I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. CAMPBELL. Mr. President, I ask unanimous consent that the Senate now resume consideration of amendment No. 929 by Senator THOMAS and ask that the yeas and nays be vitiated.

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

Is there further debate on the amendment? If not, the question is on agreeing to the amendment.

The amendment (No. 929), as modified, was agreed to.

Mr. CAMPBELL. Mr. President, I move to reconsider the vote.

Mr. KOHL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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 President, I ask unanimous consent that the order for the quorum call be rescinded.

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

Mr. CAMPBELL. Mr. President, I ask unanimous consent that the following be the only remaining first-degree amendments other than the pending amendments and that they be subject to relevant second-degree amendments. They are an amendment by Senator FAIRCLOTH, two by Senator HUTCHISON, three amendments by Senator COVERDELL, one by Senator ABRAHAM, one by Senator DEWINE, one by Senator CHAFEE, one by Senator COLLINS, one by Senator GRASSLEY, one by Senator HATCH, one by Senator DASCHLE, one by Senators LOTT and DASCHLE, one by Senator CLELAND, one managers' amendment, one by Senator KOHL, one by Senator GRAHAM of Florida, one by Senator BINGAMAN, one by Senator DODD, and two by Senator FEINSTEIN.

I further ask that following the disposition of the above-listed amendments, the bill be advanced to third reading and final passage occur, and when the Senate receives the House companion bill, all after the enacting clause be stricken and the text of the Senate bill be inserted, the bill be advanced to third reading and passed, and the Senate insist on its amendments and request a conference with the House, and the Chair be authorized to appoint conferees.

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

AMENDMENT NO. 931

(Purpose: To amend the Federal Election Campaign Act)

Mr. CAMPBELL. Mr. President, I now send an amendment to the desk on behalf of the majority leader, Senator LOTT, and the minority leader, Senator DASCHLE, and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows.

The Senator from Colorado [Mr. CAMPBELL], for Mr. LOTT, for himself and Mr. DASCHLE, proposes an amendment numbered 931.

Mr. CAMPBELL. Mr. President, I ask unanimous consent that the amendment not be read at length.

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

The amendment is as follows:

At the appropriate place, insert the following:

SEC. . Section 302(g)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 432(g)(1)) is amended—

(1) by striking ''and'' after ''Senator,''; and

(2) by inserting after ''candidate,'' the following: ''and by the Republican and Democratic Senatorial Campaign Committees''.

Mr. CAMPBELL. I ask the Senate adopt this amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 931) was agreed to.

Mr. CAMPBELL. Mr. President, I move to reconsider the vote.

Mr. KOHL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. CAMPBELL. Mr. President, I ask unanimous consent that when the House companion measure is passed by the Senate, pursuant to the previous order, that the passage of S. 1023 be vitiated and that S. 1023 be indefinitely postponed.

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

UNANIMOUS-CONSENT AGREEMENT—NOMINATIONS OF JOEL I. KLEIN AND ERIC H. HOLDER, JR.

Mr. CAMPBELL. Mr. President, I ask unanimous consent that the Senate stand in recess until 5 p.m., and at 5 p.m., the Senate proceed to executive session for the consideration of the nomination of Joel Klein, with the previous time limitations.

I further ask unanimous consent that immediately following the vote on the Klein nomination, the Senate proceed to a vote on calendar No. 139, the nomination of Eric Holder.

I further ask unanimous consent that, immediately following the vote on the Holder nomination, the motions to reconsider be laid upon the table; that any statements relating to either of these nominations appear at the appropriate place in the RECORD; that the President be immediately notified of the Senate's action; and that the Senate then return to legislative session.

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

RECESS UNTIL 5 P.M.

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until the hour of 5 p.m.

Thereupon, at 4:49 p.m., the Senate recessed until 5 p.m.; whereupon, the Senate reassembled when called to order by the Presiding Officer [Ms. COLLINS].

EXECUTIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now go into executive session.

NOMINATION OF JOEL I. KLEIN, OF THE DISTRICT OF COLUMBIA, TO BE AN ASSISTANT ATTORNEY GENERAL

The bill clerk read the nomination of Joel I. Klein, of the District of Columbia, to be an Assistant Attorney General.

Mr. ALLARD addressed the Chair.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. ALLARD. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

Mr. HATCH. Madam President, I would like to comment just briefly here on the nomination of Mr. Joel Klein, who has been nominated for the position of Assistant Attorney General of the Antitrust Division of the Department of Justice.

Last Friday, I spoke on this floor in support of Mr. Klein and urged my colleagues to support his nomination. I certainly continue wholeheartedly to support Mr. Joel Klein. And I continue to urge my colleagues to join me.

I will not repeat today all that I had to say last week on Mr. Klein's behalf, but I would like to reiterate that support and have my statement from last Friday printed in the RECORD. I ask unanimous consent to have that statement printed in the RECORD.

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

STATEMENT OF SENATOR ORRIN HATCH ON THE NOMINATION OF JOEL I. KLEIN TO BE ASSISTANT ATTORNEY GENERAL OF THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE, JULY 11, 1997

Mr. President, I rise today on behalf of Mr. Joel Klein, who has been nominated for the position of Assistant Attorney General of the Antitrust Division of the Department of Justice. Mr. Klein was reported out of the Judiciary Committee unanimously on May 5. As his record and testimony reflect, Mr. Klein is a fine nominee for this position, and I am pleased that his nomination has finally been brought before the full Senate today. He has my strong support.

