STATEMENT OF CHRISTOPHER J. WRIGHT
BEFORE THE COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

Hearing of November 19, 2003, on:
"Saving the Savings Clause: Congressional Intent,
the *Trinko* Case, and the Continued Application of the
Antitrust Laws in the Telecom Sector"

Thank you for the opportunity to present my views on the very important issues you are considering at this hearing. I have dealt with these issues over the last two decades while working for the Solicitor General, as General Counsel of the Federal Communications Commission, and, most recently, while representing telecommunications companies. Because of that experience, I understand just how difficult it has been to dismantle the monopolies given to the Bell Operating Companies.

The main point I would like to make is that proper enforcement of the antitrust laws and section 271 of the Communications Act is critical to ensuring that local telecommunications markets become as vibrantly competitive as the long-distance market and the wireless market. Proper enforcement of the antitrust laws and section 271 will give consumers real choices, but faulty enforcement will lead to a reversal of the modest steps that have been made toward opening local telecommunications markets to competition and could lead to the extension of the Bells' dominance into the long-distance market.

The Importance of Antitrust Enforcement. I know the Committee is very familiar with the *Trinko* case and the other cases involving the antitrust savings clause, such as *Goldwasser*.[1] And the Committee certainly knows that Congress included a savings clause in the 1996 Act to make clear that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[2] Despite the savings clause, the Bells have relied on some unfortunate dicta in *Goldwasser* to argue that the enactment of section 271 and the other market-opening provisions of the Telecommunications Act of 1996 preempted the application of the antitrust laws in the telecom sector. That argument is a loser: On account of the antitrust savings clause, there is simply no way to conclude that, if a Bell company violates both the Telecommunications Act and the antitrust laws, a person injured by the action may not bring an antitrust action. The Department of Justice never endorsed the Bells' preemption argument in its broadest form – indeed, the Antitrust Division opposed the Bells on that issue in the lower courts – and in the Supreme Court the Bells have not emphasized the preemption argument in its straightforward form.

Verizon and the government have instead advanced positions that would unduly restrict the application of the antitrust laws. Those laws require monopolists to make their facilities available to competitors in circumstances where that is essential to permit the development of

[1] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, Sup. Ct. No. 02-682 (argued Oct. 14, 2003); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

[2] Section 601(b) of the 1996 Act (codified at 47 U.S.C. § 152 note).

competition. For example, in the *Kodak* case, the Supreme Court held that Kodak could not refuse to sell parts used to repair Kodak copiers to independent service organizations that sought to compete with Kodak in the market for servicing copying machines.[3] Without that requirement, the Court recognized, Kodak could leverage its monopoly in the parts market into the service market. In earlier cases, the Court reached similar conclusions. For example, in *Otter Tail* the Court held that section 2 of the Sherman Act required an electric utility to sell power at wholesale to municipalities that wanted to replace the utility as the retail provider of electric power.[4] And in the *MCI v. AT&T* case that played a key role in the break-up of AT&T, the Seventh Circuit held that telecommunications facilities are the archetypal example of essential facilities.[5]

In the *Trinko* case, Verizon has attempted to distinguish *Kodak* and *Otter Tail* by pointing out that in those cases the defendant had voluntarily agreed to deal with competitors at some point in time. While that is so, it is truly a distinction without a difference. In fact, that approach would reward companies that consistently take every possible step to prevent the emergence of competition. And that approach would make the antitrust laws a dead letter in the telecom sector. Under the interpretation of the antitrust laws advanced by Verizon in *Trinko*, it would not violate the Sherman Act if a Bell company CEO told his managers that, because the company would have higher profit margins without competition, they should do everything they can to undermine competitors that must lease essential facilities from the Bell company – including slow-rolling deployment of those facilities and providing discriminatory treatment with respect to maintaining those facilities – as long as the company never voluntarily agreed to lease facilities to competitors.

