the Justice Department except that we have agreed with a somewhat lower standard.

We do not agree, however, with a notion that the Justice Department ought to be dealt out of this altogether, reserving only a consultative role for the Justice Department.

I understand the question. I will try to get an answer with respect to the Administrative Procedures Act I believe the Senator asked about.

Mr. PRESSLER. Yes. We have to resolve the Administrative Procedures Act matter or clarify it to the Senate. The Justice Department, being a prosecutorial branch of our Government, can operate in secret or does not have to follow the administrative procedures rules. Therefore when you file a waiver—presently when a telephone company files for a waiver—they do not have the same rights to know what is going on or ex parte rules or rules of openness that one has with an agency such as the FCC.

And under the 14-point checklist that we have and under the public interest rules at FCC, they have to follow the administrative procedures. This provides openness and and protects the rights of parties. But when they go over to the Justice Department—and it was one problem we had with the VIII(c) test very frankly—there is not that openness. The Justice Department does not have to have open meetings

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and hearings. It does not have to have ex parte rules. Your rights over there are less than they are when you are before an agency that has the Administrative Procedures Act.

I think this goes to the core of the debate here on the Senate floor. The Justice Department is a different sort of an agency. It is a cabinet agency that does not have to be under the Administrative Procedures Act. It can prosecute people. It interprets the antitrust laws. It interprets the Sherman Act and the Clayton Act and the Hart-Scott-Rodino Act, and it does a good job in those areas.

I might say that the present Assistant Attorney General, a fine woman, has done a great job, in my opinion, on Hart-Scott-Rodino, and she has done a great job in administering this huge group of lawyers over there who are regulators presently under the MFJ. And I suppose that somebody fears they are going to have to let all their lawyers go, somewhere between 200 and 900 lawyers, and I do not know where they are going to go. Maybe that is the problem.

Seriously, on a serious note, the Department of Justice wants to keep on being a regulator without being under the Administrative Procedures Act. And that is a problem. When you get over to the Justice Department—first of all, under the Dorgan amendment, you go to the FCC and you have openness. You can have an open hearing. If one of the commissioners talks to somebody even at a reception about this case, he has to file a report of it and give equal time to somebody else. But you go over here to the Justice Department, you are not under the Administrative Procedures Act. They can operate in secret if they want to. They are a prosecutorial agency. They can operate without the ex parte rules.

I think that is a very important thing. Constitutionally, I do not think you should be able to apply all of the aspects of the Administrative Procedures Act to the Justice Department. They have a different role in the nature of our Government. They have a different mission to carry out. Now, every agency would like to have several rooms full of lawyers who are regulators. And, indeed, if you look in the present Ameritech case, the Department of Justice had regulators checking on the validity of telephone books, to see whether they fit into the rules. They have regulators checking into the validity of Yellow Pages. This is in the Department of Justice, where we hold up the hand of the balance of justice.

This has nothing to do with the balance of justice. This belongs in the regulatory agency that we spend so much money on, the FCC. So that is I think a very core point here in the nature of this debate.

I am going to yield any further time. I will just conclude by saying, because we have to get this debate moving, I challenge my friend from North Dakota to name another area of commerce where the Department of Justice has a decisionmaking role. This is trying to give the Department of Justice a decisionmaking role.

And the answer to that question, which I will get, is none, not another single area—not transportation, not aviation, not financial services or any other area. Why telecom, which is an important area? Why are they putting them over in the Department of Justice? It is going to take a thousand regulators at least to carry out the Dorgan amendment. And we have this job done twice already, once at the State level and once at the FCC. I hope when we get into the wireless age I will still be around here offering a bill to eliminate the regulation that we have, but that may be 10 years down the road.

In any event, this is a bad concept, from the Administrative Procedures Act to the decisionmaking role.

I yield the floor.

Mr. DORGAN. Mr. President, I just disagree with the Senator from South Dakota. We are not talking about a regulatory role for the Department of Justice. We must be talking about a couple different pieces of legislation. We are not talking about putting Justice into a regulatory environment, the Justice Department, although I would admit that the term "justice" itself is a useful term for us to use as we discuss this because this is not about some mom and pop businesses having to confront the Justice Department. The real pawns in this debate are the American people, the consumers who are going to have to pay the bill for whatever communications services they purchase.

We would hope, all of us in this Chamber would hope they can go to a marketplace that is a free, open, competitive marketplace and purchase those services, even in the local exchanges. And the question for the Justice Department is the question of when is there competition and under what conditions this competition exists in the local exchanges, because then the regional Bell operating companies will be able to go out and compete in long distance service.

However, we are not suggesting the role of the Justice Department be a regulatory role. I think somehow the Senator and others are mistaken about that. I do think, though, that when one makes the point we have crafted an amendment that attempts to set up competing forces here that represent dual obstacles for an applicant is just wrong. It is not the way it is written. It is not what the amendment is about. And it is not what we are trying to do.

We are saying the absence of a substantive Justice role in this telecommunications bill we think has the potential of cheating the American people.

Mr. KERREY. Will the Senator from North Dakota yield?

Mr. DORGAN. Let me yield the floor.

Mr. KERREY. Just for a question.

Mr. DORGAN. I will be happy to yield.

Mr. KERREY. The Senator from South Dakota asked and then raised in the following series of arguments against, after having asserted that the Department of Justice has a different role and function, which it unquestionably does—it has been managing the movement from a monopoly to a competitive environment. Why should it not be different? Of course, it is different. As to the Yellow Pages case, it is a very important anticompetitive case, very important anticompetitive case.

Mr. DORGAN. Let me yield the floor to the Senator from Nebraska, if that is sufficient.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. KERREY. Mr. President, I thank the Senator. I am sorry for the long warmup to the question. I appreciate the yielding of the floor.

As to the question the Senator from South Dakota is asking, the language of 652 on page 89 appears to be—and I ask my colleague if he reads it the same way—on line 7, it says:

> The commission shall issue a written determination . . .

And here is the language that triggers the administrative procedures that the Senator was asking whether or not would exist. As I understand it, case law says this is the language that you need in order to trigger the very administrative review that the Senator is for. The language is:

> . . . on the record after a hearing and opportunity for comment.

I think it is a legitimate concern. I think the question that is being raised by the Senator from South Dakota is quite legitimate.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER. The senior Senator from Nebraska.

Mr. PRESSLER. Mr. President, if I could just answer that question.

The PRESIDING OFFICER. Will the Senator from Nebraska yield?

Mr. EXON. I yield.

Mr. PRESSLER. On page 89, "determination by the Commission," that is the Administrative Procedures Act applied to the Federal Communications Commission. My point is that it does not apply in Department of Justice proceedings.

The PRESIDING OFFICER. The Senator from Nebraska has the floor.

Mr. EXON. I thank the Chair.

Mr. President, I stand by the committee-reported bill's compromise on the role of the U.S. Department of Justice. As one of the architects of the Justice Department's advisory role compromise, I believe that this compromise delicately balances provisions that hold together very well under even the most dedicated scrutiny. The survival of the Federal Communications Commission public interest standard is a testament to that fact.

As a lesson in the art of compromise, the role of the Department of Justice is an example of how Congress should work together. Chairman PRESSLER

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presented a draft on behalf of his Republican colleagues which embraced a day certain for Bell entry into long distance, no role for the Department of Justice in the long distance decisionmaking, and no savings clause to preserve antitrust authority.

Our ranking member, Senator HOLLINGS, presented a draft on behalf of the Democrats which held equally firm to the position of no date certain, a separate decisionmaking role for the Department of Justice, and a full preservation of antitrust authority over the telecommunications issue.

What I am explaining is that a lot of thought and compromise and discussions and "-cussions" have taken place with regard to this very important matter. I happen to feel that the Commerce Committee, on which I have served for 17 years, since I have been here, has done itself proud on this particular issue. We have, I think, by compromise, by understanding, by persuasion convinced all that the Department of Justice, indeed, has a role to play.

What we are talking about and debating today—and I think the debate is very worthwhile—is how much authority, how far can the Justice Department go in this area. I happen to believe that while this, like most other bills and most other amendments that we adopt from time to time, is not perfect, we are not certain how it is going to work out. But we are certain in that this issue has been debated very, very thoroughly, and I believe that we have something that makes a great deal of sense. I hope we will hold to the committee position.

Following months of consultation, negotiations and bipartisan compromise, the committee recommended to the full Senate a bill which preserves an advisory role for the Department and certainly, without any question, preserves what I think was a necessary addition, making sure that the antitrust authority is maintained in the Department of Justice where I think it rightfully belongs.

The compromise did not include a day certain for Bell entry into long distance, but it did include a certain procedure for entry that I think is important. It is a compromise, and I think it will work. It is a compromise which is balanced. It is a compromise which presented a win-win proposition as best we could for both sides. I certainly think that Chairman PRESSLER and ranking Democratic member HOLLINGS should be complimented for reaching out to each other and the Democratic and Republican sides of the aisle to come up with something that I think is something that could be best described as providing a lot of wisdom.

I have been somewhat proud in the role of breaking the logjam between Democrats and Republicans on this particular critical issue, and certainly I appreciate the fact that there are others in this debate, including my friend and colleague from Nebraska, who have made some excellent points with regard to the debate that has taken place on this vital issue.

At the heart of this debate is the appropriate role for independent regulatory agencies, of which the Federal Communications Commission is an important one. It is often said that these agencies are a half-step among the legislative, judicial and executive branches of Government. We should keep it that way, I suggest. It has not been my experience that the Justice Department has always been the hallmark of cooperation or understanding of the needs of the public at large. The Senate Commerce Committee has a unique relationship with all of the entities involved in these decisions. I have found over the years that Congress has a much easier time working to implement policy with the independent regulatory agencies than it often does with the executive branch and, specifically, in many instances, with the judicial branch.

The central purpose of this telecommunications reform bill is for the Congress, the representatives of the people, to regain control of telecommunications policy. It is ironic that the Justice Department and Judge Greene removed telecommunications policy from the congressional domain, and now here is a move to shift that control back to the world of the unelected, which I think the suggested amendment would do.

Make no mistake, the Department of Justice will have a key role in telecommunications policy. Its expertise will not be wasted, and there is a great amount of expertise within the Justice Department on this and other things with regard to communications. Nothing in this legislation repeals the antitrust statutes, and I debated and cited instances of that on Friday last. This legislation specifically requires that the Department consult with the Federal Communications Commission.

The bottom line is there should be one rule book and one referee. The preservation of the public interest test assures that the Federal Communications Commission will give the Department's advice the most serious of consideration, as I think, by and large, history will prove they have done in the past.

At this time of reinventing Government, there is added merit to avoiding duplication from shopping around, looking to different agencies of Government to get relief.

To my colleagues who have expressed shock at the recent attacks on the Federal Communications Commission and the irresponsible suggestion that the Federal Communications Commission should be abolished, I suggest now is an appropriate time to stand up and show confidence in the independent judgment of that important agency.

Mr. President, I hope that the Senate will follow the well-thought-out and, I think, well-compromised and well-done effort on the measure that we have been debating now for some time.

Thank you, Mr. President. I yield the floor.

Mr. BREAUX. Mr. President, I congratulate the distinguished Senator from Nebraska for what I think has been a very articulate statement about his opposition to the pending amendment and why it is not necessary.

I wonder, as we have these debates on the floor, about how difficult it must be for all of our colleagues who have not sat through weeks and months and, in fact, years of hearings as a member of the Senate Commerce Committee discussing the very complicated telecommunications bills and language and amendments. I know that, as a member of that committee since I have been in the Senate, it is incredibly complicated to me. We use acronyms and talk about so many different agencies and about long distance versus RBOC's. It is very complicated for all of us, including those of us on the committee. I can just imagine how complicated it is for a Member not on the committee to come to the floor and be immersed in the telecommunications debate, trying to figure out what is right and wrong, and trying to understand a little bit about the history of this legislation, knowing that something happened several years back when we had the Department of Justice involved in breaking up the AT&T operations into separate operating companies known as the regional Bell companies. And we see that we are constantly being bombarded by all of the telecommunications suppliers in this country advertising about their services being better than somebody else's services; you will save a penny here or a penny there if you pick us over somebody else. All of this is truly very complicated. I guess there is no way to get around that, because what we are talking about is multibillion-dollar industries.

What I said at a hearing one time when we talked about one side wants to do this and the other side wants to do that, was, "Who is right?" I summarized by saying it is like all of these companies were coming before the committee and saying: I want in yours but you stay out of mine. Long distance companies were saying: I want to do local service but you cannot do long distance service. And the local Bell companies were saying: Well, I want to do long distance service, but I do not want you to come do local service. Hence, the summary of the situation being: I want in yours but stay out of mine.

I think the committee is to be congratulated for coming up with a scenario whereby we favor competition. We are going to say that the marketplace, when properly allowed to do so, can be the best regulator for the benefit of the consumer. The problem is, we have not had a telecommunications bill really since 1934. For all of our colleagues not on the committee, the reason why the judges have been involved in setting telecommunications policy in this country is because we in the

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Congress have really not substantially written a telecommunications bill for the 1990's. The telecommunications bill that we operate under was written in 1934. Does anyone doubt the technology increases we have had since 1934? We have had 60 years of technological developments, and we are still being guided by an act written in 1934. You wonder why we have problems in this industry and you wonder why the Department of Justice has had to use not a telecommunications statute but an antitrust statute to help set telecommunications policy for the 1990's.

The reason why it is not being handled very well in many cases is the fact that the law they are applying has nothing to do with telecommunications. It has to do with antitrust. The breakup of the Bell companies was not based on telecommunications policy set by this Congress. It was based on antitrust laws that were concerned about the size and monopolistic practices of companies in this country. Therefore, all of that was achieved in sort of a haphazard fashion. We have a Federal Judge, who, to his undying credit, has done a heroic job in trying to set policy for the telecommunications industry—Judge Greene here in Washington. He has had to do all of that because we have not done our jobs. We have never tried to come up with policy that makes sense for the nineties and the years thereafter.

I congratulate the chairman, Senator PRESSLER, and the ranking member, Senator HOLLINGS, for their long contribution in trying to come up with a bill that balances those interests, that says to the billion-dollar companies on this side and the billion-dollar companies on that side that we, for the first time, are going to create an atmosphere in this country that allows the marketplace to work and fashion what is good for the consumers and good for technology development and for the companies that provide telecommunications services. That is what this bill tries to do.

There are those who are going to argue that we cannot change the way we have been doing business because that is the way we have been doing business. We are not going to make any changes in the roles of the various agencies in Government because, well, that is what they have been doing since 1934.

I think we have to understand that, with this legislation, we are calling for fundamental changes in the telecommunications business. We are going back to allowing people to be able to compete, and there will be losers and there will be winners among the companies. But I think that the competition that we will provide will make sure that consumers are the ultimate winners in what we do with this legislation. I think it is very, very important. The role of the Department of Justice—and I have a great deal of respect for the junior Senator from Nebraska, Senator KERREY, for his comments. I understand the points they make, saying that the Department of Justice needs to be involved in order to protect consumers and make sure nobody does things to other people and other companies that they should not. I understand that. But that was appropriate when the old system existed. I suggest that that is not appropriate under the new system.

Let me give examples of why I think the Department of Justice —which is sort of the policeman or the cop when it comes to looking at various industries in this country—should not be, in this case, the policeman, cop, judge, jury, and everything rolled into one. It will still have a role under the chairman's legislation. Their role will be to enforce the antitrust laws of this country. Nothing changes in that. No one can say that this bill somehow guts the Department of Justice's role in enforcing antitrust laws, because it makes no changes in that. They will still look at the whole array of communications companies and apply the antitrust laws of this country to make sure that they are being held up to the standard that the Department of Justice says they should be held to.

But what is different is that they will not be the agency that regulates telecommunications in their day-to-day activity. They will enforce antitrust laws, yes, but they will not have to be an agency that sits back and says to all these industries, please come to us and ask if you can provide telecommunications service. Please come to the Department of Justice building and file some more applications which may take 2, 3 years to get filled out because fundamentally the system is being changed. That is the big point that I think needs to be understood by all of our colleagues who are not on the committee—that this legislation of Senator PRESSLER and Senator HOLLINGS and the majority of the committee fundamentally changes the way telecommunications policy is going to be carried out.

Therefore, under the old system when you needed the Department of Justice to enforce the law using antitrust laws, it is no longer necessary, because we have a new document, a new set of rules and regulations, as to how this industry is going to work in this country. The old way was defective. It was written in 1934. Like I said, you had to go back and find antitrust laws to come in and protect the interests of consumers because we did not have the plan, a bill, a document that made sense. This bill makes sense, and this is the new rule book. It says that the Department of Justice's role will be to make sure that antitrust laws are not violated.

Let me give some examples. When you have competition and when you have deregulation, then you do not have the same role for the Department of Justice, and that is what we are following in this legislation here today. I will give you an example with regard to the airline industry. The airline industry is regulated by the Federal Aviation Administration. They look at questions about safety and make sure that airlines are doing what they are supposed to do to make sure that they are economically sound before they come in and start servicing a particular area. When they do that, they do it in a manner that is safe to the consuming public. There is competition and there are prices, and what have you. When you want to start an airline, you do not have to go to the Department of Justice and ask, "Can I do it?" You do not go to them for a permit to run an airline in a particular area. Now, if they become involved in antitrust violations, then the Department of Justice can get in right away and say, "Shut this down; it is in violation of the antitrust laws of this country."

The airline industry, however, does not have to go and beg to the Department, "Please approve and give us a permit to serve a particular area." That has changed.

Why has it changed? Because they have been deregulated. Now competition is how they operate. As long as they do it within the boundaries of antitrust laws, DOJ is not involved in that endeavor, the FAA is, the Federal Aviation Administration.

Let me give another example; that is, the trucking industry. When I served in the other body for 14 years, I was on the Transportation Committee. We worked the Department of Transportation, dealing with the trucking industry. I was there during decontrol and deregulation of the trucking industry. A carrier today, when they want to operate, goes not to the Department of Justice to get approval. They go to the Interstate Commerce Commission and get a license to serve a particular area.

They look at the financial condition of the company. Can they operate? They look at the soundness of that company. In terms of its equipment, can they operate safely? Do they have enough equipment to do what they are supposed to do? And then they are granted permission to go out and serve areas—by the Interstate Commerce Commission.

They do not go to the Department to say "Please let us be a trucking company." The Department still has the enforcement rights of the Sherman Antitrust Act. Of course, if they violate that act, the Department of Justice can come in and shut them down.

Now, the two examples I gave, I think, are apropos to the situation we have with the telecommunications industry. We have fundamentally changed how, with this legislation, how they will operate.

We are going to allow long distance companies, which in the past have been prevented from providing local service, to provide local service. There will be more people providing local service. It just will not be the regional Bells. There can be MCI, Sprint, AT&T, and a

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whole array of new companies providing local service.

Guess what? In return, we will allow local companies, principally the regional Bells, to be able to provide long distance service. There is going to be competition both in long distance and there will be competition in local service.

Therefore, it is the committee's opinion, and I think, wisely reached, that we have a different set of procedures and rules that are going to work.

That is why the committee said there is a different role for some of the agencies in Government, that they are not needed to do what they used to do because there is a different setup in the competition of providing telecommunications service.

What some of the Federal agencies want, we have new players, a whole new system, but we still want to play by the old rules. We have sort of a paternalistic attitude by some of the Federal agencies that say, "Well we used do that. You mean you are going to change it? We can't do it anymore?"

Yes, because we have fundamentally changed how business is going to operate in the telecommunications business.

This committee, I think, has done a terrific job in trying to say to, for instance, the Bell companies, what they have to do to allow competition to come into the local market.

There are pages of this bill that spell it out. It is a very extensive, very detailed list of what all the Bell companies have to do to allow their competitors to be able to come in and compete.

This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out. It is there on page 823, called a competitive checklist. It says a Bell company may provide long distance service if, first, they go through all of these things that they do, to allow the long distance companies to provide local service.

It is kind of almost a jump-start. You can get in my business when I can get into your business. But I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything.

Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access Bell operating company affords to itself.

That is pretty long. It says we will let you do anything with our network that we do with our network that we built. It says, second, the capability to exchange telecommunications between customers of the Bell operating companies and the telecommunications carrier seeking interconnection. So they have to be able to exchange communications between the Bell's customers. That is, we are giving you our customers and you can talk to them. Go for it.