I believe Mr. Klein is as fine a lawyer as any nominee who has come before this committee. He graduated magna cum laude from Harvard Law School before clerking for Chief Judge David Brazelon of the D.C. Circuit and then Supreme Court Justice Lewis Powell. Mr. Klein went on to practice public interest law and later formed his own law firm, in which he developed an outstanding reputation as an appellate lawyer arguing—and winning—many important cases before the U.S. Supreme Court. For the past two years, Mr. Klein has ably served as Principal Deputy in the Justice Department's Antitrust Division, and for the past several months he has been the Acting Assistant Attorney General for the Antitrust Division.

It is clear, both from his speeches and his enforcement decisions, that Mr. Klein is within the mainstream of antitrust law and doctrine and will be a stabilizing influence at the Antitrust Division. While no one doubts his willingness to take vigorous enforcement actions when appropriate, it is a credit to Mr. Klein that the U.S. Chamber of Commerce, the National Association of Manufacturers and other business associations have written in strong support of his nomination to lead the Antitrust Division. They believe he will be good for American business. And I think they are right.

At the same time, Mr. Klein has demonstrated a sense of direction and a vision for the Antitrust Division, which is important in a leader. He is committed to enforcing our Nation's antitrust laws in order to uphold our cherished free enterprise system and protect consumers from cartels and other anticompetitive conduct. So, I am certain that Mr. Klein will also be good for consumers.

Antitrust doctrine has had its ups and downs over the years—although we may not all agree on which times were which. At this point, however, I am hopeful that antitrust is entering a more mature and more stable period. Although antitrust analysis is fact-intensive and will always contain gray areas, I hope Mr. Klein will work to help make antitrust doctrine as clear and predictable as possible so that companies know what is permitted and what the Antitrust Division will challenge. This will help businesses compete vigorously without the worry and chilling effects that result from uncertainty. I would suggest that the Division's goal should be to avoid burdens on lawful business activities while appropriately enforcing the law against those who clearly violate it.

Finally, I would like to add that I personally have been very impressed with Mr. Klein. He strikes me as a person of strong integrity, as a highly competent and talented lawyer who is well-suited to lead the Antitrust Division. While I expect we may not always agree on every issue, I believe that Mr. Klein's skills and expertise will be a service to the Department of Justice, to antitrust policymakers, and the health of competition in our economy and I look forward to working with him in the coming years.

In what appears to be a last-ditch effort to scuttle Mr. Klein's nomination, there are some who have now floated an allegation that the nominee's participation in a particular merger decision was somehow improper. Upon examination, let me say that it appears to me that these reports are wholly unfounded and provide no basis whatsoever for questioning the nominees conduct. I understand that, with respect to the matter at issue, Mr. Klein consulted with the proper ethics officials and was assured that his participation raised no conflict of interest or even the appearance thereof. Based on what we know, this judgment appears sound, and I am confident that the nominee has conducted himself appropriately. I should hope that nobody in this body will use this extraneous, ill-founded notion as an eleventh hour basis for opposing Mr. Klein's nomination. I am confident that Mr. Klein is a man of integrity, and urge my colleagues to cast their votes in his favor.

Some have suggested that Mr. Klein is misapplying the Telecommunications Act and has taken questionable positions on particular mergers. I will refrain here from passing judgment on any particular decision and from engaging in a detailed debate on Telecommunications antitrust policy. I fully recognize that there are some very, very important issues at stake here, especially in light of a number of ambiguities left in the wake of the Telecommunications Act. I also recognize that there have been some controversial mergers in this area, and yet other potentially landmark mergers which have not come to pass.

In short, telecommunications competition and antitrust policy is one of the most important, yet somewhat unsettled, policy areas affecting our emerging, transforming economy. The looming policy decisions to be made in this area cannot be ignored and indeed I plan to have the Judiciary Committee and/or our Antitrust Subcommittee fully explore these issues.

But I believe it is neither fair nor wise to hold a nominee hostage because of such concerns. In my view, sound public policy is best served by bringing this nominee up for a vote, permitting the Justice Department to proceed with a confirmed Chief of the Antitrust Division, and for us in Congress to move forward and work with the Department and other involved agencies in the formulation and implementation of telecommunications policies.

I hope that all Senators, and especially those of the President's own party, would permit the administration's nominee to be voted on.

Mr. HATCH. I would also like to point out that numerous past and present Government officials and attorneys have voiced strong support for Mr. Klein, including James Rill and John Shenefield, who headed the Antitrust Division during the Bush and Carter administrations respectively.

I also ask unanimous consent that a letter to the New York Times editor from Messrs. Rill and Shenefield be printed in the RECORD.

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

WASHINGTON, DC,
July 11, 1997.

The NEW YORK TIMES,
New York, NY.

TO THE EDITOR: We write to state our disagreement with the New York Times and with several Senators who have expressed opposition to the nomination of Joel Klein to head the Antitrust Division at the Justice Department. Mr. Klein should be confirmed because he has all the qualities of leadership and judgment to make an outstanding Assistant Attorney General. In fact, the reasons why his detractors have put his nomination on ''hold'' actually support the case for his nomination. The objections to his nomination stem not from concern about his qualifications, but from a difference of opinion over the best way to ensure competitive markets in telecommunications.