The Antitrust Division supported Verizon in *Trinko*, but it emphasized a different argument. The Antitrust Division stated that, to find an antitrust violation, a court must always find evidence of exclusionary conduct and advanced an unduly restricted interpretation of that phrase. In the federal government's view, "exclusionary conduct" is a "demanding standard," and it appears that the "sacrifice of short-term profits" in order to injure competition is the only form of anticompetitive behavior the Antitrust Division finds sufficient.[6] While the "sacrifice test" makes sense in the predatory pricing cases where it originated, it does not make sense in the context of essential facilities and monopoly leveraging cases like *Trinko*. Under the test, it would be a valid defense for a monopolist to argue that it makes "business sense" for it to exploit its dominant position and undermine the development of competition because it would make more money if it maintains and extends its monopoly than it would if competition develops. But competition will never develop in local telecommunications markets – and never would have developed in the long-distance market – if that were the standard.

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[3] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

[4] *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

[5] *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983).

[6] Brief for the United States and the Federal Trade Commission in Sup. Ct. No. 02-682, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, at 7-8.

The Antitrust Division's analysis rests on a faulty understanding of the effect of the savings clause in particular and the 1996 Act in general. Under the Act, Bells with authority to provide long-distance service must lease specific "network elements" to competitors at cost-based rates. While not every violation of the duties established by the 1996 Act necessarily is an antitrust violation, repeated failures to provide nondiscriminatory access to essential network elements, taken in order to frustrate the development of competition, are straightforward violations of section 2 of the Sherman Act under *Kodak*, *Otter Tail*, and *MCI v. AT&T*. That conclusion is reinforced by the 1996 Act because, under antitrust law, it has always been appropriate to consult "extrinsic law" to determine what is anticompetitive.

Yet the Antitrust Division seems to think the legal regime Congress established in 1996 immunizes the Bells from antitrust liability, despite the savings clause. Most particularly, as its brief makes clear, in the Division's view the fact that Congress required the Bells to lease network elements at wholesale rates that are lower than the retail rates the Bells could charge if they maintained their monopolies provides a valid justification that has the effect of conferring immunity from the antitrust laws.[7] That is backwards: although not every violation of the Telecommunications Act is a violation of the antitrust laws, the fact that the Telecommunications Act requires the leasing of network elements at cost-based rates does not immunize failures to do so, taken to impede competition, from antitrust liability. To the contrary, as the government acknowledged in its brief, under the antitrust laws the "violation of extrinsic statutory or legal duties may be significant in determining whether conduct is exclusionary for antitrust purposes."[8] By enacting the savings clause, Congress made clear that antitrust law – including the normal rule that it is appropriate to consult extrinsic law to determine what is anticompetitive – continues to apply.

Moreover, Congress did not go to the trouble of making clear in the 1996 Act that it was saving the antitrust laws from preemption so that antitrust laws would be construed to have no role to play in that effort. To the contrary, Congress understood that the antitrust laws had played a key role in opening the long-distance market to competition and knew that the threat of antitrust remedies could play an important role in opening local markets to competition. And, contrary to the position espoused by the Antitrust Division in *Trinko*, it makes no sense to contend that the Bells may present a legitimate business justification in an antitrust action by arguing that they don't want to do what the 1996 Act compels them to do because they will be better off if they retain their monopolies.

In addition, contrary to the arguments advanced by Verizon, the existence of the regulatory regime Congress created in 1996 makes application of the Sherman Act easier. Congress has established a process to determine what network elements the Bells must lease to competitors and the prices for leasing them. An antitrust court therefore need not struggle with questions about the price at which those facilities must be leased, but can concentrate on determining whether a company violated its legal duties in order to maintain or extend its monopoly. Thus, rather than the sacrifice test, the appropriate antitrust standard is whether a

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[7] *Id*. at 3 n.1.

[8] *Id*. at 25 n.10.

defendant impeded access to a facility it is legally required to provide to competitors in order to thwart competition.

