DEPARTMENT OF JUSTICE

STATEMENT

OF

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

SAVING THE SAVINGS CLAUSE: CONGRESSIONAL INTENT, THE TRINKO CASE, AND THE CONTINUED APPLICATION OF THE ANTITRUST LAWS IN THE TELECOM SECTOR

PRESENTED ON

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

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

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

successfully advocated the procompetitive interpretation and implementation of the Act's local-market-opening provisions, and helped successfully defend the constitutionality of the Act's transitional restrictions on the Bell companies' entry into long distance.

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

The Division carefully evaluated each application under its standard. The Division recommended that the FCC deny applications in five states; in all of these

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

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

Looking back, the "pro-competitive, deregulatory framework" Congress established in the 1996 Act set a sound course. We have seen significant progress in bringing increased competition to telecommunications markets. Spurred by the incentive of being permitted to enter the long distance market, the former local exchange monopolies of the Bell System have taken the necessary steps to open

their markets to competition by facilities-based carriers, resellers, and network element users. New technologies, such as those being introduced by wireless and cable companies, are offering or have the potential to offer additional competitive choices to consumers. High-speed Internet service is available through cable as well as through the incumbent local telephone companies, with other competitors seeking ways to enter. Telecommunications services are being offered in attractive packages by a variety of competitors, and the number portability required by the Act, and which the FCC is now implementing, is going to make it even more convenient for consumers to take advantage of the choices. While more still needs to happen before the 1996 Act realizes its full promise in all telecommunications markets, it is abundantly clear that Congress made the right decision in opting for competition to spur continued innovation and increased choices for consumers.

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

by existing or proposed regulations.

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

- Our 1999 challenge to SBC's acquisition of Ameritech resulted in the parties divesting one of their two competing cellular telephone systems in 17 markets, including Chicago and St. Louis.
- Our challenge that same year to Bell Atlantic's acquisition of GTE and its joint venture with Vodafone resulted in divestiture of overlapping wireless operations in 96 markets in 15 states.
- Our challenge in 2000 to AT&T's acquisition of Media One focused on harm to competition in the market for aggregation, promotion, and distribution of broadband content, and resulted in divestiture of AT&T's interest in the Road Runner broadband Internet access service, along with limitations on certain kinds of agreements between AT&T and Time Warner, who purchased the divested Road Runner interest.

- Our lawsuit that year to block the merger of WorldCom and Sprint to protect competition in a variety of markets, including residential long distance service, Internet backbone service, data network and custom network services to large business customers in the U.S. and international private line services between the U.S. and numerous foreign countries, led the parties to abandon the merger.
- Our challenge that year to SBC's joint venture with Bell South to create a nationwide wireless network resulted in divestitures in 15 wireless markets in three states.

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

We are also being vigilant in monitoring the telecommunications marketplace for unlawful restraints of trade. In August, we filed the first charges in our ongoing nationwide criminal investigation into possible bid-rigging and other unlawful collusion involving the E-Rate program, a federally funded program created under the 1996 Act to subsidize the provision of telecommunications,

Internet access, and internal communications to economically disadvantaged schools and libraries. Duane Maynard of Arvada, Colorado, a former electrical contractor pled guilty to participating in a bid-rigging scheme involving a E-Rate project in the West Fresno, California Elementary School District. He and others had conspired to ensure that Maynard's company would be the successful bidder for the general contract, that no other co-conspirator would submit a competing bid, that co-conspirator companies would serve as subcontractors on the project, and that any competing general bid would be stricken as nonresponsive. Maynard agreed to accept a higher sentence for having earlier given false testimony before the grand jury, and to assist us in our ongoing investigation.

In the monopolization area, we are continuing, almost eight years after passage of the 1996 Act, to work through issues regarding the Act's interpretation and its relation to the antitrust laws. We recently completed oral argument before the Supreme Court as amicus in *Verizon v. Trinko*, in which the Second Circuit had allowed a monopolization claim under section 2 of the Sherman Act to go forward against an incumbent local exchange carrier on the basis of the carrier's failure to comply with the interconnection agreement it had negotiated pursuant to the market-opening requirements of the 1996 Act. We believe the proper resolution of the issue in this case, whether passage of the 1996 Act augmented or altered the

duties that section 2 of the Sherman Act imposes on dominant local exchange telecommunications providers, is critical for preserving the integrity and vitality of the antitrust laws. The antitrust savings clause in the 1996 Act makes clear that the antitrust laws continue to apply fully in telecommunications, and are in no way displaced by the 1996 Act's own requirements. A corollary to this is that passage of the 1996 Act did not have the effect of increasing any party's obligations under the antitrust laws. Consistent with existing precedents, and consistent with the Division's position since its 1991 amicus brief in *Consolidated Rail Corp. v. Delaware & Hudson Railway Co.*, and followed in our *Microsoft* and *American Airlines* filings, we are taking the position that, for an incumbent's denial of an essential facility to a rival to constitute a section 2 violation, the denial must be predatory or exclusionary – that is, it must make business sense for the incumbent only because it has the effect of injuring competition. While the Telecommunications Act can and does impose other requirements, we believe it is important to preserve the distinction between a violation of the Telecommunications Act and a violation of the Sherman Act.

Mr. Chairman, in the coming years, our economy is likely to depend more than ever on a robust, innovative, competitive telecommunications industry.

Vigorous antitrust enforcement will continue to play a crucial role in fostering and protecting competition in this important sector. This Committee has a strong record of leadership in this critical area, and the Antitrust Division looks forward to continuing to work with you to ensure that businesses and consumers receive the benefits of a competitive telecommunications marketplace.

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