The Antitrust Division was created to function as a specialist agency with the expertise and experience essential to making sound antitrust enforcement decisions. Quick, intuitive judgments based upon an incomplete understanding of either the facts or the law can easily lead to incorrect decisions. Critics of Mr. Klein's recent decisions are at a disadvantage because they cannot possibly have his detailed knowledge of the facts. That is why Congress wisely entrusted such decisions to an expert agency. In the past that trust has not been misplaced because the Division has been willing to take an unpopular stand that it considered to be in the public interest—as it did in settling the AT&T case.

Mr. Klein's willingness to reach a decision on the Bell Atlantic merger indicates he has the courage to make a fine Assistant Attorney General. He made a decision despite the fact that whatever he decided to do was likely to offend someone who was considering his nomination. No doubt Mr. Klein could have found a way to delay a decision until after he was confirmed. Instead, he made what he believed was the correct decision from the perspective of the antitrust laws. Mr. Klein is being criticized for doing his job. To substitute the political process for the judgment of an expert enforcement agency in an area where both the facts and the law are remarkably complicated would be a dangerous precedent that could only harm enforcement of the antitrust laws in the future. We hope that those who have expressed misgivings about Mr. Klein's nomination will soon allow it to come to a vote, so that Mr. Klein can be confirmed—as he should be.

JAMES F. RILL.
JOHN H. SHENEFIELD.

Mr. Rill was Assistant Attorney General in charge of the Antitrust Division during the Bush Administration; Mr. Shenefield was Assistant Attorney General in charge of the Antitrust Division during the Carter Administration.

Mr. HATCH. I am very pleased that cloture was invoked last week with such overwhelming support. I must say, however, that I was quite surprised, and disappointed even, to find us in the position of voting on cloture for someone as good as Joel Klein. Even I, as chairman or ranking member of the Judiciary Committee, have not filibustered a single Clinton administration nominee for the Justice Department or the Federal courts. I am not saying I will not in the future, but I will say that I have not up until now.

Indeed, the last filibuster of a Justice Department nominee was over the nomination of Walter Dellinger to head the Department's Office of Legal Counsel back in October of 1993. Of all the nominees I have seen in recent years, I must say that Joel Klein certainly ranks among the very best of them.

Of course, I know my good colleague from South Carolina would not take

this step lightly and without what is, in his view, adequate justification, but in fairness I think we must now move quickly to confirm this nominee who has been awaiting confirmation since May 5 of this year.

As I explained last Friday, I believe it is critical for the Department of Justice, and the business community generally, to have a permanent, confirmed antitrust chief. Until we do, any antitrust matter before the Department of Justice will invite political maneuvering and gamesmanship by the affected parties, and any ultimate decision by the Department, no matter how justified on the merits, will unfairly be subject to criticism.

Mr. Klein has, to his credit, not permitted the likelihood of such criticism to deter him from leading the Department to bring closure on critical matters pending before the Antitrust Division. I believe it is most unfortunate that, because of this body's, the U.S. Senate's, delay, Mr. Klein has been unfairly criticized for such decisions. This does a disservice to the Department as well as to those who come before it.

By urging that we move to confirm Mr. Klein, and in expressing my support for this fine nominee, I intend in no way to diminish the important issues raised by my colleague from South Carolina, and others, regarding competition and antitrust policy in the telecommunications field. Quite the contrary, it is my belief that telecommunications competition and antitrust policy is one of the most important, yet somewhat unsettled, policy areas affecting our emerging and transforming economy.

In fact, I announce today that I plan to work in coordination with Senator DEWINE, who chairs the Judiciary Committee's Antitrust Subcommittee, to explore the looming policy decisions in this area and the role of the Department of Justice in the telecommunications arena. In my view, there are few competitive issues which are more worthy of examination than this one.

Notwithstanding the tremendous import of the issues raised by some of my colleagues, I believe it is neither fair nor wise to hold this nominee and the Antitrust Division hostage because of concerns about his potential positions in this very turbulent area of the law. In my view, sound public policy is best served by bringing this nominee up for a vote, permitting the Justice Department to proceed with a confirmed Chief of the Antitrust Division, and for us in Congress to move forward and work with the Department and other involved agencies in the formulation and implementation of telecommunications policies.

So, I urge my colleagues on both sides of the aisle to vote to confirm Joel Klein as Assistant Attorney General for the Antitrust Division.

I have known Mr. Klein for quite a while, and I have to say I know him well. I also know his abilities well. I can also say, as someone who has had a little experience in the law, that Mr. Klein will stack up with anybody. He is a fine nominee. I commend the President for having made this choice, for having had the foresight to put somebody like this into the Justice Department.

I commend Mr. Klein for the work that he has done up to date, for his fearless work and not waiting until he is confirmed to act as the acting person in that Department and for the work he did prior to this nomination in that Department. I commend him for a lifetime of service to this country and to his family and to the law firms that he has worked with.

There is no question he has the academic and other credentials that far exceed the academic and other credentials of many others who served with distinction, who served in the Government of the United States, and particularly in the Justice Department.

So I am very happy to support his nomination. I hope that today everybody will support his nomination. I think it is the right thing to do.