Next, nondiscriminatory access to poles, ducts, conduits, and right of ways owned or controlled by the Bell operating company. That is a very significant requirement that not only are we inviting you to come in and compete with us, but we will give you access to all of our equipment—telephone poles, the conduits, the right of ways.

You got it; you want it, come on in, you can use it, provide local service, talk to our customers, use our networks, because we want you to have access to our business. In addition, they say that local loop transmission from the central office to the customer's premises, unbundled from local switching or other services; and next, local transport from the trunk side of local exchange carrier switch, unbundled from switching or other services.

Finally, local switching unbundled from transport, local loop transmission, or other services.

All that is very complicated, but what it essentially says is that Bell operating company has to do all of these things, give permission to all your competitors to come in and use your equipment, use all of these things so you can compete for local customers, but in return for that we are going to start providing interLATA service or long distance services.

Legislation says the Commission shall consult with the Attorney General regarding that application. The Attorney General may apply any appropriate approval or any appropriate standard that they desire under their rules and regulations.

The Commission must find that the requested authorization is consistent with the public interest, convenience, and necessity.

Mr. President, I think that pretty well spells out what this bill is trying to do in terms of long distance versus local service. It spells out why I think the committee has crafted a very good proposition, one that protects the interests of the consumer.

The FCC deals with this issue like the ICC deals with transportation, and like the FAA deals with aviation. When we changed the rules in those industries by deregulation and bringing about greater competition, of course, the role of the Department was changed, as well. Like those other industries, those industries that do not have to go to DOJ to get approval or to let them say no to an application, that is not their role. Their role is to look at criminal violations, violations of the Sherman Antitrust Act. And all the other criminal rules that the Department has the authority to use when there are potential violations of the antitrust statutes are not affected at all.

What is affected is that we are putting into the FCC the proper role that it should have, like we have in these other areas.

If we look at the history of the Department in trying to approve all of these mergers, the time that they have taken to give a ruling has increased from an average pending application of 2 months in 1984 to 3 years in 1993.

No wonder we have problems making the bureaucracy work, and I suggest that that is a very good example.

In addition to having a Federal Communications Commission, we have public service commissions in all 50 States plus the District of Columbia which appropriately and properly will be involved in communication and telecommunication policies and issues, as they have been in the past.

Mr. President, I ask that all of our colleagues who are trying to figure out what is the proper answer to this very complicated process that we are involved in will just look at the history of where we have been, the fact that the committee has crafted a very balanced bill.

There were differing opinions in our committee as to what the proper role should be. I think after debate, we reported this bill out with a vote of 18 to 2. I think it is very clear that both Democrats and Republicans agree that this is by far the best approach. I would recommend it to my colleagues in the Congress.

Mr. PRESSLER. Mr. President, I received word that the leadership would like this matter to be voted on at about 6 o'clock, for the notification of all Senators. That would give Members 2 hours.

I shall have more remarks, but I will yield to other Senators. Those Senators wishing to speak on the Dorgan amendment should bring their speeches to the floor.

The PRESIDING OFFICER (Mr. GRAMS). The Senator from Nebraska is recognized.

Mr. KERREY. Mr. President, I inform the Senator from South Dakota, I object to the time of 6 o'clock. We should talk about it.

Mr. PRESSLER. Why would my friend object? We debated Friday afternoon and today. We are trying to move this process along.

Mr. KERREY. I understand we are trying to move the process along. It is not so much that I have an interest in debating this all night long. It is that there have been requests from a number of people who indicated they prefer to stack votes and vote tomorrow morning. I am obliged to tell you I think that is not an unreasonable request.

Mr. PRESSLER. I am a great admirer of my friend and I plead with the Senator, we must move forward. I received word that there are many who would like to vote at 6. We will have to resolve it, perhaps in a private conversation. But for purposes of other Senators in their offices, it is our intention to try to put this to a vote at 6 this evening.

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The PRESIDING OFFICER. The Senator from South Carolina is recognized.

Mr. HOLLINGS. Mr. President, let me join in the desire of our chairman here to get a vote this evening. When we broke on Friday the understanding was we would vote at 5 o'clock, perhaps. Not specifically on this amendment. We would have votes. This is the amendment that is up. We discussed it some, actually, on Thursday; all day Friday. This has been a crucial amendment.

I guess the world is not going to end if we put it over to tomorrow morning for this particular Senator. But you could not call a vote at 6 o'clock, or 7 o'clock, or this evening at all, unreasonable. Because we have debated. We look for the Members to come and join in.

In fact, it has been debated on the telephone all weekend long. Because the pressure has been on. As a result, now, the Senator from North Dakota and the senior Senator from South Carolina have gotten together on the one amendment to get the best vote, I take it, possible on this particular issue.

With respect to the issue, Mr. President, I hearken back to the hearings we had over a year ago. We commenced with the Secretary of Commerce, Secretary Ron Brown. The reason I refer to this is we are constantly being admonished: Wait a minute, you voted for this last year. Wait a minute, you voted for this last year.

I wish I could be as charming as the distinguished Senator from Illinois, the former minority leader—momentarily I think he may have been majority leader but he was mostly minority leader, Senator Everett Dirksen. And he said—I think he was quoting Emerson, "Consistency is the hobgoblin of little minds."

So, yes, the Senator from South Carolina voted for this last year. However, the Senator from South Carolina, and referring to Secretary Brown's appearance in February of last year—I refer on page 40:

Secretary BROWN. Well, I certainly respect that view, Senator Danforth, and the one expressed by the Chairman. It is our view that VIIIc), administered by the Department of Justice, which has a good deal of experience, as the Chairman points out, would achieve the purposes of the committee and achieve the purposes of S. 1822. That is the only difference we have. We have the same goal.

Mind you me, S. 1822 did not have the Department of Justice as a checkoff at all when I introduced S. 1822, after much discussion with many of the Members.

"The Chairman," as I was acting chairman at that particular time:

You are suggesting that this be administered by the FCC and the Department of Justice?

Secretary BROWN. That is correct, Senator.

The CHAIRMAN. Well, that is the basic difference, then. You want two entities to start administering communications.

Going on over two or three pages at the bottom of page 43, because here we have at the present time the law with respect to telecommunications is unchanged, as respects the Department of Justice. Section 2 of the Sherman Antitrust Act is untouched, absolutely untouched.

Let me emphasize that. That is where the so-called Department of Justice got all of this wonderful experience that we keep hearing about. They have all of the experience over the years and they have the marketing expertise and what have you. So, on page 8 of the bill, if you follow now, on 8 of the bill down at the bottom on section 7,

Effect On Other Law . . . nothing in this Act shall be construed to modify, impair, or supersede the applicability of any antitrust law.

Mr. President, you cannot say it more clearly than that. I elaborated on it in the committee report and I turn to page 43 wherein:

The FCC is required to consult with the Attorney General regarding the application during that 90 day period. The Attorney General may analyze a Bell operating company application under any legal standard (including the Clayton Act, Sherman Act, other antitrust laws, section VIII(c) the [modified final judgment], the Robinson-Patman Act, or any other standard).

You see, that had not changed and is not changed by S. 652. So what we were trying to do, and as I pointed out as we started out on S. 1822, was to cut out the duplication, and certainly not give authority for regulation to the Department of Justice. The Department of Justice is a law enforcement department. In fact, under Sherman, Section 2 of the Sherman Antitrust Act, are civil and criminal penalties. I said when we started on this last week the telephone companies were not a bunch of criminals and there was not any reason to start getting them—yes, there is a difference. My distinguished colleague from Nebraska says get a different lawyer. You bet your boots you get a different set of lawyers. It is just like going to a doctor for a broken arm, on the one hand, and going to a doctor, on the other hand, for diabetes. They do not know anything in broken arms about diabetes, and diabetes cannot set any broken arms.

Similarly, in the legal profession, if you are going before antitrust, I can tell you now as I have had to face antitrust lawyers and this particular attorney was not expert. I had to go up to VanSeiss, in New York, for a solid week seminar, because we did not have any particular antitrust lawyers in Charleston, SC, at the time that were willing to take this case. I told the prospective client, I said, "Wait a minute I am not an antitrust lawyer. I am not steeped in that particular discipline."

I had met VanSeiss and he had a seminar, and we buddied off, my law partner and myself, for a week's seminar and came back and figured we learned enough not only to defend but to prevail. But that is another story.

But I can tell you from hard experience, the answer is "yes." You do not get the same lawyers before the FCC, necessarily, and the same lawyers before Justice and the Criminal Division of section 2 of the Sherman Antitrust Act.

The Clayton Act, in all fairness to the amendment of the Senator from South Carolina, Senator THURMOND, that deals strictly with civil penalties, with the matter of measuring whether there is excessive competition that could lead to extensive—not competition but monopolistic practices.

But in any event, let me refer back to page 43 of the hearing committee record so everybody who is interested about how we change—you are going to tell how change comes about. The chairman, which was Senator HOLLINGS, said, and I quote:

Well, let me just comment on the matter about antitrust because I did discuss with Anne Bingaman this particular bill before it was introduced. And I made it known to her that, and she well knows I recommended her for the position of Assistant Attorney General in charge of the Antitrust Division. She is a breath of fresh air. I am the appropriations chairman of the Antitrust Division of the Justice Department. I have been dealing with the moneys for this Antitrust Division of the Justice Department for numerous years, and I can tell you categorically we are way behind the curve in this particular field. And she has got more . . . grace . . . the FCC has its responsibility. On that basis, trying to eliminate lawyering, trying to eliminate the delays, trying to simplify the procedure, we really do not need more of a role for the Department of Justice other than consultation. Well, there is an egregious situation of monopolization . . . they do consult, and we put that in there. But otherwise we did not want to get into Justice and get into the Judiciary Committee and get bogged down.

That is exactly where we had intended, as I said at the very beginning, the one-stop shopping. But the White House disagreed, and the Justice Department disagreed, and numerous Senators disagreed, and the task of a chairman of a committee is to get the best product you possibly can so long as you do not do injury to the overall goal of deregulation and fostering competition.

So I went on in the bill S. 1822. But those who continually say, "Well, you voted, you voted—last year. You should be admonished." Rather than admonishing me, my original intent as the chairman of the committee was to do just as Senator PRESSLER has provided in S. 652. So in S. 652 we provided the one-stop shopping at the Federal Communications Commission. The Department of Justice is totally unhindered and unaffected with respect to their antitrust responsibilities and authority. There is no question about that. No one has raised that question. They are seeking in the amendment additional authority and responsibility, which I think very positively confuses the situation and constitutes a bad amendment.

Why do I say that? I say that for this language here in the Thurmond-Dorgan amendment. It says the "FCC, in making its determination whether the requested authorization is consistent

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with the public interest, convenience and necessity, the Commission shall not consider"—listen to this—"the Commission shall not consider the antitrust effects of such authorization in any market for which authorization is sought."

I am your lawyer. You have a communications company. You come to the lawyer and say, "Lawyer, tell me. What about this thing?" I say, "Well, it says it should not have any authority at the FCC over any antitrust section of marketing, in any market for which authorization is sought. However, we know marketing forces and we know forces of competition. And we know measuring market competition. You have an affirmative action responsibility empowered in the FCC by S. 652." I say, "It is the present law," or the law as my client would come to me. And I say, "They have to do all of this unbundling, dialing parity, interconnection, number portability." And I list all of these particular things. "You have the public interest section in here about marketing. Yet, you have a section in there that says you cannot touch the marketing thing if they reflect antitrust. Well, marketing competition, antitrust marketing competition, could be, as we lawyers say, the mime shows, or the same thing."

I can tell you here and now you have a bad amendment where they are jockeying around to get Justice into this and mess it up. I can tell you, leave the Justice Department Antitrust Division, leave section 2 of Sherman antitrust, leave section 7 of the Clayton Act, leave all of those things as they are. S. 652 does. But do not come wandering down the road with dual committee jurisdiction, dual jurisdiction, two types of attorneys, and everything else. And about the time, if you were going at the same time and think you are making progress now with respect to the Federal Communications Commission, after, say, two or three hearings, some antitrust lawyer gives out a release, saying, "Well, we are concerned about the XYZ communications company getting into this section 2 of the Antitrust Division," it will stop. Boom. It goes right straight on down because you have the criminal department of the Justice Department, the law enforcement department, it is not regulatory, the public is confused, the market is confused, the Congress is confused. It is a bad, bad amendment. And let us not talk about where the expertise is.

I want to relate to the function now of the Federal Communications Commission. The Federal Communications Commission for year on end was to maintain a monopoly. They were there to protect AT&T and its monopolistic Bell companies. Today, we are supposed to protect the RBOC's in a general sense. That has been the primary function in the Federal Communications Commission. But getting in the 1960's, due to the pressure of Congress, the market and the evolving technology, in 1969 the Federal Communications Commission separated out the equipment from services somewhat as was later done with the modified final judgment in AT&T. We began to sort of measure competition and market forces.

Then in 1971, the Federal Communications Commission allowed competition for long distance services. Then in 1980, for the computer industry to get in, they provided competition for information services. That is the computer services and information. Then in 1990, the Federal Communications Commission approved video dial tone in competition for the cable companies, which, in short, allowed the telephone companies to get into the cable business.

Most recently, last week—I will get that decision because we have it all lined out here—I think this is powerfully interesting, the Federal Communications Commission was taken to the Circuit Court of Appeals for the District of Columbia in the case of the Warner Entertainment Co., petitioners, versus the Federal Communications Commission.

I wish you could read the lawyers. They are talking about lawyers. This is what we are trying to do. Look. They have three pages of lawyers in this thing; three, four pages, lawyers upon lawyers upon lawyers. I could interest the U.S. Senate no end about the lawyers for Warner Entertainment Co., for the Cable Television Association, Inc., for petitioners from the city of Austin and Dayton and King County, WA; Miami Valley Cable; Montgomery County, MD; St. Louis, MO, and the lawyers for the Cable Telecommunications Co.; Larry Tribe, and everybody else for Bell Atlantic, and on and on.

You talk about not getting lawyers in the Justice Department. There are lawyers coming out of my ears in one decision. Guess what the court said in this decision.

With respect to rate regulation, Congress determined that local governments should be permitted to regulate only the basic service rates of those cable systems that are not subject to effective competition.

Yes. Measuring market forces, measuring market competition. You have heard all afternoon, "Wait a minute now. The Department of Justice is the expert on measuring market competition. The FCC over here is with megahertz, some kind of radio technicians and TV aerial boys. They do not know anything about marketing competition." That is absolute nonsense.

Here is the most recent decision on measuring market competition saying that they did an outstanding job. The Federal Communications Commission struck an appropriate balance between the competing interests of the cable companies and their subscribers in violation neither of the 1992 Cable Act nor of the Administrative Procedures Act. It is listed as one of the FCC's most significant legal victories because it is stated here—and it is the best wording I thought—that not only the Government—I will have to read that part. I wanted to refer to it. But they did an outstanding job in substance, take my word, and we will put the decision in the RECORD.

The Federal Communications Commission did an outstanding job in measuring competition—that is everybody in the world about measuring market competition.

I think it is highly significant that we do not start dividing the roles in your mind. The role of the Justice Department and the Antitrust Division is law enforcement, antitrust law enforcement, under 2 of Sherman, civil and criminal, civil and criminal penalties. I can tell you here and now that is the fundamental basis of the modified final judgment. That is untouched by S. 652.

What is suggested by the amendment is that we want to start superimposing a whole new series of hearings. About the time you think you can get through the FCC, here is the Congress that has come to town and said we are going to reregulate, we are going to let market forces operate but, oh, by the way, we are going to put the law enforcement into the regulatory and have two regulatory bodies. Here we are getting rid of the ICC because other than railroad mergers it has become deregulated—and the trucking industry. Here we have done away in a general sense with the Civil Aeronautics Board. Mergers, that is under the Justice Department, but under regular routes and approvals and gates and slots and safety we have the Department of Transportation and the Federal Aviation Administration. In communications, we have the Federal Communications Commission and they have talent coming out of their ears over there on measuring market competition.

So the section 7 of Clayton under the Thurmond amendment of trying to determine substantially lessening competition is another market measure that the FCC has to make. That is why we wrote this bill this way. We are trying to get market competition. And we certainly do not want another division of government coming in. At one time they had it written so you had the Federal Trade Commission because under section 7 of Clayton you have both the Federal Trade Commission and the Justice Department.

And for a while, reading this thing, they had the Federal Trade Commission, the Justice Department, and the Federal Communications Commission, and then refer it to Congress and let them have a hearing and the Congress will say let us get a commission and study like we have done with Medicare. Come on.

Let us kill this amendment here once and for all and do not act like it is anything other than what it is. We have not affected the fundamental responsibility and authority of the Department of Justice. The amendment is a

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jerry-built amendment of two interested Senators trying to get the Judiciary Committee on the Senate and House side with a say-so. They had a similar move over there. They have not reconciled it over on the House side. But it is bureaucracy at its worst. That is why you cannot come to the Government and you need a Senator to go through and lead you through here and lead you through there and everything else of that kind. Let us just get the one place, the one-stop shopping and say come in and here is what you have to prove and here is the entity that has the expertise and they will have it. And we will have the money for them. They made 7 billion bucks the other day in an auction so we have plenty of money at the Federal Communications Commission to do this unbundling, dial parity, nonportability, interconnection, public interest standard, measuring market forces and its competitive nature.

We have all that and let us put it in one place. Let the lawyers get this in one place. Let them get a formative decision. And if at any time the Justice Department finds, as they did against AT&T in the 1970's, and they started in and they went with the antitrust procedures and everything else of that kind on law enforcement enforcing the antitrust laws, fine business.

I admire the Justice Department, particularly the Antitrust Division, particularly Assistant Attorney General, Ms. Bingaman, who has been in charge. She has done wonderful things with Microsoft and many of the other cases, and she has plenty of work to do without adding more on now to have another regulatory commission or body resolved into the Antitrust Division of the Department of Justice and come in, walking down the same street, measuring market forces and everything else. There is no separation, as they say, where we have the technology and the technicians and the experts with respect to megahertz and TV towers and radio frequencies and all of these other things, whereas they measure the market.

On the contrary, the FCC has not only measured the market but measured it most successfully according to the circuit court of appeals just last week. I think we ought not to come in particularly with this phrase in here, *where here we have the FCC with responsibility* and they come in with the phrase that is devastating. It says here—people do not study these amendments that you have to read.

Look at that amendment. I hope they can get a picture of that thing. You need a civil engineer and a compass, not just a lawyer. But it says here:

> In making its determination whether the requested authorization is consistent with the public interest, convenience and necessity, the Federal Communications Commission shall not consider the antitrust effects of such authorization in any market for which authorization . . .

Well, the antitrust affects all within the marketing measurements that we have in here with the unbundling and the checklist and everything else, plus the public interest. So how in the world can they do half a haircut at one department and another half a haircut at another department and call this good law? It is a terrible amendment and it ought to be killed.

Mr. ASHCROFT addressed the Chair.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. ASHCROFT. Mr. President, I rise in strong opposition to this amendment.

I recommend that my colleagues in the Senate carefully consider the implications of this effort to grant an unprecedented role to the Department of Justice. I happen to have the privilege of serving in the U.S. Senate now, but I once had the responsibility of being attorney general for the State of Missouri. I hope that my comments as an enforcement officer of an antitrust unit carry extra weight as we examine these very important issues.

We have heard the word "power" used often in this debate. On Thursday morning in summarizing this bill, S. 652, one Senator said, "It is about power, Mr. President, power to do what they want to do."

I see it differently, Mr. President. Let us make no mistake about it, this bill is about change. This is a bill which allows us to look at the future and embrace it. This bill will allow us to look at the technology and opportunity and creativity of the future and take advantage of it. This amendment is about power, and this amendment would layer bureaucracies in the face of change.

Those individuals who want to set another layer of bureaucracy on the communications industry and upon the technology, creativity and innovation, those who would sponsor this kind of an amendment that would place lawyer after lawyer of the Justice Department in this mix, are individuals who have gone to the precipice of the future. They have looked into the future, and they are running back in fear, running for the old ways of saying that we need Government to protect us from the system of competition.

The truth of the matter is, nothing could be further from the truth. For what we have seen not only in the cellular area, where we have had competition, but in the long distance area, where we have had increasing competition, is that we do not need protection from the competition. Certainly not multiple governmental bureaucracy protection. We need to let competition help us to have the lower rates in local telephones which we have found in the long distance area. We need competition to provide for us the benefits, as in the area of cellular phones, which competition has been very valuable to us in improving our opportunity for service. So competition is what will help us, and competition in the context of regulation under the Federal Communications Commission, but not with the needless layering of bureaucratic regulation by the Justice Department.