With respect to antitrust enforcement, I would also like to make the point that regulatory remedies by themselves are unlikely to be effective. I say that as someone who worked for seven years at the Federal Communications Commission and, while there, helped Chairman Kennard establish the new Enforcement Bureau. I also know that the Bureau has an excellent staff and that there are many able staff in the state commissions around the country. But I also know how limited their resources are, how ferociously the Bells have fought since 1996 to enter the long-distance markets without really opening their local markets to competition, and how resource-intensive the development of a case demonstrating anticompetitive actions can be. In addition, the FCC primarily views itself as a rulemaking body, and it deals with Bell company representatives every day while acting in its quasi-legislative capacity. It is very difficult for it to put on its quasi-adjudicative hat and act as a judge with respect to those companies – and I don't think anyone who is familiar with the Commission disagrees that the FCC is more comfortable when making rules than when resolving complaints. And finally, as Chairman Powell has stated repeatedly, the FCC's authority to punish carriers that violate the Telecom Act is quite limited.

For those reasons, there really is no question that the Bell companies are much more likely to provide nondiscriminatory access to their essential facilities if antitrust remedies are available than if there is merely the possibility of regulatory action. And experience since 1996 has confirmed that consumers – and especially residential and small business customers – have no prospect of benefiting from the competitive alternatives Congress intended to provide by means of the 1996 Act unless competitors may lease those facilities on nondiscriminatory terms and at cost-based rates.

Section 271 enforcement is more important than ever. The FCC will soon grant the final petition authorizing a Bell company to enter the long-distance market. Although the Bells seem to think that section 271 is therefore now less important, in fact section 271 is now more important than ever. Section 271 specifies what a Bell company must do to enter the long-distance market and also *what the Bells must do to continue to provide long-distance service*. Section 271(d)(6) makes clear that a Bell company's authorization to provide long-distance service should be suspended or revoked if it does not continue to comply with section 271's competitive checklist. That means that section 271 has superseded section 251, which governs all incumbent local exchange carriers, as the principal statutory provision governing the Bell companies. Before the section 271 petitions were granted, the requirements of section 271 did not actually apply to the Bell companies – those requirements told the Bell companies what they must do to obtain authorization to provide long-distance service. After a section 271 petition has been granted, however, section 271 has increased legal significance – a violation of the checklist now calls for the imposition of the remedies listed in section 271(d)(6).

As I know this Committee is well-aware, Congress crafted section 271 to require the Bell companies to take the steps necessary to let competitors into their markets before the Bells were permitted to enter the long-distance market, and there is a real danger of the Bells extending their dominance into the long-distance market on account of their control of essential facilities if they are not required to continue to take the steps necessary to open their markets to competition. In particular, they must lease their essential facilities to competitors at nondiscriminatory rates. Because that requirement is so critical, the competitive checklist in section 271 requires the Bell companies to lease four specified network elements – loops, transport, switching, and signaling – on a nondiscriminatory basis at cost-based rates. By leasing those four network elements – which have come to be known as the "platform of network elements" or "UNE-P" – a competitor may enter local markets as easily as the Bells may enter the long-distance market, which the Bells do by leasing capacity from interexchange carriers at the cost-based rates available in that highly competitive market. The competitive choices now available to residential customers and small businesses primarily depend on nondiscriminatory access to the platform of network elements.

The Bells relied heavily on the existence of competitors using the platform of network elements in support of their section 271 applications. Early on, they persuaded the FCC that a competitor leasing the platform is a "facilities-based" competitor within the meaning of "Track A" of section 271. Now they argue that a competitor using the platform of network elements provides merely "synthetic competition." That is not so – any more than the competition the Bells provide in the long-distance market is "synthetic" because they lease facilities to provide long-distance service. But in any event the Bells can't have it both ways – they can't be permitted to point to UNE-P competitors as evidence that their local markets are open to competition so they may enter the long-distance market and then turn around and eliminate the ability of those competitors to provide service. That is a classic bait-and-switch tactic.