Again, I say, my colleague from South Carolina is sincere and dedicated in his effort, but I hope he will see fit to support this nomination as well, on the basis that he has made his case, he has made his arguments, he has stood up for what he believes his principles are, and now it is time to support the President's nominee for this particular, important position in the Antitrust Division.

Mr. LEAHY. Madam President, it is my hope that Joel Klein will be a strong and effective advocate for competition and the interests of consumers when he is confirmed as Assistant Attorney General for the Antitrust Division of the Department of Justice.

I had a close working relationship with his predecessor, Anne Bingaman. I hope that we can develop that kind of relationship, as well.

Mr. Klein has been buffeted a good bit since being nominated. He had to answer some tough questions during his nomination hearing about approving the Bell Atlantic-NYNEX merger without conditions. After the Judiciary Committee reported his nomination to the Senate on May 8, he responded to a letter from Senator BURNS and succeeded in convincing our colleague to remove his hold on this nomination. That letter and an addendum filed by Mr. Klein as Acting Assistant Attorney in connection with the application of SBC Communications before the FCC raised serious concerns for a number of other Senators, however.

Last week the Senate proceeded by unanimous consent to consideration of this nomination. Until that moment, I understood there to have been Republican holds against this nominee. Why the Republican leadership proceeded immediately upon calling up this nomination to file a cloture petition, they will have to explain. In fact, we had worked out a time agreement for the debate before the unnecessary cloture vote on Monday. That agreement was confirmed by the majority and minority leaders and pursuant thereto we are debating the nomination today.

In this regard, I note the consistent willingness of Senator HOLLINGS to debate and vote on this nomination from the outset, and the sincere efforts of Senators DORGAN and KERREY to obtain clarification of issues that concern many of us.

I have given a good deal of thought to this nomination. I believe that the Antitrust Division and the Assistant Attorney General who heads it are extremely important to effective enforcement of our laws and protection of American consumers. I have come to rely on them for advice as we draft legislation and develop policies to foster competition.

I hope to continue to do so. I believe that the President is to be given significant deference on his selections for his Administration team. The Attorney General has contacted us in support of Mr. Klein and his interpretation of the law, and that means a good deal to me. As I consider the legal interpretations and policies in question, I do not find myself in total agreement with the Acting Assistant Attorney General. Nonetheless, I will vote to confirm him.

Unlike some who have spoken in opposition to this nomination, I feel that a good deal of the fault I find with Mr. Klein's positions stems from the Telecommunications Act of 1996. I worked hard to correct and improve that act's weak and deferential standards for ensuring competition. In some measure we succeeded in strengthening the act, but other significant provisions that I supported to foster competition and protect consumers were rejected. That was a principal factor in my decision to vote against that act—the bill was not strong enough.

Others predicted that passage of the Telecommunications Act would launch an era of competition in which cable companies would compete with the regional Bell operating companies for local phone service, long distance companies would compete with the Bells in both local and long distance services, and regional Bell operating companies would compete against each other. The promise of competition was a sales pitch but has not materialized to benefit American consumers. Instead of competition, we see entrenchment, mega-mergers, consolidation, and the divvying up of markets.

I, too, hoped that the Justice Department Antitrust Division would act aggressively to protect consumers and foster competition. I have noted my concerns during Mr. Klein's confirmation hearing in my questioning of his unconditional approval of the Bell Atlantic-NYNEX merger. If the current law only serves to protect against mergers that tend to diminish competition where it already exists, it may be

time to amend the law to foster competition where none has existed. I hope that Joel Klein will help us do that.

I was taken aback by the language Mr. Klein used in his May 20 letter to Senator BURNS by which he ''specifically rejected the suggestion in the conference report'' on the Telecommunications Act that the 8(c) test be employed. But the more that I reviewed the matter, the more I realized that much of the fault lies with the conference report itself and the Telecommunications Act's failure to provide a definitive test.

I was not appointed to serve on that conference committee, although I was serving as the ranking Democrat on the Antitrust Subcommittee on the Judiciary Committee at the time. I would have wanted to help that conference incorporate a stronger test into the law. That did not happen.

It is my hope that working with the Department of Justice we can now help ensure that the test the Attorney General has adopted—that the local market be fully and irreversibly open to competition—is a meaningful standard and strong enforcement tool. If not, Congress should revisit it and strengthen it.

I do think that Senator HOLLINGS is correct when he criticizes the addendum to the Justice Department's submission in connection with the SBC Communications application. Both Senator HOLLINGS and Congressman BLILEY concur as principal drafters of the law regarding their intent and its meaning. I trust that the Antitrust Division will review its position on the proper meaning of section 271 of the Telecommunications Act and its requirement for competing service providers to offer facilities-based services.

In opening the debate on this nomination, Senator HATCH cited ''ambiguities left in the wake of the Telecommunications law'' and ''unsettled policy areas'' and said:

> But I believe it is neither fair nor wise to hold a nominee hostage because of such concerns, especially one as competent and decent as Joel Klein. In my view, sound public policy is best served by bringing this nominee up for a vote permitting the Justice Department to proceed with a confirmed chief of the Antitrust Division, and for us in Congress to move forward and work with the Department and other involved agencies in the formulation and implementation of telecommunications policies.