George Gilder is an individual whose name has already been mentioned in several of the conversations in the debate, particularly by the Senator from Alaska. Before publishing his more recent volumes about computers, microcosms, and telecosms, Mr. Gilder wrote:

> In every economy, there is one crucial and definitive conflict. This is not the split between capitalists and workers, technocrats and humanists, government and business, liberals and conservatives, or the rich and poor. All of these divisions are partial and distorted reflections of the deeper conflict: The struggle between past and future . . .

The truth of the matter is, we are confronted again by a struggle between the past and the future, between the existing configurations of industries and the industries that may someday replace them.

Gilder goes on to say:

> It is a conflict between established factories, technologies, formations of capital, and the ventures that may soon make them worthless—ventures that today may not even exist; that today may flicker only as ideas, or tiny companies, or obscure research projects, or fierce but penniless ambitions; that today are unidentifiable and incalculable from above, but which, in time, in a progressing economy, must rise up if growth is to occur.

I believe that is the division we see today. It is the division between those who want to protect us from the future and from those who want to capitalize on the future. It is a division that divides the people who want to embrace the past and those who want to accelerate the future to bring the benefits of the communication age to the American people and to protect the capacity of the American worker to continue to provide the very best, the foremost, the cutting edge of communications technology to the technology industry worldwide.

Mr. President, George Gilder wrote in 1981 about the division of the past and the future, but I believe we are unlikely to find any better explanation for the intense activities surrounding this bill. Both in Commerce Committee sessions and on the floor, one Senator after another has testified to the extraordinary attention given this single piece of legislation. Most Senators imply what the Senator from Arizona said in his opening remarks last week that never before has there been such intense and continued and high-priced lobbying. I imagine that the two managers must have felt the urge last Wednesday evening to stand up and say, "Mr. President, I rise to bring S. 652 kicking and screaming to the floor of the Senate."

These two Senators, along with other senior Senators on the Commerce Committee, have fought the telecommunications battles longer than I have even been aware of them, and the counsel of experience rings through their testimony. This is no ordinary bill. The stakes are higher than any of us can

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quantify. This bill is fundamentally about change. As Mr. Gilder told us 15 years ago, change is always the definitive conflict.

So, Mr. President, with these thoughts in mind, I want to focus on the amendment we are now considering, the compromise between Senator DORGAN of North Dakota and Senator THURMOND of South Carolina. Unlike the bill in general, this amendment is not about change in our world, but about power in our Government. It is about the power to choose the winners and the losers in our economy, to stand above the marketplace and to play gatekeeper.

I think it is important for us to resist that temptation, to resist the idea that Government should somehow choose the winners, choose the losers; that the pollution of politics would possibly infect those who would succeed and those who would fail. Let us have a level playing field, let us have a clear competition, let us let the marketplace make those decisions.

The purpose of this amendment is to stand between the marketplace and the people. It is to play gatekeeper. The purpose of the amendment is to hand to the U.S. Department of Justice unprecedented power in shaping the future of the telecommunications of America. This is not a light matter. This is not a matter of no consequence. This is an unprecedented power that Congress has never before granted to anyone.

Supporters of this amendment have been asked to give us a precedent for their proposal, but they have not provided one. As we have learned from the debate last week, the precedent is not to be found in the MFJ decree. Justice only has an advisory role in the court action of Judge Greene, the same role that is reserved and preserved in this bill in its current form.

It is not in our best interest to elevate or escalate that role. I will not get into the entire argument here; however, it is worth mentioning that a very insightful colloquy took place on this floor last Thursday night. I encourage all Senators to read the outstanding arguments presented by the two managers, the Senator from South Dakota and the Senator from South Carolina. This issue should have been put to rest that evening. But proponents of the amendment press ahead, ignoring the experience of those Senators most able to judge whether or not balance has been reached in this bill.

Senator HOLLINGS stood up and admitted he is a good witness to settle this case. I wish the other Senators would accept this.

I do wish to briefly comment on a specific argument that was suggested Thursday night that handing the Justice Department unprecedented authority is somehow justified because we are passing unprecedented legislation. Throughout this debate, that particular argument has been advanced by a Senator, and that Senator has advised this body to proceed with caution on such a monumental piece of legislation. We should instead have caution before putting the Justice Department and its lawyers into a historic role of replacing Congress as the Nation's policymaker.

The transition from monopoly to competition requires great care. Indeed, it requires clearly defined parameters. For this reason, we have developed a substantial checklist. It is in the legislation. It is here in specific detail. The checklist requires safeguards, so we put safeguards into the bill. Some have suggested that it requires experienced counsel, so we provide for an advisory role by the antitrust experts at the Department of Justice.

Let me emphasize this final point about the advisory role. We provide for an advisory role by antitrust experts, as the Department of Justice. Contrast this to what the others are saying. Some Senators believe that the lawyers at the Justice Department are the only experts in competition in this country. I quote from a statement made last Wednesday evening.

> Lawyers from the Justice Department understand competition. The Antitrust Division of DOJ understands where and when competition is, and they are about the only ones in this town that, at least by my measurement, are out there fighting to make sure the marketplace is in fact working.

That argument was made on the floor of this Senate. Mr. President, I find this statement hard to believe. If the Justice Department is the only entity in this town, or in America, that is fighting to make sure that the marketplace really works, why do we not hand over micromanagement of the entire economy to them? You could extend the logic of this amendment from the telecommunications industry—it is an important industry—if you have to have the Justice Department micromanaging that part of Government, why not apply it to all other commercial industries? Why not start with all of the other departments within the Antitrust Division—transportation, energy, agriculture, computers, finance, foreign commerce, professions, intellectual property—take the professions divisions. Do we hear the call from Congress to regulate lawyers from entering different types of practice? Can you imagine the uproar if Congress proposed to have the Department of Justice determine when each law firm could practice different types of law? Well, we do not have to imagine what they are proposing here. What they propose is to single out the most dynamic economic sector of the American economy, the sector undergoing the most rapid and dramatic change, the sector in which we have perhaps the most dramatic competitive advantage in a marketplace—a productive competitive marketplace, the world marketplace—and they want to add the ingredient of governmental cement to the process. We do not need to freeze and to repress the developments in our industry, we need to energize them, and having the Federal Communications Commission there is enough regulation, particularly when you have the Justice Department with its ability to be advice givers in antitrust.

Then we are told that we should not fear more governmental involvement in the private sector. This is not some "big bureaucracy," one Senator said. They only have 800 lawyers over there at the Antitrust Division. Imagine that, Mr. President. We are trying to convince the American people that a group of 800 Government attorneys are going to be helpful in providing productivity and competitiveness for our telecommunications industry. In fact, we tell the people that if these 800 lawyers do not help us by picking the economic winners and losers, then the fastest growing industry will fail and rain unknown harm on American consumers.

Well, let us consider, stop and take a look at some of the decisions we have made in this bill that were influenced by the present policies of those 800 lawyers at the Department of Justice. Let us see if their past performance leaves us with nothing to worry about. Take the GTE consent decree. In 1982, GTE purchased a company called Sprint. The Department thought that these two companies getting together providing local and long distance services could be dangerous to competition, so they said that GTE, before the acquisition of Sprint could take place, would have to agree to a consent decree, with which the company complied. With that consent decree, 10 years later, in place, GTE had disposed of all the Sprint assets, and had divested itself of the entire acquisition. But the Justice Department refused to lift the decree.

By 1992, GTE was essentially the same company that had existed before it had purchased Sprint when it had operated without the oversight of the Justice Department and its army of lawyers. But was the Justice Department willing to relinquish its control over a private business once the bureaucracy had worked its fingers into the situation? Obviously not.

The Justice Department would not lift the decree, and has not lifted the decree to this very day, in spite of the fact that the acquisition of Sprint was the reason for the decree, and the divestiture of Sprint happened years ago. And GTE has returned to the kind of company it was prior to the acquisition. This issue of Sprint was a high priority for me during the course of drafting this bill. If Justice was not prepared to act properly on this matter, then I felt Congress should not reassert the authority of the Justice Department. I am happy to say that having passed the majority leader's deregulation amendment last week, the Senate has finally removed GTE from the micromanaging influences of the Department of Justice.

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Please note, Mr. President, that the GTE consent decree was lifted by Congress—or will be lifted by Congress, not by 800 of the so-called I-am-here-to-help-you friendly lawyers at the Justice Department.

In a case similar to the GTE case, a company called AirTouch has been relieved of its restrictions by this bill. This was a cellular carrier, once a subsidiary of PacTel. It has been an independent, publicly traded company since April 1994. Again, Justice would not remove the MFJ restrictions that were reserved for Bell companies. Again, Congress lifts the restrictions in this bill.

It might be interesting to add here that after AirTouch submitted an opinion at Justice stating its position that it was no longer bound by the MFJ, a competitor in the long distance market filed a letter opposing MFJ relief for the cellular carrier. We cannot say for certain whether pressure from a long distance carrier played any role in the inaction of Justice—their failure to relieve AirTouch of the restrictions. We can say for certain that this is the exact type of legal and political pressure that will be finding its way into an inhibition of the productivity and competitiveness of the telecommunications industry if we layer bureaucracy upon bureaucracy, intermeddling, and seeking to micromanage what the marketplace can properly regulate. We can say for certain that we do not want this type of legal and political pressure, which would be intensified to a degree beyond comprehension if Justice is put in the position of deciding MFJ relief for all Bell companies.

I am not saying, by any means, that 800 friendly lawyers at Justice do not know what they are doing. I am sure that they are experts in antitrust matters. Again, this amendment does not ask them to investigate antitrust. It authorizes them to implement congressional policy.

The question is whether this is the proper role of Justice. I think the answer is clear, and I think the answer is resounding. I think the answer is simple. I think it is time for the Congress to make that answer unmistakable. The answer is no. Let Justice continue its role as a prosecutor of the Sherman and Clayton Acts.

Let us consider another example in the cellular phone industry. As we all know, several years ago in every city and town, two licenses were granted for providers of cellular phone service. In each of the seven Bell service areas, the incumbent Bell company was granted one of the two licenses. But the playing field was not even. One of the great advantages of cellular is its independence of the traditional landline and wire infrastructure. Cellular operators are not subject to the limitation of the LATA boundaries. They are, by definition, mobile phone systems. This allows some cellular companies to offer creative price discounts to their customers. I say some companies are allowed to offer these creative price discounts, because others are not. In each service area, some carriers can offer customers one price for all calls, whether they are local or long distance. Some carriers cannot. The law says so.

The Department did not act to change this policy. A combination of court decisions and the Department's inaction has left Bell cellular affiliates unnecessarily restricted to its wireline boundaries, while non-Bell competitors enjoy the complete benefits and flexibility that the wireless world presents.

In fact, an interesting case developed that led to an incredible situation in Arizona. The non-Bell cellular carrier could offer the entire State in Arizona as a local call. The Bell affiliate could not, bound by the rules that govern wire transmissions. When the non-Bell operator sold its license to another Bell affiliate, that Bell affiliate, having purchased the cellular company, could no longer offer the entire State as a local call. Even though it was not even operating as a cellular carrier in its own landline region, the Bell affiliate operating in another part of the country had to respond to criterion that governed, according to the Department, its own operation in the area of the landline.

So on one day, the cellular customer in Flagstaff could call Tucson for the price of a local call. Because the company that he was using was bought by a Bell company, the next day they were charged long distance rates.

Now, the customers in Arizona were denied substantial savings because of the Department policy. It is that simple. That kind of officious intermeddling, micromanagement is counterproductive, distorting competition rather than promoting competition, and costs consumers benefits.

The Department did not move aggressively to end this disparity. It is still undecided now on how to proceed.

Making the decision is one of the tough things. The marketplace makes decisions efficiently and effectively. I believe competition also rewards those who make the right decision in the marketplace.

The Department is not the group which, in the words of one Senator "is out there fighting to make sure that the marketplace really works" in that sense. The Department in Arizona and other cases like we just mentioned really stood between the benefits and the marketplace and the consumer. The Department denied Americans the opportunity to benefit from competition that we all believe brings out the best in each of us and the best in industry.

Mr. President, once again, Congress must act to correct this senseless policy. Parity had to be reinstated, and Congress had a choice. Either we lift all restrictions on cellular carriers so that there be a level playing field, allowing cellular phone operators and proprietors of cellular companies, saying any call you make is like a local call. Or we could extend the artificial restrictions to all carriers.

Now, the bill that we have here lifts those restrictions. This bill lifts all restrictions on the cellular industry and allows the cellular provider to say: Go ahead, make a long distance call for the same price a local call.

Congress acts in its proper role, and the FCC is instructed to implement that policy.

Supporters of this bill have expected the delicate balance contained in the bill to be severely tested. The first test was on the definition of public interest. There are many who think that 14 criteria are enough, and that should do it.

There was a balance struck in the development of this bill. That balance was that we would protect the public interest by adding a definition including the public interest.

I must admit, Mr. President, I find merit with the arguments of the Senator from Arizona, [Mr. MCCAIN], among the cosponsors of the amendment that sought to take that public interest out of the bill.

I am uncomfortable with the breadth of the term "public interest," and I would otherwise prefer that we leave as little room for subjective analysis as possible; that the Congress, representatives of the people, actually specify the policy, and that policy be carried out by the FCC.

But the managers called for a balance and they vowed to defend the balance. They are to be commended for defending that balance. I cannot think of two Senators who would better understand this matter than the two Senators who bring this bill to the floor. They may have brought it here kicking and screaming. This has been a hard bill to put together. They deserve our support in maintaining this balance.

This amendment is one of the most serious assaults on the bill's balance. A vote in favor of this amendment would not only destroy the balance of the bill, it would destroy the reason for having the bill, and that is to promote more competition and to extricate from this arena the heavy hand of Government.

The idea that when we look into the face of the future, we are so gripped with fear, we not only have to have regulation, but we have to have layered regulation, is an idea that we need to reject.

Let me leave a few final observations. The committee has heard from over 30 entities with a direct involvement in this legislation. Senator HOLLINGS, to his credit, went through the entire list last week.

Sure, it involved some big companies engaged in big battles. We even have present monopolies battling against former monopolies. The Baby Bells are battling against AT&T, Mama Bell.

But the American people know who has the biggest monopoly of all. The biggest monopoly of all is the monopoly of Government. The biggest battle

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of this bill is not between the Baby Bells and Mama Bell, and the long distance companies and the local exchange carriers; the biggest battle is found right here in this amendment. It is between the Congress and the Department. It is a battle over who sets policy in this country.

I received a copy of a letter sent to Chairman PRESSLER by Henry Geller, former communications policy advisor under President Reagan, who also happened to testify at one of the committee hearings. If the chairman has not already done so, and if the Senator from South Dakota does not mind, I would like to submit the entire letter for the RECORD. I ask unanimous consent that the letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

HENRY GELLER, COMMUNICATIONS FELLOW, THE MARKLE FOUNDATION,
Washington, DC, June 7, 1995.

Senator LARRY PRESSLER,
Chairman, Senate Commerce Committee, Russell Senate Office Bldg., Washington, DC.

MR. CHAIRMAN: We are disinterested parties who have participated in the legislative process leading to S. 652. We address here the question of the appropriate role for the Department of Justice on the issue of entry by the divested Bell Operating Companies (BOCs) into the interexchange (IX) long distance and manufacturing markets. We urge that it would be an inappropriate and seriously flawed process to give Justice a decisional role.

The Department and the antitrust court were necessary to effect the break-up of AT&T. But that court, using the Department as its "staff", is now engaged in essentially regulatory activity—namely, the terms and timing of full entry by the BOCs into all sectors of telecommunications. The FCC, as the expert agency with centralized authority in the telecom sphere, is engaged in the same area, but under an antiquated law.

A main thrust of the pending legislative effort is to remove the antitrust court from the regulatory policy making process and to have the important policy guidelines set by the Congress and implemented by the established Congressional delegatees in this field, the FCC and the State commissions (with the FCC steering and the States rowing). That is the sound approach of S. 652.

Justice, however, argues strongly that it should continue to have a decisional role on the two remaining MFJ issues—IX and manufacturing—and should apply an antitrust standard to these issues. But that makes no sense at all. If these matters are to be settled under antitrust law, there is no reason to remove the antitrust court or the appellate court—to, in effect, leave the "staff" as the decisional point in the antitrust field. The whole point of the legislative exercise is to end the antitrust chapter and in its place to substitute Congressional guidelines implemented by the traditional regulatory scheme. Stated differently, with the antitrust court removed, what is left is a regulatory scheme. Justice's role is to prosecute antitrust cases—not to be a regulatory agency duplicating the FCC, so that there will now be two regulatory agencies.

This is not a new position for us. In a 1969 Report to the Benton Foundation on the Federal regulatory structure for telecom, the same analysis and conclusion—that this is a "cockamamie policy arrangement"—are set out in the context of the then contentious issue of BOC entry into the information services. The pertinent discussion is attached as an appendix. We particularly recommend perusal of the 1988 statement of Assistant Attorney General Charles Rule, who was then in charge of the Antitrust Division in the Reagan Administration.

The Department asserts that it has developed considerable expertise on the issues involved. Of course it has. It can fully bring that expertise to bear in submissions to the FCC. As a party respondent in any appeal from an FCC decision, it can make known its position to the appellate court (and indeed it can appeal in its own right). It can participate fully in any oversight proceedings of the Congress. Finally, it continues to have broad authority under the antitrust laws to prosecute anti-competitive conduct that it regards as violative of those laws.

The Department's expertise is thus not lost at all. What is to be avoided is for the Congress to establish two regulatory agencies at the Federal level to deal with the regulatory problems of BOC entry into the IX manufacturing fields. Such duplication constitutes bureaucratic layering that the Congress and indeed, the Administration should avoid.

The Administration, perhaps unconsciously, may be motivated by what is a common phenomenon in this town—protection of "turf." There is no question as to what is motivating the opposition of private opponents of BOC entry. The more hoops the BOCs have to jump through—the more decisional hurdles for them, the more chance there is of delaying their entry and thus delaying having to face their competition. We do not blame the opponents for this effort: As the late Senator Magnuson wisely said, "All each industry seeks is a fair advantage over its rivals."

But if the Administration for reasons of "turf" has lost its way, it is all the more reason for Congress to adhere to sound process. We hope, therefore, that S. 652 follows the appropriate procedure now set forth in the bill.

Thank you for your consideration of our views on this important issue.

Sincerely yours,

HENRY GELLER
(For Barbara O'Connor).

Mr. ASHCROFT. I would like to share the key point expressed:

A main thrust of the pending legislative effort is to remove the antitrust court from the regulatory policymaking process and to have important policy guidelines set by the Congress and implemented by the established congressional delegates in this field, the FCC and the State commissions. . . . That is the sound approach of S. 652.

In closing, what is the role of Congress, if not to set policy? Mr. Geller goes on to ask the same question I asked today. He put it this way:

If these matters are to be settled under antitrust law, then why are we passing this legislation? One Senator keeps mentioning the length of this bill. Well, we could reduce these 140 pages down to one simple paragraph and let the Justice Department take over from there. But that is not what we want to do, nor is that what we ought to do. That is not to be the case because the role of Justice is to prosecute cases, not to manage or micromanage industry. Congress has the role of setting national policy. These two roles are fundamentally different, and I know which one I expect to fulfill on behalf of the people of Missouri. I will not vote to transfer policymaking to the Department of Justice, and I encourage the Senate to reject this amendment.

Mr. President, in closing, I offer an observation: We are debating fundamental differences in attitudes. Some Senators say the competition is not the best regulator. I say the American people are the best regulator. Some Senators have looked into the future and they recoil in fear. They argue that the American people are afraid of the future, that they are begging for Government to protect them from the unknown.

I have more faith in the American people. That faith springs from my belief that the enterprising spirit of our people will reap immeasurable benefits in our country, especially in this exciting industry.

We do not wait for a busload of citizens to march into our office and demand this bill. We should pass this bill because Congress must also let the people have the benefits of the 21st century. We should pass this bill because this bill will provide a basis for our competitiveness and productivity, and the growth of this industry is vital to our future, and the benefits will go to every citizen in America.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. DOLE. Mr. President, I have been discussing the situation with the Senator from Nebraska, Senator KERREY. As I understand it, he would be willing—I do not want to cut anybody off. This is an important amendment, as I said on Thursday and again on Friday. If we could agree that we could take up other amendments and then move to table the Kerrey amendment, say at noon tomorrow, would that be satisfactory to the Senator from Nebraska?