But that is only one example of the arguments the Bells are already advancing in an attempt to renege on their side of the bargain embodied by section 271. There are at least three other examples. First, in the recent *Triennial Review* proceeding, the Bells persuaded the FCC to adopt an "impairment" standard under section 251 which provides that incumbent local exchange carriers do not have to lease network elements to competitors even where those competitors "would suffer from a substantial cost disadvantage" and "are likely to sell less of their product" without access to the network elements.[9] In other words, under the FCC's new test, a competitor is not necessarily "impaired" in providing competitive service if its product is non-competitive without access to the network elements Congress identified as essential to the development of competition. It is hard to see what "impairment" means if it does not apply in that circumstance, as Judge Bork explained in a letter that the Commission followed in part, but only in part.[10]

Second, the Bells persuaded the FCC that, even though the competitive checklist specifically requires the Bells to lease network elements under the "cost-based" standard adopted by Congress for network elements in 1996, and even though it is undisputed that loops, transport, switching, and signaling are "network elements," the Bells do not necessarily have to charge

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[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC No. 03-36, ¶ 112 (rel. Aug. 21, 2003) (*"Triennial Review Order"*).

[10] Letter from R. Bork to Chairman Powell, attached to filing by A&T in FCC Docket 01-338 (Jan. 10, 2003).

cost-based rates for those network elements. And the FCC seemed to think that the Bells could set the prices for those network elements in some cases without arbitration by state commissions, who are charged by the 1996 Act with the task of establishing rates for network elements when the parties cannot agree.[11] But Congress did not establish both substantive and procedural rules for determining the prices of network elements so that the Bells could ignore those rules.

Third, Verizon filed a petition asking the FCC to "forbear" from enforcement of the four items on the section 271 checklist if a new entrant is not "impaired" without access to the network element under the FCC's new test. The FCC recently denied that request, explaining that the section 271 checklist could not be more clear that Bell companies that are authorized to provide long-distance service must lease the four network elements to competitors without regard to the impairment test.[12] Verizon has brought suit challenging that decision. It also has filed a modified forbearance request asking the Commission to refrain from enforcing the checklist insofar as it requires the Bells to lease network elements that may be used to provide high-speed transmission capabilities, and that petition is pending.[13]

The Bells' new arguments are aimed at reversing the modest gains competitors have made in offering competitive alternatives by eliminating the availability of the platform of network elements. For example, with respect to residential and small business customers, it is entirely clear that, without the platform of network elements, the competition provided by MCI's Neighborhood plan and similar offerings would simply not be possible. And the Bells can make network elements unavailable just as effectively by pricing them at discriminatory rates as by refusing to lease them at all. The Antitrust Division played a critical role in 1996 by filing comments explaining that in detail and urging the FCC to adopt a long-run incremental cost pricing standard, which we did.[14] Five former chief economists of the Division – a bipartisan group, I would like to add – also played a critical role that year by making a filing urging the FCC to stand by its pricing rule after the Eighth Circuit, at the Bell companies' urging, overturned it.[15] Of course, the FCC stood by its pricing rule and the Supreme Court ultimately upheld it in *Verizon v. FCC*.[16] Nevertheless, and despite many more pressing matters, the FCC has opened a proceeding at the Bells' request to revisit its pricing rules.

The positions currently being advanced by the Bells are very much in keeping with the Bells' consistent efforts since 1996 to enter the long-distance market while keeping their local markets closed to competition. As I am sure many of you recall, SBC persuaded a district court judge to declare section 271 unconstitutional as a Bill of Attainder on New Years' Eve 1997.

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[11] *Triennial Review Order*, ¶¶ 656-64.

[12] Public Notice, *Commission establishes comment cycle for new Verizon petition requesting forbearance from application of section 271*, FCC 03-263 (Oct. 27, 2003) (citing *Triennial Review Order*).

[13] *Id*.

[14] Comments of the U.S. Department of Justice, FCC CC Docket 96-98 (May 16, 1996) at 31.

[15] Letter from B. Owen *et al*. to R. Hundt, FCC CC Docket 96-98 (Dec. 2, 1996).

[16] *Verizon Communications, Inc. v. FCC*, 5535 U.S. 467 (2002).