I agree. I look forward to the Judiciary Committee and our Antitrust Subcommittee exploring these important competition and antitrust policy matters. I will likewise expect Senator HATCH to support other Administration nominees for areas in which policies are in controversy.

Now that the majority leader has moved to implement his new hold policy of proceeding on nominations, I trust he will not delay any further the nomination of Eric Holder to be Deputy Attorney General and that he will promptly move to consideration of the judicial nominations reported by the Judiciary Committee over the last several weeks.

Some wrongly view confirmation as the end of the nominee's work with the Senate. I hope that this is just the beginning of Assistant Attorney General Joel Klein's work with us to protect consumers and foster competition. This is an awesome responsibility.

Mr. HATCH. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HATCH. I ask unanimous consent that the call of the quorum be rescinded.

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

Mr. KERREY addressed the Chair.

The PRESIDING OFFICER. The Senator from Nebraska is recognized.

Mr. KERREY. Madam President, I had a conversation with the distinguished Senator from Utah who encouraged me to throw my entire prepared remarks away and take a gentlemanly course and support the nomination of Joel Klein. I have chosen not to do that. I have great respect for the Senator from Utah, and I have chosen to continue to offer to my colleagues reasons why I have chosen to vote against Joel Klein, why I have chosen to oppose the nomination.

I like the man, I respect him, I believe he is a good individual, and I don't like coming here opposing a nominee that President Clinton sent to the Congress for confirmation. I would like very much to give him my unqualified support, but I simply, Madam President, cannot.

About a year and a half ago, many of us in this Chamber who participated in this debate over the Telecommunications Act—and I must say, Madam President, one of the reasons I found myself in opposition to Mr. Klein is I led him to get the Department a role in the Telecommunications Act so that they would have some voice in determining whether or not there could be competition prior to approving the moving of entry from one sector to another. I fought for that, and many opposed that. We ended the day and prevailed here on the floor, prevailed in conference, and prevailed for final passage. It was signed and made a part of the law.

Mr. Klein, in response to a question raised by a Member of this body who actually opposed that, it seems to me in a letter gives away Justice's role. Now the Attorney General, Janet Reno, has written in response to our asking her if she thinks Justice has a role, has written a letter saying, indeed, she believes Justice does have a role, and she intends to exercise the authority the law gives her.

Indeed, Madam President, Mr. Klein, in meetings with me and with others who were concerned about the remarks he made in this letter, has given me assurance and pointed to several cases where his actions seem to be very, very much procompetitor—my hope is that Mr. Klein is. As the head of the Antitrust Division of Justice—I can read the tea leaves earlier on the cloture vote and would expect he will receive a fairly substantial vote, a resounding vote of support. My hope is I am wrong.

This morning in the Omaha World Herald this article appeared. The headline says, ''So Far, Consumers the Losers in Battle for Dial-Tone Dollars.''

Madam President, this is what Members should be concerned about, not just the Antitrust Division of Justice but they should also be concerned about the nominees for the Federal Communications Commission and what they intend to do, how they intend to vote, how they intend to make certain that we have competition, because unless we get competition at the local level, unless there is competition at that local level for that local dial tone, indeed for all information and services at the local level, it is not likely the consumers will benefit in the same ways that consumers benefited after divestiture in 1982. Divestiture produced competition in long distance. That competition resulted in a reduction of price to the consumer and an improvement of quality, as competition almost always does.

Without precedent, this legislation proposes to move us from a monopoly at the local level—which we still have for most residential customers—from a monopoly to a competitive environment. We are not there yet. We still have a monopoly. That monopoly can always, if there is only one choice that the consumer has, can always basically charge whatever they want to charge.

This new legislation preempts States authorities from being able to do many of the things they had done in the past. There are 358,000 residential lines in the regional Bell company serving Omaha, NE. The present rate for that local residential service is proposed to be $16.35, from a current rate of $14.90, a 9.7-percent increase, almost a 10-percent increase from another local company that is also being proposed. They have that authority, now Madam President, to be able to come and raise these residential rates.

It is going to be a problem for all of us if we do not get, in as expeditious a way as possible, competition down to the local level. What will happen, all of us will have to be explaining why it was, in 1996 when we debated this bill, why it was that we all promised this would be great for the consumers—reduction in price, improvement in quality of service—why it is that they are not seeing this reduction in price, why it is they are seeing an increase in price instead of a promised reduction. The answer will be, we don't have competition yet.

My belief is that the Congress is going to have to think in a very hard and clear fashion what it is we have to do in order to make certain that we

have competition. I remember the distinguished Senator from Arizona, Senator MCCAIN, as he debated this bill, and I believe he ended up voting against it for precisely the same reasons I am talking about now. He actually talked about lots of regulatory requirements that didn't necessarily mean that we would get competition. He favored, as I heard him at the time, something that actually had great appeal to me, which is forget all the regulatory requirements, let's have almost a Le Mans racing start. Set a time certain when everybody can compete, regardless of who they were, in everybody else's market—let's have that.

As my colleagues will probably recall in 1996 when we were having our debate, the prediction was that what we would have is the regional Bell companies competing against one another in individual markets, that we would have the cable companies then competing. Since that time, what we have seen is a significant amount of mergers, and I don't believe the kind of movement needed, with the single exception of a few companies. We have seen Ameritech moving aggressively to open their market and try to get approval, as well to get into long distance. That is the transaction that the law provides for—open up your local market and then you can go into long distance service. That is the idea of the law. But it isn't happening very fast.