Mr. KERREY. That would be satisfactory. I have no objection to that. It is the Dorgan-Thurmond amendment.

Mr. DOLE. Dorgan-Thurmond, excuse me. I know the Senator from Nebraska has an interest in it. I would have to check with both Senator DORGAN and Senator THURMOND to see if we could get that agreement so at noon the Senator from South Dakota, Senator PRESSLER, could move to table. That would satisfy the Senator from Nebraska.

I think Senator BUMPERS is prepared to come to the floor to offer an amendment and maybe Senator LEAHY. I am advised that may be an amendment that would take a considerable amount of time.

As I look at the list of amendments, there are 24 amendments that are pending. Maybe there are some that will be accepted. I only see one here noted that would be accepted.

That would indicate we still have a number of amendments to deal with in addition to the major amendment offered by Senators DORGAN and THURMOND. I hope we could complete action on this bill tomorrow evening so we could start on welfare reform on Wednesday.

I know the managers are prepared. I have just been advised by the chairman

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of the committee he is prepared to stay here all night if necessary. So I urge my colleagues on both sides, I looked down the list. There are Democrats and Republicans who have amendments. We are open for business. We will have votes this evening. I think most everybody has been able to return from their States, and I hope we can dispose of some of these amendments tonight.

I notice an amendment by Senators EXON, LEAHY, and COATS, a bipartisan amendment. I do not know what it is; something on pay phones, foreign ownership, red lining, burglar alarm. Senator LEAHY has another amendment. Senator FEINSTEIN has three amendments.

So there are a number of amendments on each side. If I could just ask my colleagues to cooperate with both Senator HOLLINGS and Senator PRESSLER.

As soon as we get clearance, then, I will ask consent that at noon tomorrow the Senator from South Dakota be recognized to table the Dorgan-Thurmond amendment.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. DEWINE). The Senator from Nebraska.

Mr. KERREY. I know the Senator from Montana is on the floor, and I will be here for a while longer. I just want to respond. There were actually three speakers previously who opposed this amendment and said many things. The distinguished Senator from Missouri did not cite me by name, but he quoted me generously during his own presentation, and every quote he opposed.

Let me begin. One of the strongest arguments the distinguished Senator from Missouri and others have made is that you cannot trust the Department of Justice. You should not involve them with this. They do not have a role.

I, last week, made a mistake in assessing the Department of Justice. I said they have approximately 800 lawyers because I was informed that in 1982, when the consent decree was filed, that is approximately how many people were down there. That is true, 860 —about 800 actually, in 1982. But today there are 323 lawyers and 686 total employees, total staff at the Antitrust Division at the Department of Justice. It is a very small agency.

This bill is about power. I do not walk, as the Senator from Missouri implied, to the precipice of change and be afraid of change. I am not afraid of this bill other than what it might do if we do not have the agency that has not only current responsibility but experience in managing what this bill describes we are going to do. This bill says we are going to move from a monopoly to a competitive environment. That is what it attempts to do. We are going to move from a monopoly in local telephone service in a market—no free market down there, folks. This is not a little mom and pop shop that started in business 10 years ago now with local telephone service. They were given a monopoly franchise.

If the people of the United States of America are trying to figure out who do I trust in this deal, it was not the peoples' Congress in 1982 that busted up the monopoly, that gave them a competitive environment in long distance, that managed that transition from monopoly to competition that is cited over and over and over by people who come down here to the floor. It was not the U.S. Congress. It was the Justice Department. A Reagan appointee goes to the court and files a consent decree with AT&T, and that is what this is all about.

To set this thing up as "you are either for the devil or for the angels" sort of an argument does not, it seems to me, lead to a very constructive argument. The question really is how are we going to manage this? How are we going to manage this transition now? We have decided. There is very little argument. I do not think there is a single Member of this body, maybe there is, maybe there is somebody who believes we ought to preserve the monopoly at the local level. I do not. The Senator from Missouri acts like that is the argument here: Choose the market or choose a regulatory environment. Have the Government tell you what to do or let the market tell you. That is nonsense, baloney. That is not the argument here. That is not the question that needs to be answered.

If you believe you want to preserve the local monopoly and keep it the way it is, fine. I do not hear anybody or have not heard anybody yet argue that is what ought to occur. I caution Members that when we move from that monopoly to a competitive environment, there is going to be trauma, there is going to be real trauma, and we better make sure we get this thing right because it is not the demand for change we are talking about here and that I am an advocate for. The demand for change is not coming from townhall meetings. It is not coming from citizens in Missouri or citizens in Nebraska or citizens in Ohio who are saying, "I am unhappy with local telephone service, I am unhappy with my cable service, I am unhappy with broadcast, except for some of the things having been raised having to do with obscenity and violence and that sort of thing." That does come from town hall meetings. But as far as, "Do I want a monopoly or do I want to deregulate?" That is hardly a debate going on out there on Main Street.

We have made a reasoned judgment based upon input from a variety of different people that we can go to a competitive marketplace in local service. These arguments have a way of turning it around every now and then. In 1986, a couple of years after the consent decree was fully in place and the divestiture had occurred, I supported legislation in the Nebraska Legislature to deregulate the telephone companies on the question of pricing. I tried to get them to change the law. The legislature changed the law to allow competition at the local level and was told—indeed I was rolled at the time, not told—I was told and rolled we were not going to do that. Technology would not allow competition. That was the argument in 1986. So I lost that battle.

We deregulated on price but we did not deregulate to produce a competitive environment because we were told the technology would not allow it. And lest anybody think I have walked to the precipice and am fearful of embracing change, as was suggested earlier, in 1986 I asked and was given the authority to be the lead Governor for telecommunications for the National Governors' Association. We reached a conclusion—I had a little task force —that we ought to, in an expeditious fashion, eliminate the restrictions that were currently in place in the modified final judgment. I thought we had the votes. It was one of those deals where you were sure you had all the votes, did all the calling and everything. We had a meeting, annual meeting, in South Carolina in 1986. I was sure I had that thing won. That year I got rolled by AT&T. They came to that deal and said: Oh, no, if you loosen the restrictions and you have competition, all these things—they did, like many of the speakers have said—here are the horrible, terrible things that are going to happen. Here are all the bad. Jobs are going to go down the toilet, things are going to explode and be bad. And we lost. We got rolled in 1986 trying to change that policy.

So I understand that there is a lot of active interest in whether or not the Department of Justice should have a role. Earlier, the Senator from Missouri said, "I am a former Attorney General and I have experience doing this." And he said "I hope I am listened to."

Mr. President, I ask unanimous consent a letter from 24 State attorneys general be printed as part of the RECORD at this point.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

STATE OF WISCONSIN,
DEPARTMENT OF JUSTICE,
Madison, WI, June 2, 1995.

DEAR MEMBER OF CONGRESS/SENATE: The undersigned state attorneys general would like to address several telecommunications deregulation bills that are now pending in Congress. One of the objectives in any such legislation must be the promotion of deregulation that fosters competition while at the same time protecting consumers from anticompetitive practices.

In our opinion, our citizens will be able to look forward to an advanced, efficient, and innovative information network only if such legislation incorporates basic antitrust principles and recognizes the essential role of the states in ensuring that citizens have universal and affordable access to the telecommunications network. The antitrust laws ensure competition and promote efficiency, innovation, low prices, better management, and greater consumer choice. If telecommunications reform legislation includes a strong commitment to antitrust

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principles, then the legislation can help preserve existing competition and prevent parties from using market power to tilt the playing field to the detriment of competition and consumers.

Each of the bills pending in Congress would lift the court-ordered restrictions that are currently in place on the Regional Bell Operating Companies (RBOCs). After sufficient competition exists in their local service areas, the bills would allow RBOCs to enter the fields of long distance services and equipment manufacturing. These provisions raise a number of antitrust concerns. Therefore, telecommunications deregulation legislation should include the following features:

First, the United States Department of Justice should have a meaningful role in determining, in advance, whether competition at the local level is sufficient to allow an RBOC to enter the long distance services and equipment manufacturing markets for a particular region. The Department of Justice has unmatched experience and expertise in evaluating competition in the telecommunications field. Such a role is vital regardless of whether Congress adopts a "competitive checklist" or "modified final judgment safeguard" approach to evaluating competition in local markets.

Second, legislation should continue to prohibit mergers of cable and telephone companies in the same service area. Such a prohibition is essential because local cable companies are the likely competitors of telephone companies. Permitting such mergers raises the possibility of a "one-wire world," with only successful antitrust litigation to prevent it. Congress should narrowly draft any exceptions to this general prohibition.

Third, Congress should not preempt the states from ordering 1+intraLATA dialing parity in appropriate cases, including cases where the incumbent RBOC has yet to receive permission to enter the interLATA long distance market. With a mere flip of a switch, the RBOCs can immediately offer "one-stop shopping" (both local and long distance services). New entrants, however, may take some time before they can offer such services, and only after they incur significant capital expenses will they be able to develop such capabilities.

In conclusion, we urge you to support telecommunications reform legislation that incorporates provisions that would maintain an important decision-making role for the Department of Justice; preserve the existing prohibition against mergers of telephone companies and cable television companies located in the same service areas; and protect the states' ability to order 1+intraLATA dialing parity in appropriate cases.

Thank you for considering our views.

Very truly yours,

Tom Udall, Attorney General of New Mexico; Grant Woods, Attorney General of Arizona; James E. Doyle, Attorney General of Wisconsin; Winston Bryant, Attorney General of Arkansas; Richard Blumenthal, Attorney General of Connecticut; Garland Pinkston, Jr., Acting Corporation Counsel of the District of Columbia; Calvin E. Holloway, Sr., Attorney General of Guam; Tom Miller, Attorney General of Iowa; Chris Gorman, Attorney General of Kentucky; M. Jane Brady, Attorney General of Delaware; Robert A. Butterworth, Attorney General of Florida; Jim Ryan, Attorney General of Illinois; Carla J. Stovall, Attorney General of Kansas; Scott Harshbarger, Attorney General of Massachusetts; Hubert H. Humphrey III, Attorney General of Minnesota; Joseph P. Mazurek, Attorney General of Montana; Drew Edmondson, Attorney General of Oklahoma; Jan Graham, Attorney General of Utah; Christine O. Gregoire, Attorney General of Washington; Jeremiah W. Nixon, Attorney General of Missouri; Heidi Heitkamp, Attorney General of North Dakota; Charles W. Burson, Attorney General of Tennessee; Jeffrey L. Amestoy, Attorney General of Vermont; Darrell V. McGraw, Jr., Attorney General of West Virginia.

Mr. KERREY. Mr. President, with some assist from my drugstore eye glasses, let me read one paragraph from it. It says, "The United States Department of Justice should have a meaningful role in determining, in advance—not after the fact—whether competition at the local level is sufficient to allow an RBOC to enter the long distance services and equipment manufacturing markets for a particular region."

Understand we are not just talking about the interLATA long distance. We are also talking about removing the restrictions on manufacturing.

So the question is, "Do you have some competition at the local level?"

If you have it, it will allow you to get into previously restricted areas.

The Department of Justice has unmatched experience and expertise in evaluating competition in the telecommunications field. Such a role is vital regardless of whether Congress adopts a "competitive checklist" or "modified final judgment safeguard" approach to evaluating competition in local markets.

Mr. President, I really do not believe this is one of those amendments that ought to be characterized as a choice between picking the "dreaded Government regulators who are going to micromanage everything in your life" or choosing the market. But what we are attempting to do in good faith is answer the question, "How do we manage this thing?" This is an unprecedented change, unprecedented that Congress is going to attempt to manage. We have reached the decision, I believe a majority of us have, that we should use competition in the local market, competition in manufacturing, competition in services, competition in switching, not to regulate but to determine what is the best service, what is the best piece of equipment, what is the best switching offered out there. Let competition determine that. We have been successful in long distance. We grow confidence based upon success. We can do it at the local level and in manufacturing. We are about at the edge of enacting legislation to do that.

The question before us is, "Should we give the Department of Justice more than a consultative role?"

I would like to offer a couple of things. Earlier the Senator from South Dakota I believe had a question having to do with administrative law with the Department of Justice, a very good question. I will try to restate the question—I do not know if I will get it right—the question was with the Federal Communications Commission, we have an open process. You have an administrative law that governs hearings and so forth. It has to be open. Then the Senator from South Dakota asked—at that time it was the Senator from North Dakota on the floor—would the Department of Justice have that same kind of law apply to it? The amendment specifically inserts on the page that the Senator from South Dakota referenced on page 89, and it refers to the determination by the Commission and the Attorney General. They would issue a written determination on the record—after hearings and the opportunity for a commitment. So the language that we discussed earlier, I say to the distinguished chairman of the committee, does not just refer to the Commission. It also refers to the Department of Justice.

Second, I say it again for emphasis, we are not talking lawyering or a new bureaucracy. It is a parallel process. You apply specifically what one does, and what the other one does. You ask the guy that has the experience. We are trying to figure out. Do we have the competitive market, perhaps in a perfect fashion? You are looking for the person that got the job done before this, the person you ought to call on in the agency, a very small agency I point out, again to attempt to manage this transition again.

Then one of the questions that comes up says, "Well, we did not do this with airlines, we did not do this with trucking, and we should not, therefore, do this with telecommunications." Telecommunications is by many people's estimate one-half of the U.S. economy directly or indirectly. It is a big part of the economy, probably two or three times the size of the entire health care industry which was of great concern to us during our debate in 1993–1994. At least that is what has been represented to me. It leads directly to the manufacturing and the production of goods and services, or indirectly the information industry is now roughly half the U.S. economy. Not all of these are regulated. Many of these are unregulated businesses. We are talking about in any event managing a substantial amount of the U.S. economy; that is to say, not managing it. We are managing from a monopoly situation trying to transfer the control of the decisions away from regulators so that the marketplace is making those decisions. The reference earlier was that airline and trucking

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would be a good example to use and based upon the success of airline and trucking deregulation we should not have a DOJ role.

However, Mr. President, I look at a couple of incidents.

From 1985 to 1989, during the transition from airline regulation to competition, the Department of Transportation (DOT) had the authority to approve airline mergers, subject to advice from DOJ. In 1986, DOT approved two mergers over DOJ's vigorous objections: Northwest Airlines' deal with its main rival in Minneapolis, Republic, and TWA's acquisition of its main competitor in St. Louis, Ozark. DOJ advised DOT that each transaction would sharply reduce competition for air travel into and out of the affected city. DOT rejected this advice, concluding that the deals would not result in a substantial reduction of competition in any market.

Unfortunately, DOT—with little expertise in assessing competition—was wrong. Just as DOJ predicted, the transactions resulted in higher air fares and less choice for travelers at the Minneapolis and St. Louis hubs. In fact, a study by the General Accounting Office found that TWA's air fares at St. Louis shot up at two to three times the rate of all other air fares in the wake of the merger.

The Department of Transportation now concedes that assigning the job of making competitive assessments to it, instead of DOJ, "was not a success."

Mr. President, we are not talking about an assignment of responsibility here that is heavily bureaucratized. We are talking about a question that we ought to be able to assess, particularly given the fact that I believe it is the case that an awful lot of us are going to be held accountable for this vote. Those of us who are advocates of deregulation are attempting to answer the question, "How do we do this in a fashion so that our consumers get the benefit of lower prices and higher quality that comes at a competitive environment?" We want to make sure that, as you move from a monopoly to a competitive environment, the consumers indeed benefit from that transition.

DOJ still has the role. It is not enough. DOJ has the role after the fact, not prior to the decision being made. The Antitrust Division is not doing the same thing as the FCC. It is not duplication, as has been alleged.

As to the delays, I can go through that argument. I have gone through it once before. If you examine the detail of why there has been delay, I think the presentation of the charts going up to the right, in fact, fall on their face.

The Department of Justice is not asking to be a regulator in this thing. I am not coming to the floor because I am concerned about the Department of Justice. I am not on the Judiciary Committee. I am on the Agriculture Committee, the Appropriations Committee, and the Intelligence Committee. I am not trying to figure out how to give some additional authority. They are not asking for regulatory authority. They are merely asking, and I think correctly so in this case, for some additional authority as we try to move from a regulated sector at the local level, at the local loop, and regulated sector in manufacturing as well to a competitive environment. If we get it right, we will end up being rewarded right along with the consumers with the praise as a consequence.

Mr. President, I believe again that the 146 pages that we are about to vote on, whatever it is, relatively soon, we will be voting on final passage, I presume, is one of the most important pieces of legislation that I have had the opportunity to be a part of in my entire political career.

I really want, as I have done before, to pay tribute to the Senator from South Dakota and the Senator from South Carolina both who have pushed on this thing. Leadership in the majority changed in November 1994. That change did not result in the stopping of this legislation. These two men have worked very, very closely together. They have worked to try to come up with a reasonable solution. I think they have made a good-faith effort.

I think this amendment improves the legislation. It does not repeal the legislation. It improves the legislation. The risk that we will be taking in giving the Department of Justice this role is relatively small given the risk of not giving them this role, in my opinion. If it turns out that things get slowed down and the wheels of progress start to grind, we can always reverse it. We are literally in uncharted waters. To my knowledge this has never been done before with a sector of the economy as large as this and which is growing. We are trying to figure out how to go where we have not gone before. This bill does not deregulate in a massive fashion. It is a structured for the movement from a monopoly situation to a competitive situation.

I hope that this amendment can continue to be argued in a straightforward fashion, as the ranking Democrat and the chairman of this committee have thus far. I hope, in fact, that it is adopted. I believe it will improve the legislation. I believe the compromise worked out between the distinguished Senator from North Dakota and the distinguished Senator from South Carolina, though it lowers the test, does not remove the strength from the amendment which is to keep the Department of Justice, the agency that has demonstrated its capacity to get the job done, involved in this process.

Mr. President, I yield the floor.

Mr. DOLE. Mr. President, I now ask unanimous consent that the pending Dorgan-Thurmond amendment be laid aside until 12 noon Tuesday and at 12 noon Senator PRESSLER be recognized to make a motion to table the amendment.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. DOLE. I thank the Senator from Nebraska. I think this will work. He may want to reserve some of that time before noon for final argument, maybe from 11 to 12 to be equally divided between—so you would have 1 hour of debate before the motion to table. So from 11 to 12 noon, unless there is jection, will be an hour equally divi on that amendment.

Mr. HOLLINGS. Right.

The PRESIDING OFFICER. Is th objection? Without objection, it is ordered.

Mr. DOLE. The time will be allot by the managers or their designees.

Mr. HOLLINGS. Right.

Mr. DOLE. So now we are down real business if we can get some otl amendments over here.

Mr. PRESSLER addressed the Cha

The PRESIDING OFFICER. The S ator from South Dakota.

Mr. PRESSLER. Mr. President, might review these checklists here.

Mr. President, earlier today, I poi ed out the system that we have set that really explains this bill, how y get into other people's business un this bill, how we really do not nee Justice Department review.

First of all, the first thing that h pens under the bill that we worked in the Commerce Committee betw Senator HOLLINGS and myself and ot members—with all the other Memb of the Senate invited to participat the first thing is that the State tifies compliance with market-oper requirements. So the States are volved first of all.

Next, the FCC affirms the public terest and convenience and necess That is another test. We debated t here on the Senate floor and in Commerce Committee. Some of conservative publications in town we should eliminate public inte but we decided not to. So that is other test.

The next step is that the FCC tifies compliance with the 14-p checklist. I have a chart of the che list over here, to prove there is c petition. This is in place of the VII test. This says the regional Bells h opened up their markets.

Next, the Bells must comply wit separate subsidiary requirement, t is, the Bell companies, to have a se rate subsidiary, for at least a perio 5 years.

Next, they have to meet the n discrimination requirement. They c not give all their business to one sidiary or stack it so the subsidiar not a subsidiary.

Next, there is a cross-subsidizat ban which the Bells must comply wi

Now, during all the time that thi going on, the FCC allows the Dep ment of Justice full participation in its proceedings. In fact, under Hobbs Civil Appeals Act, the Dep ment of Justice is an independ party in all FCC appeals. That is something happens here that the c pany is not satisfied with the F they can appeal and the Justice partment can be their partner. So Justice Department is involved in bill as an active participant.

Now, also the Bells must com with existing FCC rules in rigorous nual audits, elaborate cost accounti

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computer assisted reporting, and special pricing rules.