That decision, designed to allow them to provide long-distance service without opening their local networks to competition, was overturned, of course.[17] And the Bell companies' position was all the more startling because Congress had enacted section 271 exactly as the Bell companies had urged in order to avoid any constitutional problem.[18]

In addition to arguing that section 271 is unconstitutional, SBC also argued that the FCC had erroneously denied their section 271 application for Oklahoma on the basis that there was no competition when, SBC claimed, there was competition – it pointed out that four employees of a would-be competitor were getting service from their employer on a test basis. Of course, the D.C. Circuit rejected the argument that such evidence established that SBC had opened the Oklahoma market to competition.[19] But the point is that the Bells early on advocated positions that would have permitted them to enter the long-distance market without showing that their local markets were open to competition. Along the same lines, Verizon argued that a more obscure provision – section 272(e)(4) – authorized it to enter the long-distance market without satisfying the competitive checklist – another argument that the courts rejected that would have permitted the Bells to provide long-distance service while retaining their local monopolies.[20]

The Bells also argued that they should be permitted to disconnect network elements solely for the purpose of raising their rivals' costs. Or, the Bells argued in the alternative, they should be permitted to impose "glue charges" – payments not to disconnect network elements in the first place. The Supreme Court condemned the Bells' argument, using very strong language. "As the Commission explains," the Court said, the Bells sought to "'disconnect[] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'"[21] The Court saw no more reason to permit the BOCs to "impose wasteful costs" on competitors than to permit them to "sabotage network elements."[22] However, in a confusing footnote that apparently was added to the *Triennial Review Order* at the last minute, the FCC appears to have concluded that Bells with authority to provide long-distance service need not combine network elements, at least in some circumstances.[23] That would either effectively deny competitors the ability to use the platform of network elements or raise their costs for no productive reason.

The common thread in each of the arguments the Bells advanced before their section 271 applications were granted is that the Bells wanted to enter the long-distance market without taking the steps necessary to open their local markets to competition. The common thread in each of the arguments the Bells are currently advancing is that, now that they have obtained

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[17] *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998).

[18] *BellSouth Corp. v. FCC*, 162 F.3d 678, 690-91 (D.C. Cir. 1998).

[19] *SBC Communications, Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

[20] *Bell Atlantic Telephone Cos. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1997).

[21] *AT&T Corp.*, 525 U.S. at 394, *quoting* FCC Reply Brief at 23.

[22] *AT&T Corp.*, 525 U.S. at 394.

[23] *Triennial Review Order, supra*, n. 1989.

authorization to provide long-distance service, they want to stop taking the steps that made competition possible. But Congress made very clear in section 271(d)(6) that the Bells must continue to comply with the checklist after they have entered the long-distance market. No other approach would make sense. As the Supreme Court said in the *Verizon* decision, the Bells "have an almost insurmountable competitive advantage" on account of their ownership of network elements resulting from their prior status as franchised monopolists.[24] Competitors must continue to be able to lease those bottleneck elements at nondiscriminatory rates or the competition that has developed will disappear.

This Committee's close attention to the FCC's resolution of these issues is therefore more important than ever. Enforcement of section 271's obligations is no longer in the background, but is now at the forefront. I therefore urge the Committee to ensure that section 271 is implemented as Congress intended, and that the Bells are not permitted to close local markets to competition now that they have entered the long-distance market.

It also would also be helpful if the Antitrust Division urged the FCC to require the Bell companies to provide nondiscriminatory access to the four network elements Congress listed in section 271 at cost-based rates. The Division's comments in 1996 were very helpful in establishing those requirements. The Division also has expressed doubt concerning the merit of a number of section 271 applications that the FCC nevertheless has approved, despite the FCC's duty under the statute to give "substantial weight" to the views of the Department of Justice – which highlights the need for continued oversight. In any event, it surely would make no sense, but instead would completely undermine the role Congress assigned the Department, if the FCC were now to forbear from enforcement of the requirements of section 271.

Finally, although I disagree with the Antitrust Division's position in *Trinko*, its position is premised on the claim that enforcement of the requirements of the 1996 Act is sufficient to open all telecommunications markets to competition. Given that position, it is all the more important for the Department of Justice to make sure that the requirements of the 1996 Act, and especially the requirements of section 271, are applied as Congress intended.

[24] *Verizon*, 535 U.S. at 490.