As a consequence, I don't think I will be the only Member who opens up their hometown newspaper and looks at the headline and sees, ''So far consumers the losers in battle for dial-tone dollars.'' The reason the consumers will be the losers is that the consumers in Omaha, NE, the residential consumers, when it comes to dial tone, they have two choices—take it or leave it. If you don't like the increase you can buy your local service from nobody else. You really only have one choice.

I say, Madam President, I will not be supporting the nomination of Mr. Klein. I will be voting against Mr. Klein. I hope that other Members who are wondering what this debate is about will give it some very serious thought. They will, as well, be hearing from consumers in the not-too-distant future, if they haven't already, ''I remember, Senator, when you were debating this. Didn't I recall you issued a press release saying that this legislation was going to produce lots of new competition and reduction in price, and improvement and quality of service? Where is the competition? I still don't see it. Where is the promised price reduction? Where is the promised benefits to the consumers that were supposed to be coming our way at a theater near you?'' Instead, what we have is price increases.

Mr. Klein, in his rather unfortunate, as he describes it, letter in response to a question by a Member who opposed giving the Justice Department authority over antitrust matters when it came to telecommunications, Mr. Klein says today, ''Well, I didn't really mean all those things. I intend to be a very forceful advocate for competition.''

Madam President, I don't believe that is likely to happen. Mr. Klein approved the Bell Atlantic NYNEX merger. There were a lot of people, when this bill was being debated, that would not have stood up and said, ''The reason I am supporting this is because I hope what we get is the regional Bell operating companies merging with one another. I hope that happens. I hope we get mergers because that is exactly what we need in order to get more choice.'' I don't know how that produces more choice for the residential consumers in this new expanded area that now a single company will have. I see decreased choice.

I heard a lot of people coming down and saying in fact what we are likely to see is the large local monopolies competing with one another for service. Though we are seeing some of it, I don't believe we are seeing anywhere near what we promised we were going to see, and unless we get a vigorous advocate for competition in the Department of Justice, unless we get, as well, on the Federal Communications Commission, appointees who will do the same, as I said, Madam President, there will be a lot of people in this Senate as well as in the House of Representatives having to explain to their consumers, to their residential consumers, just what exactly did you think was going to happen back in 1996?

So I hope that my colleagues, when they come down here to make a decision about whether or not they will vote yes or no for the man who will have a very significant role in determining whether or not we were right or wrong in 1996, I hope they give very serious consideration to whether or not they believe that this individual is going to be able to do what we all promised we were going to try to do when we voted for and took credit for this very significant piece of legislation in 1996.

I yield the floor.

Mr. HOLLINGS. Madam President, let me first thank my colleague, the distinguished Senator from Nebraska. He has been very, very participatory over the years. It actually took us about 4 years to get the Telecommunications Act of 1996 to a vote. On both sides of the Capitol and both sides of the aisle we had a very, very deliberate discussion and treatment of the particular issues involved. No one understood better the thrust of trying to deregulate and bring about competition than Senator KERREY of Nebraska. I praise him publicly, once again, for his leadership and the inclusions that he had contained in the final act itself.

Referring to that final act, Senator KERREY tells exactly what is at stake here—this institution. The U.S. Senate seemingly has no historical memory. What we really had on course during the 1960's, 1970's and early 1980's was a terrible monopolistic control of American Telephone & Telegraph. The fact of the matter was that they had some 12 particular rulings by the Federal Communications Commission. But the smart lawyers for the AT&T group would always put those on appeal, seek further delay, further consideration. While there were 12 orders on course at the Federal Communications Commission, mind you me, none of them could get enforced. We were in an outrageous standoff in the courts and at the Commission and, yes, an outrageous standoff in the Congress itself. We could not get a bill passed. They have that much political power. There isn't any question about it.

So, a very brilliant and dedicated jurist, Harold Greene of the circuit court here in Washington, DC, took this matter over on a petition from the Justice Department for the AT&T breakup. In 1984, the modified final judgment was handed down and the Bell companies were spun off on their own to begin competition, and AT&T itself was opened up for competition. That wasn't easy. I wish my friend, Bill McGowan of MCI was here because it was 30 years ago, practically, that he, with a little two-floor apartment down in Georgetown, with a little aerial on top and three assistants, started to try to get into long distance. Very interestingly, the Farmer's Home finally gave him a loan. Can you imagine that? Competition started with a Farmer's Home loan. With that little bank, so to speak, he worked and brought some cases, he began nibbling away at the magnificent monopoly of AT&T in long distance.

Since that time, of course, the long distance market has opened up. You've got MCI, Sprint, GTE, and the Brits are coming in, and the Germans, and all are participating—the Canadians, and otherwise. And so you have a very dynamic long distance market.