Meanwhile, when all this is going on, you still have the full application of the Sherman Antitrust Act, the Clayton Act, and the Hart-Scott-Rodino Act. So still the Justice Department is involved. There is sort of an implication here that if we do not give the Department of Justice an administrative decisionmaking role they are not involved. They are very much involved. They are very involved in antitrust laws, but they are still involved in full participation in all the proceedings, and they are involved in the Hobbs Civil Appeals Act. The Department of Justice can be an independent party in all FCC appeals.

In addition to all this, the FCC must confer with the Attorney General and the Attorney General can recommend an VIII(c) test or a Clayton standard or a public interest standard, those three things.

So I would like to point out that we already have a lot of conditions. By the time you go through all of this, it is going to cost a company and the taxpayers a lot of money, and it is going to require a lot of tests—14 tests—public interest test, the Justice Department, the separate subsidiaries. It goes on and on and on. So there is plenty of regulation and plenty of review in the proper regulatory agency.

Now, a part of this is the so-called competitive checklist. This is the heart of the compromise that was reached. Some of the conservative magazines and some of the Senators wanted a so-called LeMans start where you set a certain date and everybody competes. The problem in telecommunications is you cannot get on everybody's wire; you have to use the other guy's wires and interconnections and unbundling of his system before you can compete.

So we decided, after weeks of meetings—and all Senators were invited to these meetings, and their staffs—to develop the checklist. I must commend the Senator from Nebraska and his staff because they were present and helped write this bill. But so did several other Senators, Democrats and Republicans. This bill has been around a long time. It is the product of all 100 Senators' work.

But in any event, the competitive checklist was developed, and at the FCC the companies come before the FCC and the FCC goes through this checklist, hopefully very quickly, and this replaces the market test, the VIII(c) or replaces the Clayton 7 Act or it replaces some other types of tests. But this is the test.

First of all, access to network functions and services. That means interconnect. It means that the Bell company has to open up its wires. I went down to the big wire station of Bell Atlantic here in Washington to see all those wires. They have to open them up. That is what interconnect means. Let us say you and I wanted to form a local telephone company. We would be able to get into the wires of the regional Bell. That is interconnection.

The second checklist item that the FCC uses before certifying is capability to exchange telecommunications between Bell customers and competitors' customers.

Third, there has to be provided access to poles, ducts, conduits, and rights of way.

Fourth, local loop transmission unbundled from switching. These next three are unbundling. That is, again, the company has to open up its systems, unbundle so somebody else can get in. I guess this has been compared to if you are making pizza and somebody else delivers your pizza. It probably would not be in such godd shape. But we are requiring in these unbundlings that the other person, the competitor with the Bells, is treated well. When he gets into the regional Bell's wires, he does not get a buzz tone or be told to wait 3 minutes or a tape recording saying his call will be handled when it becomes convenient. The competitors will be given quality treatment.

Unbundling. That is Nos. 5, 6, and 7. Local transport from trunk sites unbundled from switch. Local switching unbundled. And No. 4, the loop transmission unbundled from switching. These three are the so-called unbundling tests.

Then No. seven is access to 911 and enhanced 911. Enhanced 911 is where you just push one button for an emergency. Also access is required for directory assistance and operator call completion services. That is an important one in many cases. Next is white pages directory listing being available at a reasonable price.

The ninth test is access to telephone number assignment; tenth, access to databases and network signaling, important if you are going to compete and get into the market; eleventh, interim number portability; twelfth, local dialing parity; thirteenth, reciprocal compensation; and fourteenth, resale of local service to competitors.

What I am saying is we have a competitive checklist, which is the basis for getting into the local telephone business. So we are trying to get everybody into everybody else's business here. These are the portions of requirements that the FCC certifies.

What the Dorgan-Thurmond amendment suggests is that after we finish all this, we then go over to the Justice Department for yet another test, though it is not a regulatory agency. We then ask the Justice Department to give their approval under the Clayton 7 standard, which is another standard.

So if you survived in your State, if you met the competitive checklist, if you have met the public-interest test, if you have met the subsidiary test, and if you have met the nondiscrimination test and the cross-subsidization test, when you get through all of that, then you have to go over to the Justice Department.

We are told this will only take 90 days; we are going to put a 90-day requirement on it. Even taking 90 days is another delay. Some say you can do this simultaneously. As a practical matter, you cannot. You have to get through your State, you have to get through the FCC, and now we are over here at the Justice Department. We do not need this additional review. That is more regulation. That is what we are trying to avoid.

It is true, in the past, there have been suggestions for VIII(c), but we have come up with this checklist to replace it, which is quicker and covers all the subjects and has been agreed to by everybody. So we have a bill that finally has crafted a balance between the long distances and the Bells. We are now ready to go into business, but if the Dorgan-Thurmond amendment is adopted, no, wait a minute, we have another layer of bureaucracy.

What is wrong with giving the Justice Department this authority? There are a number of things wrong with it. First of all, the Justice Department's enabling statute does not say that it is a regulatory agency. The Antitrust Division's enabling statute does not say that it is a regulatory agency.

The Justice Department got into regulation the first time with Judge Greene's consent in 1982. They have several lawyers over there who carry out, administer the MFJ. That was unprecedented, but it came about. They are working for Judge Greene, not the Attorney General, and that is an important thing. They carry out Judge Greene's orders, a district court order.

But our friends would have us make the Justice Department for the first time in history by law a regulatory agency. There is no other area in commerce that this is true. It is not true in aviation, it is not true in transportation, it is not true in railroads. Originally, the ICC was created in about 1887. The FCC was patterned on it in 1934. Both agencies were intended to be the regulatory agencies. There is talk of abolishing the ICC. There is talk when we get into the wireless age of substantially reducing FCC, or that perhaps we will not need the FCC. I do not know about that. That is another debate for a later time.

But this bill will take us into transition from the wired age to the wireless. We are in the last stages of the wired communications age. I think it will last 10 years. Some people think 15; others think it will last about 5. But this bill will provide us with competition and deregulation in the last stages of the wired telecommunications era.

But to give the Justice Department a regulatory role at this time would be a step backward. That is regulation. That is another layer of regulation. Everybody here, even my good friend AL GORE, talks about deregulating and privatizing. Here it is. Here is our chance.

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So I think that debating whether or not to have a Justice role on this particular part of this bill is very important.

Let me say that in all aspects of this bill, we are trying to deregulate, whether it is letting the utilities into telecommunications with safeguards, moving toward deregulation of cable with safeguards, getting the Bell companies manufacturing and letting them get into other areas, such as cable, letting the long distance people into the local market, de- regulating the broadcasters—this is a vast bill. It deregulates almost everything.

But if we adopt this amendment, we are going back to a major layer of regulation regarding the Bell companies in long distance. I cannot conceive of why we would do that. Our consumers have an interest in deregulation and competition. They are protected by the FCC with the public interest necessity and convenience standard. They are also protected by the checklist and by other safeguards. If the FCC appeals, the Justice Department can join independently on that appeal. So there is already heavy Justice Department involvement.

So I say to my friends that we really need to decide if we are deregulating or if we are shuffling along with more regulation. If we allow the Dorgan-Thurmond amendment to be adopted, we would be delaying competition at least 2 or 3 years. My friends say, "Oh, it will only take the Justice Department 90 days to get this done." That is not true. They already have a 30-day requirement on them, and they are taking as much as 3 years to get something done over there.

I see some other Senators on the floor. If anybody else would like to speak, because I am going to be here all night, if necessary, I will yield the floor to anyone who wishes to speak.

Mr. KERREY. I would like to speak in response.

Mr. DOLE. Can I just change the consent?

The PRESIDING OFFICER. The majority leader.

MODIFICATION OF UNANIMOUS-CONSENT AGREEMENT

Mr. DOLE. Mr. President, earlier I asked that the Senator from South Dakota be recognized at 12 o'clock to move to table. I modify that part of the agreement and ask unanimous consent that he be recognized at 12:30 tomorrow to make a motion to table the Dorgan-Thurmond amendment, and that the hour for debate be from 11:30 to 12:30 instead of 11 to 12.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. DOLE. I might indicate, this is made to accommodate a number of Senators, Vietnam veterans, who have a special event that does not end until about 12:15, as I understand.

Before the Senator from Nebraska speaks, let me say that it is my understanding that there will be a vote fairly soon, as soon as Senator FEINSTEIN comes to the floor. She has an amendment with Senator LOTT. It should not take much debate.

So I tell my colleagues, or members of their staff, there probably will be a vote in the next 45 minutes.

I am now advised she cannot be here until about 6:30. Let me think about that, and I will say something after the Senator from Nebraska speaks.

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska.

Mr. KERREY. Mr. President, we have been debating this particular amendment, although in its current incarnation just about 4 or 5 hours, but we have been debating the overall role of the Justice Department for a couple of days now.

I am beginning to learn that in debate—I had not noticed it used quite so often—but one of the devices that one uses in debate is you set up a strawman and you say, "Do you want that strawman?" And you say, "No, I don't want that strawman," and then you knock it down with your argument.

The strawman in this argument is to say that this amendment would require the poor old phone company, little old mom-and-pop phone company, to go through all this burdensome procedure before the Federal Communications Commission and then go over to the Department of Justice and that we are setting up a whole new level of bureaucracy.

It is not true. That is not what is going on. It is a simultaneous process. The idea that somehow it is not going to occur simultaneously is an idea that is sold, but I do not believe is an effective sale. The question is not do you want the Department of Justice to regulate—we are not asking for regulatory authority—the question before the body is, do you want, as you proceed to a competitive environment—when you get right down to the application, the FCC will be making a judgment, just as the Department of Transportation did, as referenced earlier, when TWA tries to acquire Ozark, or when Republic is the target of Northwest Airlines. In the deregulation of the airline industry, we did not give the Department of Justice the authority to say we do not approve of it. We do not think there is competition. We do not think there will be competitive choice. We think this will decrease that.

That is the question before us is not do you want the Department of Justice, in an unprecedented fashion, to regulate, but do you want the Department of Justice to have a role more than "What do you think?" The Department of Justice, under this amendment, would have a role to say, "There is not competition at the local level, and we do not believe this application should be approved." That is the question before us.

We are going from a monopoly to a competitive environment. We are not citing enormous power in a conspiratorial fashion. With or without this amendment, I say to my colleagues, there is substantial deregulation. Without this amendment, if this fails, your cable company can still price its premium service without being regulated. With or without this amendment, Rupert Murdoch can still acquire 50 percent of the television stations in a local area. With or without this amendment, you have companies out there that will be doing things they were previously prevented from doing. This bill will deregulate without this amendment.

So this is not a question before the body that you have to answer, such as, "Do I want to deregulate, or do I want to continue the current regulatory structure?" We are going to deregulate either way.

The question before the body is, do you want the Department of Justice, with a date-certain requirement, involved not just, "Oh, what do you think about this proposed"—I almost said merger. But that is what it becomes. One of the ironies is, if a local telephone company acquires or merges with a local cable company, the Department of Justice has to approve it. Nobody suggests that is undue regulatory authority. Effectively, when you go from a monopoly with a local franchise into long distance, it is effectively the same thing. The question before us is: Do you want the Department of Justice to say we do not think there is competition?

Now, very instructive for Members, as you try to reach that decision, I think, would be to go through either one of the checklists. There are two, by the way. In section 251, there is a checklist that says here is what a local company has to do, if a long distance or another carrier—and my vision for competition, by the way, again, is that you get competitive choice not for the existing line of businesses, but you get it for a package of information services. So it is likely to come, this desire to compete at the local level, and the competition and the desire is just as likely to come from a medium-sized entrepreneur that wants to deliver information services to a resident in Cleveland, or Omaha, or wherever. That is apt to happen.

In section 251 there is a checklist, as well, that says here is what you have to do. It is a pretty tough checklist. In fact, it may be tougher than in 255. In 255, you have a checklist that says this is what you have to do if you want to do interLATA, or long distance service. If you are a local telephone company, this is what you have to do. Well, I do not doubt—and indeed I know—that the committee spent a long time putting this checklist together. There are 14 things. But read them. Read them and then ask yourself the question: Does this mean I have competition? Does this mean I have competitive choice at the local level? For the consumer a competitive choice means that if they do not like the business

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that is offering to sell them something, they can shop it someplace else. That is a competitive choice. Competitive choice means that business person that is selling you something has to make sure that the price and quality and all of the other terms and circumstances of the sale are what you want, or you take your business someplace else. That is what a competitive choice provides a consumer.

Well, I do not know if this 14-point checklist gets that job done. Maybe it does. Maybe it does. I do not know. Again, it is a very impressive checklist. Members ought to read it. Ask yourselves what does it mean if I have "nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating company's telecommunications network that is at least equal in type, quality, and price to the access the Bell operating company affords to itself or any other entity."

That would appear to mean that you have a competitive opportunity. I do not know. The real test of competition is going to occur when the consumer says, "I have competitive choice," and when that person in the neighborhood says, "I do not like my service. I do not like this. The price is too high. The quality is not what I want. I am going to take it someplace else." You do not have that today with local telephone and cable.

We are trying to move from that monopoly situation to a competitive situation, and we are merely saying with this amendment: Ask the Department of Justice—not giving them regulatory control in some sort of dark and mysterious fashion, but ask the agency that, on a regular, routine basis, is charged with a responsibility of assessing whether or not you have competition. If you do not think they can do it, look at their success in this industry.

Again, it was not Congress in 1982 that stood up to AT&T. Congress did not stand up to AT&T and say we have had enough of this monopoly, our consumers and citizens are complaining; we are going to pass legislation and divest you. Congress did not do that. The people's Congress did not respond to that and pass legislation. It was the Department of Justice that filed a suit against them originally, and eventually, as a consequence of AT&T believing they would win the suit, write up a consent decree and file it with the judge.

I hope that colleagues understand that this amendment is not offered as a consequence of our desire to continue regulation. As I said, we are deregulating telecommunications with or without this amendment. So the choice is not do I favor deregulation. With or without this amendment, you will have deregulation. I hope my colleagues do not fall into the illusion that this is a choice between, do I want another layer of bureaucracy, or do I want to prolong the process? If there is a specific objection to the language of this bill that implies there might be an unreasonable delay or might layer on bureaucracies, bring it. We have made modifications already in the amendment. I do not want to layer on excessive bureaucracy.

I urge my colleagues to go back and look at airline deregulation, in particular, not with the purpose of trying to revisit and reargue that thorny, old problem, but to look at what happened to the Department of Transportation, which was making the decisions, and the Department of Justice was merely in a consultative role. They merely said, "We advise against them," rather than being in a position where the companies understand that they do have the ability to say there is competition, thus, let us go forward, or say there is no competition, do not allow it to go forward.

I yield the floor.

Mr. GORTON. Mr. President, as one of the members of the Commerce Committee, who reached the decision to balance this legislation in the fashion that it appears here on the floor, and also as a Senator who has great respect for the views of the Senator from Nebraska, I must say that I find myself unpersuaded by his case—unpersuaded on a number of grounds.

First, it is not necessary to bandy about the word "bureaucracy" to understand that the fundamental nature of this amendment is to substitute a required approval on the part of two very distinct Federal agencies with two very distinct roles for a single such determination, before a regional Bell operating company can go in to the long distance business.

Now, Mr. President, there is no question but that the entry of a regional Bell operating company in the long distance business will be competitive in nature. The long distance business is highly competitive at the present time. Not just with that handful of large companies which constantly advertise in the newspapers and on television, but by dozens, if not hundreds, of smaller companies, as well.

Now, it is true that those companies presently in the long distance business, naturally enough, fear the entry of the Bell operating companies into their business. They make the case—not entirely persuasively, but not entirely unpersuasively, either—that allowing the Bell operating companies into that business may give those Bells an unfair competitive advantage.

It is in order to meet that argument, Mr. President—not the argument about local service, but the argument about long distance service—that this bill says to the Bell operating companies, "No, you cannot start competing in that very competitive business unless and until your own system is open to those who want to provide competition where competition in large measure does not exist right now, in the local exchange service."

It is to assure that companies now providing long distance service or cable television service or simply seeking to get into the long exchange business, are able to do so that the various conditions—some of which have been referred to by the Senator from Nebraska—are included in the bill.

The goal of the bill, Mr. President, is to create added competition in both telephone fields, in both long distance and in the local exchange.

Any additional requirement which slows down that process on both sides of the equations, seems, to this Senator, to be undesirable.

So what the bill does is to set up a set of 14 reasonably objective conditions that must be met by the regional Bell operating companies to open up their local exchange before they could get into the long distance business and provide competition and, one hopes, lower prices.

The committee was not absolutely satisfied any more than the Senator from Nebraska is absolutely satisfied that the simple mechanical meeting of those 14 conditions would, under all circumstances, be sufficient to open up the local exchange.

So it added the public interest convenience and necessity condition, requiring the Federal Communications Commission, which almost from time immemorial, has been the Government entity and agency with expertise in this field, to determine in the broadest possible sense that the requested authorization was consistent with the public interest, convenience, and necessity. A test which has been a test utilized by that Commission ever since or almost ever since its creation.

Mr. President, in adding the Department to this mix directly as a regulatory rather than as an advisory entity, the amendment, it seems to me, creates the worst situation, worse then abolishing the FCC and having this done only by the FCC, worse than leaving it the way it is in the bill at the present time.

Because, Mr. President, the Attorney General expressly has advisory authority to the Federal Communications Commission in this connection.

I suspect that in most cases, the Attorney General goes to the Commission and says, "This is a terrible idea, to let this Bell into the long distance business." We think it is going to, somehow or another, create a tremendous monopoly.

I strongly suspect that the FCC will listen to and abide by that advice unless, in its own greater expertise in the communications business, it feels that the Attorney General is flatout wrong, just does not know very much about this particular subject.

The sponsors of the amendment, in their desire to have two different entities involved in this business, have really created a most curious division of authority.

Where, in the bill as it stands without this amendment, the authority of the Federal Communications Commission in dealing with a determination of

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public interest, convenience, and necessity, is essentially unlimited, this amendment deprives the Commission of the ability to consider the effects of the authorization in any market for which the authorization is sought, with respect to antitrust matters.

Mr. President, it is very likely that may be the centerpiece of what the FCC would base its determination of public interest, convenience, and necessity on under normal circumstances.

This mention of public interest, convenience, and necessity is carved out in order to be given to the antitrust division of the Office of the Attorney General. In other words, the FCC is really going to no longer be able to consider all of the elements which go into a determination that authorization is in the public interest, convenience, and necessity.

Just last week, Mr. President, in balancing this bill, we turned down an amendment which would have stricken that authority. We did not feel, a majority of the Members did not feel, any more than a majority in the committee felt, that we could absolutely and under all circumstances rely on the 14 categories.

So now, in the interests of speaking out on antitrust matters, the sponsors of this amendment were normally thought to be on this side of the debate, while those who sponsored last week's amendment were on that side, and the committee in the middle, are doing much of the work that the sponsors of last week's amendment sought to do themselves and were rejected in that course of action by, I believe, all of the sponsors and most of the supporters of this amendment.

So, to recapitulate, this proposal deprives the Federal Communications Commission of authority it ought to have in order to give a new kind of authority to the Attorney General of the United States, a kind of authority that the Attorney General does not have at the present time.

I want to go back. The Attorney General in this bill is to be consulted by the Federal Communications Commission, and in this bill the Attorney General is not deprived of any of the authority of that office with respect to monopolization or the enforcement of the antitrust laws. Just as it can stop a merger, if it finds that the ultimate impact of such authority is to create a monopoly, it may bring the same kind of litigation that it brought that resulted in the breakup of the old AT&T. But one further matter, as that is brought up as something which took place through the Department of Justice, not through the Congress, the Department of Justice did not determine to sue AT&T to break up that monopoly in 90 days. And here in this bill the Attorney General is given only 90 days to make this determination, not of something that has happened in the past—which is fairly easy to determine—but something that might possibly happen in the future. I do not believe that the authority given the Attorney General in this bill can effectively be used in a period of time like that. It is clear that we now have two different Federal entities under this amendment having authority over the grant of this authorization based on two quite different sets of tests and that, apparently, they will not relate to one another.

Finally, it is clear to this Senator, at least, that it is more likely than not that this added authority, this two entities of the Federal Government rather than one, is likely to slow down the creation of competition, certainly in long distance, and very unlikely to speed it up in connection with the local telephone market.

So, I would summarize by saying I do not believe the committee on which I serve and on which this structure was worked out by the careful work of the chairman and the ranking Democratic member, and for that matter almost all the members of the committee, is some kind of jerry-built political compromise. It is the result of careful and sober thought as to what was the best system available for reaching two goals: one, the creation of competition in the most rapid possible fashion, both in long distance and in the local exchange; and at the same time the prevention of monopoly and the service of the public interest.

So, my own summary is that the bill, as it stands, is greatly superior, from the perspective of the public interest and competition and consumers, than it would have been had the McCain amendment been adopted last week striking the public interest section and, equally, than it will be if this amendment is adopted putting two different entities of the Federal Government into the same mix, artificially divorcing them from one another, frustrating the traditional role of the Federal Communications Commission and, in my view, frustrating the development of new technology and of competition.

For those reasons I trust when the distinguished chairman of the Commerce Committee moves to table this amendment tomorrow, that his motion will be successful.

Mr. PRESSLER. If my friend will yield for a question? Let me say, in the context of this, I hope the Senator from California will offer her amendment. The leader has asked that there be a vote—if that is agreeable to everybody—at about 6:30 on the Feinstein-Lott amendment. But I would like to, just in concluding, commend the Senator from Washington, a former State attorney general. There is one question, if he could make a response before, hopefully, the Senator from California will speak on the floor, and that is the extraordinary, unprecedented decisionmaking role for the Department of Justice that is proposed in the Dorgan-Thurmond amendment.

As a former State attorney general, has he ever seen a proposal where the Justice Department would become the decisionmaker, a regulatory decisionmaker? I guess this question goes to the heart of the division of powers in our Government.

Mr. GORTON. I do not believe I have. I would hate to make a totally generalized statement on that, but certainly I would say not in the memory of my experience as State attorney general nor did I find the Department of Justice have such authority.

I yield the floor.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I have actually two amendments, one involving the cities and a preemption clause in the bill, and the second is an amendment I would like to send to the desk right now.

AMENDMENT NO. 1269

(Purpose: To provide for the full scrambling on multichannel video services of sexually explicit adult programming)

Mrs. FEINSTEIN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from California [Mrs. FEINSTEIN] for herself and Mr. LOTT, proposes an amendment numbered 1269.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 145, below line 23, add the following:

SEC. 407A. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

"SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent and harmful to children on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) DEFINITION.—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that audio and video portion of the programming cannot be received by persons unauthorized to receive the programming."

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(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of the enactment of this Act.

Mr. PRESSLER. Will my friend yield?

Mrs. FEINSTEIN. I certainly will.

Mr. PRESSLER. Mr. President, I ask unanimous consent a vote occur on the Feinstein and Lott amendment at 6:30 this evening and the time between now and 6:30 be equally divided in the usual form.

I might say I am going to yield as much of my time to the Senator from California as she wishes. And I ask unanimous consent no second-degree amendments be in order to the amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from California.

Mrs. FEINSTEIN. I thank the Senator from South Dakota and I thank the Chair.

Mr. President, on behalf of myself and Senator LOTT I offer this amendment, which is a rather simple and direct amendment. It concerns the proliferation of adult video programming that is easily accessible for children to view. It is a commonsense amendment and it is simple. It would require multichannel video programmers, such as cable operators, to fully scramble or otherwise block sexually explicit adult programming unless a subscriber specifically requests such programming.

The full blocking requirement would apply to those channels primarily dedicated to adult sexually oriented programming, such as the Playboy and Spice channels. Until these channels are fully blocked, cable operators would have to restrict their broadcasts to certain times of the day when children are least likely to view it, such as at night.

Last year I learned that in many households across America, adult programming was being broadcast around-the-clock on certain primarily sexually orientated channels, with only partial audio and video scrambling.

This issue first came to my attention when a local city councilman in Poway, CA, a suburb of San Diego, wrote to me about the problem in his community. He said that in San Diego County, partially scrambled video pornography—replete with unscrambled and sexually explicit audio—was being automatically transmitted to more than 320,000 cable television subscribers.

Unfortunately, many subscribers and parents were unaware of these transmissions until they or their children accidentally discovered the programming. In San Diego County, for example, the partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view.

Parents would come home after work only to find their children sitting in front of the television watching or listening to the adult's-only channel, a channel that many parents did not even know existed. In Poway, the city councilman's young son learned about the adult's-only channel at school, where the easily accessible programming was a hot topic among children.

This is not an isolated program. Until just a few months ago, the local cable company here in Washington also automatically transmitted partially scrambled video pornography—replete with unscrambled and sexually explicit audio—to all of its subscribers.

To their credit, some local cable companies are taking voluntary steps to address this problem. For example, in San Diego, one local cable company restricted the times when such programming was broadcast. In Washington, the local cable company eventually fully blocked the programming so both the video and audio portions of the signal are now undistinguishable.

However, numerous other cable services across the country are still transmitting similar adult video and audio programming that is not sufficiently scrambled, with many subscribers and parents unaware of its contents. And, with the emerging information superhighway and other forms of video programming now or soon to be available, such sexually elicit adult programming will be even more prevalent.

The problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television. Currently, adult programming varies from community to community, as does the amount and effectiveness of scrambling on each local cable system. Right now, it is up to the local cable operator to regulate itself. This is like the fox guarding the hen house.

Following complaints from myself and other officials—and the threat of legislation—the National Cable Television Association recognized that this was indeed a problem and adopted voluntary guidelines that local cable operators can follow. The California Cable Television Association also adopted similar guidelines.

However, the voluntary guidelines simply recommend that local cable operators "block the audio and video portions of unwanted sexually-oriented premium channels at no cost to the customer, upon request." While this is a somewhat commendable effort on the part of industry, I do not believe that it goes far enough.

First, the guidelines are only voluntary and simply recommended that local cable operators take action. There is no guarantee that such blocking will be provided and no enforcement mechanism.

Second, the guidelines put the burden of action on the subscriber, not the cable company, by requiring a subscriber to specifically request the blocking of indecent programming. As I stated earlier, many subscribers do not even know that such programming exists, only to discover their children watching and listening to adults-only channels.

I do not believe that sexually explicit adult programming should automatically be broadcast into a program subscriber's home. On the contrary, I believe that sexually explicit adult programming should be automatically blocked, unless a program subscriber specifically requests the programming.

The amendment I am proposing today is similar to language approved by the Commerce Committee last year as part of S. 1822 and contained in Senator EXON's bill, the Communications Decency Act of 1995. It would require that all sexually explicit adult programming be fully scrambled unless requested by a subscriber.

This amendment does not prohibit or out-right block indecent or sexually explicit programming. Anyone requesting such programming is entitled to receive it, as long as it is not obscene, which is not protected by the first amendment. The amendment, however, protects children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming.

The cable television industry, in meetings over the past year or so with my staff, have expressed their opposition to this amendment, citing technological and fiscal concerns. The bottom line, however, is that fully scrambling both the audio and video portion of a cable program is technologically feasible. In fact, several cable operators have already instituted such blocking, such as here in Washington. With regard to their fiscal concerns, I have never been given any information from the industry to document what the actual costs to cable operators would be.

This amendment gives the industry flexibility in implementing the requirement to fully scramble all sexually explicit adult programming.

Until a cable operator or other multichannel video programming distributor is in full compliance, access to such programming will be limited to protect children from the sexually explicit material. The programming will be prohibited from those times of the day—to be determined by the FCC—when a significant number of children are likely to view it, such as during the mid and late morning, afternoon, and early evening.

So, the amendment leaves it up to the local cable operator on how and when to come into full compliance. Some cable operators, for example, are already in full compliance. For those operators that are not in full compliance, children will be still be protected until the adult programming can be fully scrambled or otherwise blocked.

This amendment also does not become effective until 30 days after enactment, so cable operators will have plenty of time to either fully block the programming, or restrict access to certain times of the day.

While I realize that some cable operators may incur costs in implementing

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this amendment, I believe that the price to protect children from sexually explicit programming is well worth it. In addition, as I stated above, the amendment gives the industry flexibility in coming into compliance; it lets individual cable operators decide what costs, if any, they will incur and when they will incur such costs.

It is unfortunate that this amendment is necessary. One would have hoped that cable operators and other multichannel video programming distributors would have automatically fully blocked or scrambled sexually explicit adult programming or, at a minimum, restricted the programming to certain times of the day.

But, industry has only taken baby steps to address this problem through voluntary policies that simply recommend action. The end result is that numerous cable operators across the country are still automatically broadcasting sexually explicit adult programming into households across America, regardless of whether parents want this or subscribers want it.

So I believe the provision is both necessary, timely, will be helpful, and will disadvantage no one. I urge my colleagues to support this commonsense amendment.

I ask unanimous consent that a CRS analysis of this amendment as it relates to the first amendment, which is in support of the amendment of Senator LOTT and myself, and some recent court decisions, be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, June 9, 1995.

To: Hon. Dianne Feinstein, Attention: Robert Mestman.
From: American Law Division.
Subject: Indecent Programming on Cable Television.

This memorandum is furnished in response to your request for a brief analysis of the constitutionality of your proposal to limit "sexually explicit adult programming or other programming that is indecent and harmful to children on any channel . . . primarily dedicated to sexually-oriented programming." Subsection (a) of the proposal provides that "a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portions of such channel so that one not a subscriber to such channel or programming does not receive [such programming]." Subsection (b) of the proposal states that, until a distributor complies with subsection (a), it shall not provide "such programming during the hours of the day (as determined by the [Federal Communications] Commission) when children are likely to view it."

The First Amendment prohibits Congress from abridging the freedom of speech, and the Supreme Court has held that speech on cable television has full First Amendment protection.[1] "The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[2] In the case in which this quotation appears, the Supreme Court struck down a federal statute that banned dial-a-porn "[b]ecause the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages . . . ."[3] The Court in this case also reiterated that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.' "[4]

Subsection (a) of your proposal would apparently be constitutional, under the reasoning of this week's decision in *Alliance for Community Media* v. *Federal Communications Commission*.[5] The court of appeals in this case upheld the constitutionality of provisions of the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, including section 10(b), 47 U.S.C. §532(j), which requires the FCC to prescribe rules requiring cable operators who have not voluntarily prohibited indecent programming under §532(h) to place such programs on a separate channel and to block the channel until the subscriber, in writing, requests unblocking. This statute applies only to programming on leased access channels, but otherwise it does essentially the same thing your proposal would do. It requires a separate channel for indecent programming, and it requires blocking until the subscriber requests unblocking. Your proposal would apply to "any channel * * * primarily dedicated to sexually-oriented programming" (in effect, to a separate channel), and would require blocking to non-subscribers (in effect, until they request the channel).[6]

The reason that the court of appeals upheld §532(j) despite the First Amendment's prohibiting Congress from abridging the freedom of speech is that it found that the government has a compelling interest in protecting the physical and psychological well-being of minors, and that the method Congress chose in §532(j) was the least restrictive means available to meet this compelling interest. The same analysis apparently would find subsection (a) of your proposal constitutional.

Subsection (b) of your proposal would give distributors an alternative to the subsection (a): instead of blocking they could not provide "such programming during the hours of the day (as determined by the Commission) when children are likely to view it." To the extent that it is not technologically feasible for distributors to comply with subsection (a) immediately, they will be forced to comply with subsection (b) until they are able to comply with subsection (a). Therefore, subsection (b) should be viewed as a requirement that must be consistent with the First Amendment.

In *Federal Communications Commission* v. *Pacifica Foundation*, the FCC had taken action against a radio station for broadcasting a recording of George Carlin's "Filthy Words" monologue at 2 p.m., and the station had claimed First Amendment protection.[7] The Supreme Court upheld the power of the FCC under 18 U.S.C. §1464 "to regulate a radio broadcast that is indecent but not obscene."[8] However, the Court emphasized the narrowness of its holding:

> The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. . . .[9]

Furthermore, the Commission "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it."[10]

In 1992, Congress enacted Public Law 102-356, section 16 of which required the FCC, within 180 days of enactment, to promulgate regulations that prohibit broadcasting of indecent programming on radio and television from 6 a.m. to midnight, except for *public* radio and television stations that go off the air at or before midnight, which may broadcast such material beginning at 10 p.m.[11] This statute was challenged, and, in *Action for Children's Television* v. *Federal Communications Commission (ACT III)*, a three-judge panel of the U.S. Court of Appeals declared it unconstitutional.[12] The full court of appeals agreed to decide the case, but a decision has not yet been issued.

Even with this uncertainty, it is clear from the Supreme Court's decision in *Pacifica*, *supra*, that the time in which indecent programming is proscribed must be limited. In *ACT III*, the three-judge panel held that the ban was "not narrowly tailored to meet constitutional standards."[13] It found "that the government did not properly weight viewers' and listeners' First Amendment rights when balancing the competing interests in determining the widest safe harbor period consistent with the protection of children."[14] Furthermore, the government did not demonstrate that its "interest in shielding children from indecent broadcasts automatically outweigh the child's own First Amendment rights . . . ."[15] The court directed the FCC to "redetermin[e], after a full and fair hearing, . . . the times at which indecent material may be broadcast . . . ."[16]

Similarly, in a previous decision by a three-judge panel on a 6 a.m. to midnight ban on indecent programming, the D.C. Circuit held "that the FCC failed to adduce evidence or cause, particularly in view of the first amendment interest involved, sufficient to support its hours restraint."[17] The court of appeals considered the evidence that the FCC had cited to justify its action against the nighttime broadcasters, and found it "insubstantial," and found the FCC's findings "more ritual than real."[18] The court of appeals concluded "that, in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn."[19]

Assuming that the full court of appeals applies these principles, it appears that the phrase in subsection (b) of your proposal "during hours of the day (as determined by the Commission) when children are likely to view it" may be overboard. This is because some children seem likely to be watching television at all hours of the day (and night), and it would apparently be unconstitutional to ban indecent programming around the clock. To be constitutional, your proposal might have to be changed to prohibit such programming only during hours when the ratio of children to adults watching television is significantly high. This, again, is because "the government may not 'reduce the adult population . . . to . . . only what is fit for children.' "[20]

Please let us know if we may provide additional assistance.

HENRY COHEN,
Legislative Attorney.

FOOTNOTES

[1] Turner Broadcasting System, Inc v. Federal Communications Commission, 114 St. Ct. 2445 (1994).

[2] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[3] *Id.* at 131.

[4] *Id.* at 128.

[5] 1995 WL 331052 (D.C. Cir. June 6, 1995) (en banc). This decision overturned a November 23, 1993 decision of a three-judge panel that found the statute unconstitutional.

Footnotes at end at article.

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[6] As you indicated in our phone conversation, three channels are now often only partially blocked to non-subscribers.

[7] 438 U.S. 726 (1978).

[8] *Id.* at 729. The Court stated that, to be indecent, a broadcast need not have prurient appeal; "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." *Id.* at 740. The FCC holds that the concept "is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that the children may be in the audience." *Id.* at 732.

[9] *Id.* at 750.

[10] *Id.* at 733 (quoting FCC).

[11] 47 U.S.C. §303 note; 138 Cong. Rec. S7308 (daily ed. June 2, 1992), S7423-7424 (daily ed. June 3, 1992).

[12] 11 F.3d 170 (D.C. Cir. 1993), *vacated and rehearing en banc granted*, 15 F.3d 186 (D.C. 1994). This was a companion case to the decision cited in note 5, *supra*.

[13] *Id.* at 177

[14] *Id.*

[15] *Id.* at 180.

[16] *Id.* at 183.

[17] Action for Children's Television v. Federal Communications Commission (ACT I), 852 F.2d 1332, 1335 (D.C. Cir 1988) (opinion by Judge, now Supreme Court Justice, Ruth Bader Ginsberg).

[18] *Id.* at 1341.

[19] *Id.*

[20] *Sable*, *supra* note 2, at 128.

Mrs. FEINSTEIN. I yield the floor. I thank the Chair.

Mr. LOTT. Mr. President, I am very pleased to join the distinguished Senator from California, Senator FEINSTEIN, in cosponsoring this amendment. It is an amendment that I think is needed. It is one that will complete the effort that is being made by a number of groups and a number of people that are very much concerned about sexually explicit programming on our televisions.

But I do not want to exaggerate what this amendment will do. It simply requires cable operators to fully scramble sexually explicit programming if someone has not subscribed for such programming.

Cable systems, in many cases, are not fully scrambling the audio and video of their adult programs. The pictures fades in and out. You can hear the audio. Clearly, that is not what should be done if the person purchasing these services has not subscribed to have that type of programming. It should be fully scrambled. I think we do need this amendment for many reasons. Today, the cable systems across the country are sending uninvited, sexually explicit and pornographic programming into the homes. I want to emphasize that not all cable operators are doing that, but there are too many that are doing it.

Children are being exposed to these obscene and harmful programs, and the Nation has been shocked to learn just in the last month of the rape of a 6-year-old by a 10-year-old and an 8-year-old.

Studies and exposes are showing young people, elementary-age children, are acting out the behavior they are seeing in this type of programming. Teachers and parents are becoming alarmed by the effect of such programming. It is time that we do something about it. We have expressed for over a year our concerns about this matter. We made calls to the industry. Yet in many instances, they have not adequately taken action to safeguard the children. It is an example in my opinion of where we need more corporate responsibility. But since we have not gotten that yet, we need this amendment.

In the amendment, the critical definition is this:

The term "scramble" means to rearrange the content of the signal, of the programming so that the audio and video portion of the programming cannot be received by persons unauthorized to received the programming.

I think that sums it up. I think it is a very simple amendment, but I do think it is one that should be added to this very important bill. And it will be well received by a lot of people who are concerned by what we have seen in the past months in the cable programming of this type of material.

So I yield the floor, Mr. President, at this time unless there are any other Senators wishing speak on this particular amendment.

Could I inquire, Mr. President, about the parliamentary procedure. Has there already been an agreed to vote at 6:30?

The PRESIDING OFFICER. The vote will occur at 6:30.

Who yields time?

Mr. HOLLINGS. Mr. President, I ask for the yeas and nays on the Feinstein amendment.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. PRESSLER. Mr. President, I ask unanimous consent that tomorrow the second Feinstein amendment, which will be offered tonight, be voted on at 9:30—Mr. President, I think we better proceed with the vote. I withdraw my request.

The PRESIDING OFFICER. The request is withdrawn.

The question is on agreeing to amendment No. 1269, offered by the Senator from California [Mrs. FEINSTEIN]. The yeas and nays have been ordered. The clerk will call the roll.

The bill clerk called the roll.

Mr. MACK (when his name was called). Present.

Mr. LOTT. I announce that the Senator from Arizona [Mr. MCCAIN], the Senator from Pennsylvania [Mr. SANTORUM], the Senator from Pennsylvania [Mr. SPECTER], and the Senator from Virginia [Mr. WARNER], are necessarily absent.

Mr. FORD. I announce that the Senator from New Jersey [Mr. BRADLEY], the Senator from Iowa [Mr. HARKIN], the Senator from Massachusetts [Mr. KENNEDY], and the Senator from Georgia [Mr. NUNN], are necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 91, nays 0, as follows:

[Rollcall Vote No. 249 Leg.]

YEAS—91

Abraham	Faircloth	Lieberman
Akaka	Feingold	Lott
Ashcroft	Feinstein	Lugar
Baucus	Ford	McConnell
Bennett	Frist	Mikulski
Biden	Glenn	Moseley-Braun
Bingaman	Gorton	Moynihan
Bond	Graham	Murkowski
Boxer	Gramm	Murray
Breaux	Grams	Nickles
Brown	Grassley	Packwood
Bryan	Gregg	Pell
Bumpers	Hatch	Pressler
Burns	Hatfield	Pryor
Byrd	Heflin	Reid
Campbell	Helms	Robb
Chafee	Hollings	Rockefeller
Coats	Hutchison	Roth
Cochran	Inhofe	Sarbanes
Cohen	Inouye	Shelby
Conrad	Jeffords	Simon
Coverdell	Johnston	Simpson
Craig	Kassebaum	Smith
D'Amato	Kempthorne	Snowe
Daschle	Kerrey	Stevens
DeWine	Kerry	Thomas
Dodd	Kohl	Thompson
Dole	Kyl	Thurmond
Domenici	Lautenberg	Wellstone
Dorgan	Leahy	
Exon	Levin	

ANSWERED "PRESENT"—1

Mack

NOT VOTING—8

Bradley	McCain	Specter
Harkin	Nunn	Warner
Kennedy	Santorum	

So the amendment (No. 1269) was agreed to.