However, the monopolies at the local level persisted, and those monopolies were intended for the ''public convenience and necessity''—that is a phrase hardly heard in the halls of our National Government—in order for the advantages, the services, the opportunity, the advancements to be brought onto the market and enjoyed by the public, we instituted the Federal Communications Commission. We had the old rulings coming out with respect to getting licenses to carry, and otherwise, at the State level, at ''public convenience and necessity.'' And we intentionally gave these seven Bell operating companies a monopoly. We said: You provide the services and we will protect you so that you are not bothered with the competition. On the contrary, if you get those services to the people, we will give you a profit that averages around 12 percent. Sometimes, in hearings, it went above that. You find them now to have made one heck of a lot of money. But my crowd is down in Buenos Aires, and I just read

this past week that Bell South is investing in Brazil, which has some 20 million people. That is way more than the 3.6 million that we have in my little State of South Carolina. So more power to them. They have been well-operated. They have that monopoly. That was a big headache that we had in trying to bring about deregulation, deregulation, deregulation.

This crowd up here in the House and Senate have no idea of the struggle that we had and the expertise that went into the drafting of this particular Telecommunications Act of 1996, to make sure that that monopolistic control, that checkpoint, that bottleneck, that choke-point was broken up, so that competition really could ensue. And we had what we call the ''checklist.'' And I can see that being worked on late nights around the clock, over Thanksgiving holidays, working, of course, with the Bell operating companies, we would meet—I forgot my days now— there was one on Friday and long distance on Monday. The long distance may have been on Friday and the Bell operating companies on Monday. But I set up a system, those years back, as the chairman of the Committee of Commerce, Science, and Transportation, whereby everything would be operated on top of the table. We would bring all sides in. They would all be considered and they would be told where we were and what we were negotiating and why.

I deemed that nothing was going to be done, because there were all kinds of attempts during the 1970's and 1980's—and I had learned from hard experience that you had to have a bipartisan bill and you had to have all the parties in, and no last minute surprises, or anything of that kind. So credit must be given to the various staffs on the Republican and Democratic sides, working around the clock, to fathom the particular provisions that are in issue in this particular appointment.

I know that some don't want to hear, and others don't care and they don't listen to this particular background. But it is a very interesting thing because it was worked out and finally voted upon by 95 Republican and Democratic Senators when it passed. There was a strong majority over on the House side.

It was a bill that, interestingly, when we finally agreed in December of 1995, our distinguished friend, the Vice President of the United States, heard that we in conference had gotten an agreement, and he came on the NBC Evening News program right in the middle of the news program. I happened to be listening when I had gotten back to the office. What occurred was that Tom Brokaw said, ''Wait a minute, ladies and gentlemen, we have a newsbreak from the Vice President of the United States.'' I was worried that something may have occurred to the President, but it was not that at all. He came on and said, ''We finally got my information superhighway agreed upon and I got everything I wanted. Well, this was December 1995, right after that 1994 election. Speaker GINGRICH on the House side said, ''If he got everything he wanted, that bill is deader than Elvis.'' The leader on the Senate side, Senator Robert Dole, said, ''I am not going to call it.''

Of course, I had the duty, during the ensuing weeks through into Christmas and Christmas week, and all through the month of January, of holding the line.

I describe that to my colleagues because I want them to know that every little thing in that bill was worked out with everyone and to their satisfaction and, finally, of course, to the Speaker and the Majority Leader Dole, because the bills were called in February of last year and passed both Houses and were signed by the President.

Now, in coming about the breakup of the monopolies, to make sure—because you can't get competition going unless the Bell companies go along. I can tell you here and now, if I ran a monopoly, I would continue investing in Buenos Aires and all like that for my stockholders, and what have you, and making money, and just hold on and appeal and drag feet and everything else.

Let me emphasize that is just exactly what has happened, why this particular nomination ought to really be rejected. It is a sort of sad day when you work as hard as you do to get something done for the administration, and the administration sends up an appointment of this kind that upsets the entire apple cart.

Let me tell you, Madam President, here it is, just last weekend, ''MCI Widens Local Market; Loss Estimate,'' in the July 11 Wall Street Journal. Some $800 million—saying its losses from entering that business could total $800 million this year, more than double its original estimate. Why? Because here is an analysis right here again in the Wall Street Journal, over the weekend, when they announced that their shares dropped 17 percent. I only quote Chris Mines, senior analyst of Forester Research, Inc., in Cambridge, MA, who said, ''MCI's complaints are totally justified. In general, I think local carriers are dragging their feet, using every means at their disposal to protect their monopolies.''

Now, Madam President, it is just not the news articles in the Wall Street Journal. Take this week's Business Week magazine, on page 33, ''Why SBC Shouldn't be the First Bell in Long Distance.'' Rather than reading the entire article, little squibs encapsulate those reasons. ''How SBC keeps rivals away: one, excess charges. AT&T needed customized routing to provide directory assistance to its customers in SBC's territory. SBC's initial quote is $300 million. AT&T says other Bells charge $1 million to $2 million.'' That is rather than the $300 million.

So it is perfectly obvious that they sit there and make this outrageous charge and that holds up everything. You get Senators running around, ''I don't know what is the matter with our bill. We want to open up the market. Let market forces operate.'' You have monopolies determined. Here is another reason here how SBC keeps rivals away. ''In Oklahoma, competitors must pay $19.13 per line for SBC's unbundled network, but SBC's retail rates are $14.34 a month.''

So, if they are going to charge 20 percent again more than anybody coming in the market, anybody coming in the market is going broke, and there is a loss by another long distance carrier. AT&T is trying to get in this market. MCI is trying to get in the other long distance market. They are losing already $800 million trying to just break it.