Mr. PRESSLER. Mr. President, I urge those Senators who have amendments to bring them to the floor. We are trying to get a final list.

I have been asked by Senator DOLE, with the concurrence of Senator HOLLINGS, to file a cloture motion. I urge all Senators to come to the floor with amendments they might have, or Senators who wish to speak. We will be here as late tonight as any Member wants to speak on this bill or offer amendments.

We will try to stack the votes. I know there is an event tomorrow morning, and the Les Aspin ceremony There is the one vote that has been ordered on the Dorgan-Thurmond amendment at 12:30, after 1 hour of debate. We will be taking other amendments in the morning. We want to move this bill forward.

Mr. HOLLINGS. Mr. President, on the adoption of the Feinstein amendment, I move to reconsider the vote.

Mrs. FEINSTEIN. Mr. President, I move to lay that motion on the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. HOLLINGS. Let me join in the remarks of the distinguished Senator from South Dakota with respect to amendments. We killed the day looking for amendments. We started on this bill last Wednesday.

I have been in the vanguard of opposing cloture, but I would have to support it in this particular instance because we cannot get amendments drawn and presented and voted upon. So a day passes by and everybody talks about how they would like to get out early and do these other things.

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This is the Senate's business. We hope that we can move along now expeditiously on this side of the aisle. If there are any amendments, we do appreciate the Senator from California, ready and willing and able to present the next amendment. Beyond that, I hope we can get some other amendments.

I yield the floor.

AMENDMENT NO. 1270

(Purpose: To strike the authority of the Federal Communications Commission to preempt State or local regulations that establish barriers to entry for interstate or intrastate telecommunications services)

Mrs. FEINSTEIN. Mr. President, on behalf of Senator KEMPTHORNE and myself, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from California [Mrs. FEINSTEIN], for herself and Mr. KEMPTHORNE, proposes an amendment numbered 1270.

Mrs. FEINSTEIN. Mr. President, I ask unanimous consent that further reading be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 55, strike out line 4 and all that follows through page 55, line 12.

Mrs. FEINSTEIN. Mr. President, I come to the floor today joined by our colleague, Senator KEMPTHORNE, to offer this amendment on behalf of a broad coalition of State and local governments. Since announcing my intention to proceed with this amendment, I have received letters of support from hundreds of cities across the country, including the States of Arizona, Colorado, Florida, Illinois, Indiana, California, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, North Carolina, Oregon, Ohio, Texas, and Washington.

This amendment is supported by the National Governors' Association, the National Association of Counties, the National Conference of State Legislatures, the National League of Cities, and the U.S. Conference of Mayors, to *name a few.*

Mr. President, as a former mayor, I fully understand why Governors, mayors, city councils, and county boards of supervisors question allowing the Federal Communications Commission to second-guess decisions made at State and local government levels.

On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.

The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.

That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist at the FCC, on what may be very broad question of State or local government rights.

In reality, this preemption provision is an unfunded mandate because it will create major new costs for cities and for States. I hope to explain why. I know my colleague, the Senator from Idaho, will do that as well.

A cable company would, and most likely will, appeal any local decision it does not like to the telecommunications experts at the Federal Communications Commission.

The city attorney of San Francisco advises that, in San Francisco, city laws provide that all street excavations must comply with local laws tailored to the specifics of the local communities, including the geography, the density of development, the age of public streets, their width, what other plumbing is under the street, the kind of surfacing the street has, et cetera.

The city attorney anticipates that whenever application of routine, local requirements interfere with the schedule or convenience of a telecommunications supplier, subsection (d), the provision we hope to strike, would authorize a cable company to seek FCC preemption. Any time they did not like the time and location of excavation to preserve effective traffic flow or to prevent hazardous road conditions, or minimize noise impacts, they could appeal to the FCC.

If they did not like an order to relocate facilities to accommodate a public improvement project, like the installation, repair, or replacement of water, sewer, our public transportation facilities, they would appeal.

If they did not like a requirement to utilize trenches owned by the city or another utility in order to avoid repeated excavation of heavily traveled streets, they would appeal.

If they did not like being required to place their facilities underground rather than overhead, consistent with the requirements imposed on other utilities, they could appeal.

If they were required to pay fees prior to installing any facility to cover the costs of reviewing plans and inspecting excavation work, they could appeal.

If they did not like being asked to pay fees to recover an appropriate share of increased street repair and paving costs that result from repeated excavation, they would appeal.

If they did not like the particular kinds of excavation equipment or techniques that a city mandate that they use, they could appeal.

If they did not like the indemnification, they could appeal.

The city attorney is right, that preemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.

Small cities are placed at risk and oppose the preemption because small cities are often financially strapped. As the city attorney of Redondo Beach, a suburb of Los Angeles writes, every time there is an appeal, they would have to find funds to come back to Washington to fight an appeal at the FCC.

Recently, the engineering design center at San Francisco State University, conducted an interesting study for San Francisco on the impact of street cuts on public roads. The expected life and value of public roads and streets directly correlates with the number of cuts into the road.

Although this is rather dull and esoteric to some, the study reveals that streets with three to nine utility cuts are expected to require resurfacing every 18 years, a 30-percent reduction in service life, relative to streets with less than three cuts. The more road cuts, the steeper the decline in value of the public's asset will be. Streets with more than nine cuts are expected to require resurfacing every 13 years, a 50-percent reduction in the service life of streets with less than three cuts.

An even more dramatic decline in a street's useful life is found on heavily traveled arterial streets with heavy wheel traffic. For those streets, the anticipated useful life declines even more rapidly, from 26 years for streets with fewer than three cuts to 17 years for streets with three to nine cuts, a 35-percent reduction, to 12 years for streets with more than nine cuts, a 54-percent reduction.

What does this mean? It means that financially struggling cities and counties will undoubtedly be forced to include in franchise fees, charges to allow the recovery of the additional maintenance requirements that constantly cutting into streets requires. The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their roads. States should have control over their highways.

The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.

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I would also like to point out the preemption will change the outcome in some of the dispute between communication companies and cities and States. The FCC is the Nation's telecommunications experts. But they do not have the broad experience and concerns a mayor, a city council, a board of supervisors, or a Governor would have in negotiating and weighing a cable agreement and setting a cable fee.

If the preemption provision remains, a city would be forced to challenge the FCC ruling to gain a fair hearing in Federal court.

This is important because presently they can go directly to their local Federal court. Under the preemption, a city, State, or county government would have to come to the Federal court in Washington after an appeal to the FCC.

A city appealing an adverse ruling by the FCC would appear before the D.C. Federal Appeals Court rather than in the Federal district court of the locality involved. Further, the Federal court will evaluate a very different legal question—whether the FCC abused their discretion in reaching its determination. The preemption will force small cities to defend themselves in Washington, and many will be just unable to afford the cost.

By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in the locality and the court will review whether the city or State acted reasonably under the circumstances.

Edward Perez, assistant city attorney for Los Angeles, states this will be a very difficult standard to reverse, if they have to come to Washington. On matters involving communication issues, courts are likely to require a tough, heightened scrutiny standard for matters involving first amendment rights involving freedom of speech. Courts are likely to defer to the FCC judgment.

The FCC proceeding and its appeal in Washington will be very different from the Federal court action in a locality. Both the city and the communications company are more likely to be able to develop a more complete and thorough record if the proceeding is before the local Federal court rather than before a Government body in Washington.

We also believe the FCC lacks the expertise to address cities' concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

Mr. President, this stack of letters opposing the preemption includes virtually every California city and virtually every major city in every State. What the cities and the States tell us they want us to give local governments the opportunity for home rule on questions affecting their public rights-of-way. If the cable company does not like it, the cable company can go to court in that jurisdiction. By deleting the preemption, we can increase fairness, minimize cost to cities, counties, and States, and prevent an unfunded mandate.

If the preemption remains in this bill, it creates a major unfunded mandate for cities, for counties, and for States. I hope this body will sustain the cities and the counties and the States, and strike the preemption.

So I ask unanimous consent to have a number of letters printed in the RECORD.

There being no objections, the letters were ordered to be printed in the RECORD, as follows:

OFFICE OF THE CITY ATTORNEY,
Los Angeles, CA, June 12, 1995.

Re S. 652, Section 245(d) Preemption.

Mr. KEVIN CRONIN,
Office of Senator Diane Feinstein,
Senate Hart Office Building, Washington, DC.

DEAR MR. CRONIN: You asked for our thoughts regarding S. 652, Sec. 254(d), which would create broad preemption rights in the FCC with respect to actions taken by local governments. Specifically, you are interested as to how section 254(d) could frustrate the ability of local government to manage its rights of way as Congress believes Local Government should (See Sec. 254(c)) and how it could prevent Local Government from imposing competitively neutral requirements on telecommunications providers to preserve and advance Universal Service, protect the public safety and welfare and to ensure the continued quality of telecommunications services and safeguard the rights of consumers. (See Sec. 254(b)).

Section 254(d) would permit the Federal Communications Commission ("FCC") to preempt local government:

"(d) PREEMPTION.—If, after notice and an opportunity for public comment, the Commission determined that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

Section 254(d) reposes sweeping review powers in the FCC and in effect converts a federal administrative agency into a federal administrative Court. The FCC literally would have the power to review any local government action it wishes (either sua sponte or at the request of the industry.) The undesirable consequence of this result will be that a federal agency—with personnel who do not answer directly to public—will be dictating in fine detail what rules local government and their citizens in distant places shall have to follow. The FCC would be given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, to decide to nullify or preempt such governmental actions. That is unprecedented and for reaching authority for a federal agency to have over local government.

The FCC does have an important role to play in the scheme of things. It has a professional staff with proven expertise in telecommunications matters such as technical requirements. Moreover, issues that transcend state borders need the FCC as the overseer in order to ensure consistency and fairness between the states. On the other hand, the FCC is not in the best position to know what is best for citizens at the local level regarding local issues. An example of a singularly local issue, historically recognized by Congress and the Courts, is the local government's right to manage the public right-of-way (See Section 254(c)). Federal officials do not have an adequate understanding of local issues nor do they have the staff, either in size or proficiency, to resolve local issues about every city in this country. Local Governments and the local courts (entities which are knowledgeable about local issues) should be the forum for resolution of local issues.

An important point that needs to be explicated to Congress is the procedural problems associated with the FCC resolving local issues in Washington. First is the obvious problem. Most citizens, community groups and cities do not have the financial wherewithal to litigate before a federal agency located in Washington. Even if an action of the FCC is reviewed by the Courts, that also would occur in the Washington D.C. Circuit miles away. Section 254(d) does contain due process language and such a provision may meet the technical requirements of the U.S. Constitution. However, the provision "If, after notice and an opportunity for public comments * * *" provides little solace for local governments and its citizens. The FCC all too often provides too little time to respond to its rules and rulemaking proceedings for anyone other than the expensive FCC Bar. It is impractical for local people to respond in a timely fashion and FCC preemption consequently precludes the voice of those most effected.

Second, as a general rule the courts pay great difference to administrative agencies that are created for specific purposes. There is no argument with that proposition because of the proven expertise of federal agencies in matters properly within their purview. However, a serious problem is created when a federal administrative agency is given power over issues where it has little expertise, such as the management of local rights-of-way. This is largely so because of the legal standards for review of administrative decisions. Generally, a decision will stand unless the agency has abused its discretion or has exceeded its authority.

Again, for matters properly within an agency's purview there is no quarrel. However, the sweeping review powers that Section 254(d) places in the FCC would in essence permit the FCC to preempt any statute, regulation, or legal requirement that it believes is inconsistent with the Section 254(a) of the Act. This awesome power clearly belongs with the Courts and not distant administrative staffers. As written, it will be extremely difficult for a court to find that the FCC has exceeded its authority. Consequently, with regard to this standard its decisions may in effect be unreviewable.

Equally troublesome is the abuse of discretion standard applied to federal agency actions. Practitioners in administrative law know all too well that the courts will uphold administrative decisions the vast majority of the time. A reversal occurs only when there is a clear abuse of discretion, a condition infrequently found by the Courts.

The bottom line becomes very clear to local governments, such as Los Angeles, and its citizens. Control regarding telecommunications and zoning issues will be exercised by federal officials three thousand miles away. Individuals who know little or nothing about local interests, the important everyday decisions that should be made by local officials and that should be reviewable by local

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courts, will be made by faceless names in Washington.

In addition, because if the procedural structure of the FCC, the normal right to cross-examine witnesses and their testimony is not present. The right to comment and reply to another interested party's comments theorically permits the FCC to make a fair and impartial judgment. However, the comments are not under oath and the testimony that is filed under penalty of perjury is never is reality tested for truth and accuracy. The practical effect is that anybody may say anything they wish with impunity. The decisionmakers, therefore, may be misled into believing erroneous "facts". This view is not intended to suggest that the courts are the answer for all issues. There exist some practical problems with the courts; they may be too slow and they may lack the technical expertise. However, Section 254(d) appears to effectively eliminate the courts because of the absence of any real or effective review of FCC decisions. Senate Bill 652 must be amended to leave local issues to local government and thereby permit local citizens, local governments and local courts to be active participants in the resolution of local issues.

Finally, the industry has clearly captured the decision making of officials at the FCC. In recent years the voice of local governments and its citizens have been routinely rejected by the FCC and the industry appears to have a lopsided influence.

We recommend that Section 254(d) be eliminated in its entirety. If that is accomplished, violations of S. 652 will be decided in the forum properly equipped to do so—the local Federal Courts.

As an additional note, we wish to comment that section (a) of S. 652 also represents a serious and significant invasion of local government authority over local interests. Most any action taken by local government in this area can be construed as having "the effect of prohibiting" an entity from providing telecommunications services. Surely more precise wording can be developed which would not so significantly erode the power of local government over local matters. Please advise if you would like further comment regarding this section.

If I can be of further assistance, please do not hesitate to call on me.

Very truly yours,

EDWARD J. PEREZ,
Assistant City Attorney.

OFFICE OF CITY ATTORNEY,
CITY AND COUNTY OF SAN FRANCISCO,
June 12, 1995.

Re Telecommunications Competition and Deregulation Act.

Hon. DIANNE FEINSTEIN,
U.S. Senate, Washington, DC.

DEAR SENATOR FEINSTEIN: I am writing to commend you for sponsoring an amendment to the telecommunications bill to preserve local control over the public rights of way. It is critical to local governments that subsection (d) of proposed 47 U.S.C. Section 254, which would authorize the FCC to preempt state and local authority, be deleted from the bill.

In San Francisco, as in other cities, we welcome the prospect of new telecommunications providers making expanded services available on a competitive basis. However, deregulation only increases the importance of local control over our streets because it brings many new companies seeking to install facilities in our streets.

City laws now require all street excavators—including telecommunications providers—to comply with nondiscriminatory local laws designed to preserve the public health and safety and minimize the costs to the public of repeated street excavation. Throughout the country, such local laws are tailored to the specific characteristics of each local community, including local geography, density of development and the age of public streets and facilities. The language of subsection (d) would severely undermine local government ability to apply such locally tailored requirements on a uniform basis.

Whenever application of routine local requirements interferes with the schedule or convenience of a telecommunications supplier, subsection (d) would authorize the company to seek FCC preemption. To identify just a few examples, my colleague city attorneys and I will have to send an attorney off to Washington every time a telecommunications company challenges our authority to:

(1) Regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize noise impacts;

(2) Require a company to relocate its facilities to accommodate a public improvement project, like the installation, repair or replacement of water, sewer or public transportation facilities;

(3) Require a company to place facilities in joint trenches owned by the City or another utility company in order to avoid repeated excavation of heavily traveled streets;

(4) Require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;

(5) Require a company to pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work;

(6) Require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;

(7) Require a company to use particular kinds of excavation equipment or techniques suited to local circumstances to minimize the risk of major public health and safety hazards;

(8) Enforce local zoning regulations; and

(9) Require a company to indemnify the City against any claims of injury arising from the company's excavation.

All of the requirements described above are routinely imposed by local governments in exercise of our responsibility to manage the public rights of way. Granting special favors to telecommunications suppliers, compared for example to other utility companies, will undermine the uniformity of local law and could dramatically increase the costs to local taxpayers of maintaining public streets.

In these times, when the federal government is asking state and local governments to take on many additional duties, the FCC should not be empowered to interfere in this area of classic local authority. This is especially true because, for many cities, the FCC is a remote, costly and burdensome arena in which to resolve disputes. The courts are well-suited to resolve any disputes that may arise from the "Removal of Barriers to Entry" language of Section 254 without placing heavy burdens on local governments.

I appreciate the leadership you have shown on this difficult issue. Please let me know if I can offer any further assistance with your efforts on behalf of cities.

Very truly yours,

LOUISE H. RENNE,
City Attorney.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I am honored to join my friend from California, Senator FEINSTEIN, in this amendment. This is not the first time we have teamed up together. I think perhaps our background as both being former mayors has allowed us to bring to this position some perspective to help us realize, with regard to local and State governments, how this Federal-State-local partnership really ought to be ordered.

The Senator from California was very helpful when we brought forward the bill, the Unfunded Mandates Reform Act of 1995, which the majority leader had designated Senate bill 1, and which allowed me to team up with the Senator from Ohio, JOHN GLENN. In March of this year, as you know, Mr. President, that unfunded mandates legislation was signed into law.

Part of that new law in essence says that Federal agencies must develop a process to enable elected and other officials of State, local, and tribal units of government to provide input when Federal agencies are developing regulations.

The conference report of that legislation passed overwhelmingly. In the Senate it was 91 to 9. In the House it was 394 to 28.

An overwhelming majority said in essence enough is enough, that the Federal Government must reestablish a partnership with local government. It is very straightforward. This movement toward local empowerment has consistently been expressed in the legislative reform occurring in both Houses of Congress. But I feel, as I think the Senator from California feels, that this provision in this telecommunications bill is causing a slippage back to our old habits. What we have before us in section 254 of the bill before us is a reversal of the positive progress that we have been making.

As the Senator from California pointed out, in subsection (d) the committee has added broad and ambiguous FCC preemption language that states, if the FCC "determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the FCC shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."

We are going to give this power to the FCC over the jurisdictions of the local communities and the State governments. This is a disturbing directive that instructs the Federal Commission to invalidate duly adopted State laws and local ordinances that the independent Commission may deem inappropriate. This preemption would be generated by a commission that in a majority of cases would be thousands of miles away from the local government jurisdiction that would be affected by their decision.

I know of no one in local government who objects to the language which ensures nondiscriminatory access to the

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public right of way. But what they do vigorously object to is that this proposed FCC preemption does not allow them the prerogative to manage their right of way in a manner that they deem to be appropriate and in the best interest of their community.

If I may, Mr. President, let me give you an example. When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

I think one of the things that you hear so often if you are in local government or if you tune into the radio talk shows, is when a new street has been paved, within 6 months you see crews out there cutting into that new pavement, and they are putting in a new utility. That is expensive, and it is unnecessary if you can coordinate things. Surely, we do not think that an independent commission in Washington, DC, is going to be able to better coordinate that than the local government in San Francisco or the local government in Boise, ID. It just does not happen.

This proposed preemption is based on two assumptions. First, that it is the role of the Federal Government to tell others what to do; second, that local units of government are not capable or responsible enough to make the right decisions. I reject both of those presumptions.

Like the Senator from California, with the hands-on experience that she has had at the local government level, we realize that Federal solutions do not always meet local problems. You have to take into account the local conditions and the local innovations. These Federal solutions have not worked in the past. They are not working now. They will not work in the future.

So why would we step back with all of the progress that we have been making this congressional session in reordering the partnership between the Federal, the State and the local governments in a working partnership?

This language which introduces expanded FCC jurisdiction into the local decisionmaking process is ill-conceived, and it should not be included in the final language of this important legislation. Our amendment would strike the offending subsection in its entirety. This would leave control of local right of way matters with local elected officials, which is exactly where it belongs.

The goal of Congress in regulatory reform should be to remove existing Federal roadblocks that limit productivity and creativity and innovation. We should legislate in a manner that enhances Federal-local intergovernmental partnerships for mutually beneficial results. We should not be guilty of imposing new, unnecessary bureaucratic hurdles as has been done in this case.

So, again, I am so proud to join the Senator from California in this effort. We make a good team. This is a worthy effort to team up with because this present preemption needs to be removed from the telecommunications bill.

I yield the floor, Mr. President.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, I would like to thank the Senator from Idaho for those excellent remarks. I think he hit the nail on the head with respect to the rights of local government, and the way in which this Congress is moving. This preemption sets all of our progress regarding the relationship between Federal and local government back, and hurts cities, counties, and States in the process.

So I want the Senator to know how much I enjoy working with him on this. I thank him very much.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I reluctantly rise in opposition to this amendment from two of my most respected colleagues in the Senate. The issue addressed in this amendment goes to the very heart of S. 652, eliminating barriers to market entry.

In the case of section 254, which I have here in front of me, entitled "Removal of Barriers to Entry," we do preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The actual authority granted to the FCC in subsection (d) is critical to ensuring that State and local authorities do not get in a way that precludes or has the effect of precluding new entry by firms providing new telecommunications services. At the same time, make no mistake about it, the authority granted in subsections (b) and (c) to the State and local authorities respectively in turn protect them. For example, in subsection (c) it says, "Nothing in this section affects the authority of local government to manage the public rights of way."

Mr. President, this is a particularly difficult problem because all of us want to leave authority with State and local government. But this is a deregulatory bill to allow companies to enter and to compete without barriers. If this section were allowed to fall, it could mean that certain requirements would be placed on companies, such as public service projects or certain types of payments of one sort or another for a local universal service, or whatever. We are trying to deregulate the telecommunications markets in the United States. I know it sounds great to say let every city and municipality have a virtual veto power over what is occurring in their area.

Now, it is my strongest feeling that sections (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fair-handed and balanced manner with legitimate concerns of State and local authority. Sections (b) and (c) take into account State and local government authority, (b) says:

State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

Section (c):

Local Government Authority. Nothing in this section affects the authority of a local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way on a nondiscriminatory basis if the compensation required is publicly disclosed by such Government.

Now, the preemption clause (d) reads as follows:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The intent therefore is to leave protected State regulatory authority, to leave protected local government authority, but there have to be some cases of preemption or a certain city could impose a requirement of some sort or another that would be very anticompetitive, and that is where we come out.

I have joined in a lot of efforts here to ensure that our State and local authority be preserved. And I understand there will possibly be a second-degree amendment. We have worked closely with Senator HUTCHISON and the city, county, and State officials to achieve this balance. That is where the committee came out.

I feel very strongly that it is a fair balance. It takes into account State regulatory authority, takes into account local government authority. But it also recognizes the need to open up markets, the removal of barriers to entry. In many cases these do become barriers to entry, barriers to competition.

So I rise in reluctant opposition to the amendment.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

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Mr. HOLLINGS. Mr. President, you have to be sure of foot to be opposing two distinguished former mayors. The Senator from California is the former mayor of San Francisco, and the distinguished Senator from Idaho is a former mayor of Boise. Both had outstanding records.

But let me suggest that what they have read into the preemption section is a requirement and an idea that just does not exist at all. I will have to agree with them in a flash that the Federal Communications Commission has no idea of coordinating, as the Senator from Idaho has outlined, the digging up in front of all of the sidewalks and stores and everything else, putting in the regular necessary conduit, refirming the soil and the sidewalks again in front. We have no idea of the FCC doing it.

Let us tell you how this comes about. Section 254 is the removal of the barriers to entry, and that is exactly the intent of the Congress, and it says no Government in Washington should, well, vote against it. But I think the two distinguished Senators are not objecting to the removal of the barriers to entry. What we are trying to do is say, now, let the games begin, and we do not want the States and the local folks prohibiting or having any effect of prohibiting the ability of any entity to enter interstate or intrastate telecommunications services. When we provided that, the States necessarily came and said, wait a minute, that sounds good, but we have the responsibilities over the public safety and welfare. We have a responsibility along with you with respect to universal service.

So what about that? How are we going to do our job with that overencompassing general section (a) that you have there. So we said, well, right to the point: "Nothing in this section shall affect the ability of a State to impose on a competitively neutral basis"—those are the key words there, the States on a competitively neutral basis, consistent with opening it up—"requirements necessary."

We did not want and had no idea of taking away that basic responsibility for protecting the public safety and welfare and also providing and advancing universal service. So that was written in at the request of the States, and they like it. The mayors came, as you well indicate, and they said we have our rights of way and we have to control—and every mayor must control the rights of way.

So then we wrote in there:

> Nothing shall affect the authority of a local government to manage the public rights of way or to acquire fair and reasonable compensation . . . on a competitively neutral and nondiscriminatory basis.

"Competitively neutral and nondiscriminatory basis." Then we said finally, indeed; if they do not do it on a competitively neutral or nondiscriminatory basis, we want the FCC to come in there in an injunction. We do not want a district court here interpreting here and a district court in this hometown and a Federal court in that hometown and another Federal court with a plethora of interpretations and different rulings and everything else. We are trying to get uniformity, understanding, open competition in interstate telecommunications—and intrastate, of course, telecommunications.

Now, that was the intent and that is how it is written. And if our distinguished colleagues have a better way to write it, we would be glad and we are open for any suggestion. But somewhere, sometime in this law when you say categorically you are going to remove all the barriers to entry, we went, I say to the Senator, with the experience of the cable TV. I sat around this town—I was in an advantaged section up near the cathedral. I had the cable TV service, but two-thirds of the city of Washington here did not have it for years on end because we know how these councils work. We know how in many a city the cable folks took care of just a couple of influential councilmen, and they would not give service or could give service or run up the price and everything else of that kind.

We have had experience here with the mayors coming and asking us. And this is the response. That particular section (c) is in response to the request of the mayors. If they do not do that, if they put it, not in a competitively neutral basis or if they put it in a discriminatory basis, then who is to enjoin? And we say the FCC should start it. Let us not go through the Administrative Procedures Act. Let us not go through every individual.

Yes, we want those mayors and all to come here and everybody to understand rules are rules and we are going to play by the rules and the rules protect those mayors to develop, to administer, to coordinate. I agree 100 percent, I say to the Senator from Idaho, that the FCC has never performed the job of a city mayor. But they shall and must perform this job here of removing the barriers to entry. And if we do not have them doing it, then I will yield the floor and listen to what suggestion they have. But do not overread the preemption section to other than centralizing the authority and responsibility in the FCC to make sure, like they have in administering all the other rules relative to communications here and all the other entities involved in telecommunications, they have that authority to make sure while the cities got their rights of way, while the States have got their public welfare and public interest sections to administer, that it is done on a nondiscriminatory basis.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I would like to respond to my two friends, the floor managers of this bill, and then I know the Senator from California would also like to respond.

They referenced, of course, section 254, which is removal of barriers to entry. That is the section and that is the key. They stated it:

> That no State, local statute or regulation or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.

Period. Period. And nothing in this amendment alters that at all. We affirm that. It is my impression, Mr. President, that when it is referenced that section (b), State regulatory authority, yes, the States feel that that language is good; and section (c), local government authority, yes, mayors had something to do with the writing of that language. They feel good about that. But the problem is, then you go on to section (d) which, it is my understanding, came very late in the process. In section (d), there is this line that says: "The Commission shall immediately preempt * * *"

We see this so many times with Federal legislation: On the one hand, we give but, on the other hand, we take it away. In section (b) and section (c) we give, but, by golly, we have section (d) that then says that this Commission will immediately preempt. That is the problem. We are not saying that we should not be held accountable to this. That is why there is no language in this amendment to alter the opening statement of section 254. No problem. It is section (d) that then comes right along and, after everything has been said, preempts and pulls the plug, and that is wrong. We should not do this to our local and State partners. It is absolutely wrong.

I yield the floor.

Mrs. FEINSTEIN addressed the Chair.

The PRESIDING OFFICER. The Senator from California.

Mrs. FEINSTEIN. Mr. President, my colleague from Idaho took the words right out of my mouth. I think he is exactly right in his interpretation of this section. The barrier for entry is clearly done away with by this section. Nothing Senator KEMPTHORNE or I would do would change that. What we do change, however, is simply delete the ability of a remote technical commission to overturn a city decision and create an enormous hassle for cities all across this Nation.

I would like to just give you the exact wording of what the city attorney of Los Angeles said this section does. He says:

> It proposes sweeping review powers for the FCC and, in effect, converts a Federal administrative agency into a Federal administrative court. The FCC literally would have the power to review any local government action it wishes, either on its own or at the request of the industry.
>
> A Federal agency, with personnel who do not directly respond to the public, will be dictating in fine detail what rules local government and their citizens across the country shall have to follow. The FCC would be

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given plenary power to decide what actions of local government are "inconsistent with" the very broad provisions in the bill and, without further review, hold the authority to nullify or preempt state and local governmental actions. That is an unprecedented and far-reaching authority for a Federal agency to have over local government.

I could not agree more. Senator KEMPTHORNE and I were both mayors at one time and we both understand that every city has different needs when it comes to cable television.

I remember as the mayor of San Francisco when Viacom came into the city. It wired just the affluent sections of the city. It refused to wire the poorer areas of the city. Unless local government had the right to require that kind of wiring, it was not going to be done at all. That is just one small area with which I think everyone can identify.

But when it comes to the rights-of-way and what is under city streets, the city must be in the position to set rules and regulations by which its street can be cut. This preemption gives the FCC the right to simply waive any local rulemaking and say that is not going to be the case. It gives the FCC the right to waive any local fee and say, "That's not the way it is going to be."

That is why countless cities and counties across the country, not just one or two, but virtually all of the big organizations, including the League of Cities, the national Governors, local officials and others, say, "Don't do this." If a cable company has a problem with anything we in local government do, let them go to court. Let a court in our jurisdiction settle the issue. I think that is the right way to go. For the life of me, I have a hard time understanding why people would want to preempt these local decisions with the technical, far-removed FCC agency.

So I think Senator KEMPTHORNE has well outlined the situation. I think we have made our case.

I thank the Chair.

Mr. HOLLINGS addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. HOLLINGS. Mr. President, the distinguished colleague from Idaho said "came so late in the process." I want to correct that thought. I am referring back over a year ago to a bill with 19 cosponsors, this same language:

* * * the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this subsection, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

It did not come late in the process. We have been working with mayors and we have several former mayors who were cosponsors. That was S. 1822. So this is S. 652, which is, of course, over a year subsequent thereto.

Is it the language that is inconsistent with this subsection? Is that the bothersome part? It sort of bothers this Senator. I think if you are going to violate your authority with respect to being neutral and nondiscriminatory and you have to have somewhere this authority, in the entity of the FCC, to do it rather than the courts, each with a plethora of different interpretations and law, I would think if we could take that, maybe that would satisfy the distinguished Senator from California and the Senator from Idaho.

I yield the floor. I make that as a suggestion.

Mr. KEMPTHORNE addressed the Chair.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. KEMPTHORNE. Mr. President, I appreciate the good efforts of the Senator from South Carolina, because I have always found him to be a gentleman whom I can work with and we can find areas on which we can see some common ground.

With regard to my comment that it came late in the process, this may be a concept that had been discussed quite a bit, but the mayors that the Senator from South Carolina referenced, it was local officials who told me that this particular language of (d) was not in the draft bill's language, it was not part of the draft bill when it came out. And it was really after Senator HUTCHISON from Texas, who raised this issue, had section (c) added that (d) then came back.

I do not know, it may have been something that has been discussed for some months, but as far as putting it in the bill, it was not there.

The other point then about how do we deal with this, again, Senator FEINSTEIN and I are in absolute agreement that with respect to this whole issue of removal of barriers to entry, if there are problems, if a cable company is getting a bad deal and being put off by a local government, they can go to court, but they go to court in that area, they do not have to come to Washington, DC.

The avenue for remedy already exists, so why do we then say, again, everyone must come to Washington, DC?

That is expensive. I think it is unnecessary and these cable companies, if there had been particular problems and there is a trend, they can establish a precedence in the court, and I think the local communities are going to realize if there is something wrong, they will not do it again because they will lose in court. I think the spirit in which Senator FEINSTEIN and I have joined in this is on behalf of State and local governments, that they are going to own up to their responsibilities. Let us not make them come to Washington, DC, and not make every one of them subject to the FCC in Washington, DC.

I yield the floor.

Mr. PRESSLER addressed the Chair.

The PRESIDING OFFICER. The Senator from South Dakota.

Mr. PRESSLER. Mr. President, I wanted to speak very briefly on this. I know our whip is here with some business.

First of all, I think we have to put this in context. As Senator HOLLINGS has pointed out, this section has been the result of hours and days of negotiations with city officials. It was in S. 1822 last year, and it is here. I think we have to take a step back and look at some of the cable deals and problems that have occurred in our cities. The cities have granted exclusive franchises in some cases and are not allowing competition. They have required certain programming be put on and other requirements on those companies.

Our States have granted, in the telephone area, certain exclusive franchises, not allowing competition. And the point is, if we are having deregulation here, removal of barriers to entry, we have to take this step. I think that is very important for us to considerate this point.

Now, section 254 goes to the very heart of this bill, because removal of barriers to entry is what we are trying to accomplish with this bill. We preempt any State or local regulation or statute or State or local legal requirement that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

The authority granted to the FCC in subsection (d) is critical if we are going to open those markets, because a lot of States and cities and local governments may well engage in certain practices that encourage a monopoly or that demand certain things from the business trying to do business. That would not be in the public interest.

At the same time, make no mistake about it, Mr. President, the authority granted in subsection (b) and (c) to the State and local authorities, respectively, are more than sufficient to deal in a fairhanded and balanced manner with legitimate concerns of State and local authority. These were negotiated out with State and local authorities.

We have worked closely with Senator HUTCHISON and the city, county, and State officials to strike a balance. We have gone to great pains and length to deal with concerns of the cities, counties, and State governments that are legitimately raised. We dealt with the concerns in subsection (b) and (c), while at the same time setting up a procedure to preempt where local and State officials act in an anticompetitive way, by taking action which prohibits, or the effect of prohibiting, entry by new firms in providing telecommunications services.

Now, the real problem created by the amendment offered by my friends, Senators FEINSTEIN and KEMPTHORNE, is that the very certainty which we are trying to establish with this legislation is put at risk. Certainty. A company has to go out and wonder if that local city or State will put some requirement on it to provide some kind of programming, or even to do something in

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the city to provide some service, or if it will grant an exclusive monopoly. What we are trying to get are barriers to entry, and we are reserving to the State and local governments certain authorities. So the certainty we are looking for we have taken away—no guarantee that entry barriers will be toppled and no guarantee of uniformity across the country.

The committee has dealt with federalism concerns throughout this legislation. Let me say that this debate goes to the heart of a technical detail of federalism and the Federal Government's relationship to State and local government. It is one of the most complicated areas of this bill. Believe me, it is hard to strike a balance. But if we strike this out, it gives every city in the country the right to put up barriers to entry. It lets every State have the right to have a monopoly unless they can extract something for the State in one way or another. I would not blame cities and States. If we do that, it goes to the very heart of this bill.

Now, I take a back seat to no one in advocating federalism principles. I like much power in the State and local government. It must be balanced with our other goal—removing the anticompetitive restrictions at the local level which restrict competition. Exclusive franchising in the cable and telephone markets is the very way that established monopolies in the past.

So, to conclude my statements on this, I understand that there may be a possible second-degree amendment to this tomorrow that would deal with the language on line 8 on page 55, "preemption," which would deal with the words, or is consistent with. But I am not certain that that second degree will be offered.

In any event, to conclude, this particular section of the bill goes to the heart of dealing with the federalism issue. Are we going to allow the cities and the State to put up barriers of entry to telecommunications firms? In the past, we have done so, with cable television. We have allowed cities not only to add a franchise fee, but also to require certain programming, and sometimes the companies do something else for the city as an incentive.

In telephones, we have allowed our States to set up a monopoly in the State and sometimes to collect certain things or to put certain requirements on. In this bill, S. 652, we are trying to deregulate, open up markets, and we are trying to let that fresh air of competition come forward. If our companies and our investors have the uncertainty of not knowing what every city will do, of not knowing what every State will do and each State legislature and each city council may change, the companies will be in the position of having to endlessly lobby city officials and State officials on these issues—not only that, at any time certainty is taken out.

This bill, S. 652—if we pass it—will provide a clear roadmap with certainty for competition. It will create an explosion of a new investment in telecommunications and new jobs and new techniques. And it will help consumers with lower telephone rates and lower cable rates. It has been carefully crafted and worked out in close to 90 nights of meetings, and on Saturdays and Sundays, plus last year, a whole year, plus a lot of Senators' input. I know it sounds good to give the power to the city and the State, and I am usually for that. In this case, we reserve powers to the city and State, but we very firmly say that the barrier to entry must be removed.

Mr. President, I wish to point out that I think there may be a second-degree amendment to this tomorrow at some point. I want to give Senators notice of that. There may not be. But I rise in opposition to the amendment.

Mr. LOTT. Mr. President, I do have some business to conduct, including the closing statement. At this juncture, I would like to do a couple of things, and if the Senator from Nebraska wants to make a statement, I will withhold on the closing unanimous consent.

CLOTURE MOTION

Mr. LOTT. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The assistant legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 652, the Telecommunications Competition and Deregulation Act:

Trent Lott, Larry Pressler, Judd Gregg, Don Nickles, Rod Grams, Rick Santorum, Craig Thomas, Spencer Abraham, J. James Exon, Bob Dole, Ted Stevens, Larry E. Craig, Mike DeWine, John Ashcroft, Robert F. Bennett, Hank Brown, Conrad R. Burns.

The PRESIDING OFFICER. The acting majority leader.

REMOVAL OF INJUNCTION OF SECRECY—EXTRADITION TREATY WITH BELGIUM (TREATY DOCUMENT NO. 104-7); SUPPLEMENTARY EXTRADITION TREATY WITH BELGIUM TO PROMOTE THE REPRESSION OF TERRORISM (TREATY DOCUMENT NO. 104-8); AND EXTRADITION TREATY WITH SWITZERLAND (TREATY DOCUMENT NO. 104-9)

Mr. LOTT. Mr. President on behalf of the leader, as in executive session. I ask unanimous consent that the injunction of secrecy be removed from the following three treaties transmitted to the Senate on June 9, 1995, by the President of the United States:

Extradition Treaty with Belgium (Treaty Document No. 104-7);

Supplementary Extradition Treaty with Belgium to Promote the Repression of Terrorism. (Treaty Document No. 104-8); and

Extradition Treaty with Switzerland (Treaty Document No. 104-9).

I further ask that the treaties be considered as having been read the first time; that they be referred, with accompanying papers, to the Committee on Foreign Relations and ordered to be printed; and that the President's messages be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The messages of the President are as follows:

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Extradition Treaty Between the United States of America and the Kingdom of Belgium signed at Brussels on April 27, 1987. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Treaty.

This Treaty is designed to update and standardize the conditions and procedures for extradition between the United States and Belgium. Most significantly, it substitutes a dual-criminality clause for the current list of extraditable offenses, thereby expanding the number of crimes for which extradition can be granted. The Treaty also provides a legal basis for temporarily surrendering prisoners to stand trial for crimes against the laws of the Requesting State.

The provisions in this Treaty follow generally the form and content of extradition treaties recently concluded by the United States. Upon entry into force, it will supersede the Treaty for the Mutual Extradition of Fugitives from Justice Between the United States and the Kingdom of Belgium, signed at Washington on October 26, 1901, and the Supplementary Extradition Conventions to the Extradition Convention of October 26, 1901, signed at Washington on June 20, 1935, and at Brussels on November 14, 1963.

This Treaty will make a significant contribution to international cooperation in law enforcement. I recommend that the Senate give early and favorable consideration to the Treaty and give its advice and consent to ratification.

WILLIAM J. CLINTON.

THE WHITE HOUSE, *June 9, 1995.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Supplementary Treaty on Extradition Between the United States of America and the Kingdom of Belgium to Promote the Repression of Terrorism, signed at Brussels on April 27, 1987 (the "Supplementary Treaty"). Also transmitted for the information of the Senate is the report of the Department of State with respect to the Supplementary Treaty.

HeinOnline -- 3 Bernard D. Reams, Jr. & William H. Manz, Federal Telecommunications Law: A Legislative History of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) including the Communications Decency Act S8176 1997

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HeinOnline -- 3 Bernard D. Reams, Jr. & William H. Manz, Federal Telecommunications Law: A Legislative History of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) including the Communications Decency Act [xci] 1997

HeinOnline -- 3 Bernard D. Reams, Jr. & William H. Manz, Federal Telecommunications Law: A Legislative History of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) including the Communications Decency Act [xcii] 1997