Third, legal attacks. How SBC keeps rivals away. Legal attacks. SBC has appealed even basic decisions by State regulators. For example, SBC appealed a Texas decision to let Teleport Communications Group provide competing local service. SBC contends Teleport had not met State standards.

Madam President, I cite this from this particular article because it's momentary, it's timely. What really happens is not just MCI and AT&T, but others in these monopolies, with their lawyers, are bringing cases to test the constitutionality of the Telecommunications Act of 1996. The one thing they said, ''Let's stop the bickering. Can't we work in a bipartisan nature and get things done?'' The one thing done this past Congress on a bipartisan basis was a 95 to 4 vote for the Telecommunications Act of 1996—totally bipartisan. I think those things ought to be understood and how they came about, and how long and hard we worked over them.

Now, in getting about this particular task, I communicated with President Clinton and the White House and asked him if he could note in a letter just exactly what his concerns were. I want to make sure staff gets copies of every one of these because they are not getting my file. And every time I get ready to talk, I just need a few notes. I can't even get a few notes. They are back there hidden away. So you get your copies.

Remember this: I have a White House letter, Madam President, dated October 26, 1995, from President Clinton. I ask unanimous consent that this letter be printed in the RECORD.

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

THE WHITE HOUSE,
Washington, DC, October 26, 1995.

Hon. ERNEST F. HOLLINGS,
Ranking Member, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR FRITZ: I enjoyed our telephone conversation today regarding the upcoming conference on the telecommunications reform bill and would like to follow-up on your request regarding the specific issues of concern to me in the proposed legislation.

As I said in our discussion, I am committed to promoting competition in every aspect of

the telecommunications and information industries. I believe that the legislation should protect and promote diversity of ownership and opinions in the mass media, should protect consumers from unjustified rate increases for cable and telephone services, and, in particular, should include a test specifically designed to ensure that the Bell companies entering into long distance markets will not impede competition.

Earlier this year, my Administration provided comments on S. 652 and H.R. 1555 as passed. I remain concerned that neither bill provides a meaningful role for the Department of Justice in safeguarding competition before local telephone companies enter new markets. I continue to be concerned that the bills allow too much concentration within the mass media and in individual markets, which could reduce the diversity of news and information available to the public. I also believe that the provisions allowing mergers of cable and telephone companies are overly broad. In addition, I oppose deregulating cable programming services and equipment rates before cable operators face real competition. I remain committed, as well, to the other concerns contained in those earlier statements on the two bills.

I applaud the Senate and the House for including provisions requiring all new televisions to contain technology that will allow parents to block out programs with violent or objectionable content. I strongly support retention in the final bill of the Snowe-Rockefeller provision that will ensure that schools, libraries and hospitals have access to advanced telecommunications services.

I look forward to working with you and your colleagues during the conference to produce legislation that effectively addresses these concerns.

Sincerely,

BILL CLINTON.

Mr. HOLLINGS. Madam President, I quote the second paragraph:

As I said in our discussion, I am committed to promoting competition in every aspect of the telecommunications and information industries. I believe that the legislation should protect and promote diversity of ownership and opinions in the mass media, should protect consumers from unjustified rate increases for cable and telephone services and, in particular, should include a test specifically designed to ensure that the bell companies entering into long distance markets will not impede competition.

I emphasize this because I had the charge from the President himself. Now you have the President's nominee coming and refuting all of that, because if you want to know where rates will increase, instead of competition, we are going to get consolidation, and instead of a competitive place in the market, you are going to get fixes all around. This crowd has been operating monopolies for, lo, decades upon decades. They know how to do it. They have a hard time learning.

AT&T in the 1980's pared down by a third the size of AT&T after the modified final judgment in 1984. But they made twice the profit after they finally learned how to compete. Our friends, the Bells, have yet to come and learn that. In fact, I strongly advised from these happenings that they have no idea of competing; they have every idea of holding onto the monopoly as long as they can.

Madam President, ''If we can get an Assistant Attorney General or Deputy Attorney General''—whatever you want to call Mr. Joel Klein—''in our camp, rather we can hold on and continue making out like gangbusters for years to come.''

Now, as a result of the President's letter, we finally have section 271(c)(1)(A) of the Telecommunications Act, and I ask that the statement under ''presence of the facilities-based competitor, including both residential and business subscribers, having a facilities-based competitor for both business and residential''—which was proscribed in this law, and there are no ifs, ands and buts how it is written—I ask unanimous consent that it be printed in the RECORD, just that section is necessary and not the entire act, of course.

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

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

Mr. HOLLINGS. Madam President, we had a glowing candidate for the Acting Assistant Attorney General in Joel Klein on March 11, 1997. He went down to a class, a legal work seminar, on March 11, and the title of the seminar was ''Preparing for Competition in a Deregulated Telecommunications Market.''

Joel Klein, on page 9, I read here, and I quote: ''Now let me add a few words about how we will apply this standard to our BOC applications under section 271 of the act. Our preference, though we recognize that it may not always occur, is to see actual broad-based business and residential entry into a local market.''

I ask unanimous consent that this particular speech be printed in the RECORD in its entirety. So I am not quoting out of context.

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

PREPARING FOR COMPETITION IN A DEREGULATED TELECOMMUNICATIONS MARKET

(By Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice)

First, I want to say that I'm delighted to be here today and I'm grateful to Joe Sims and Phil Verveer for having invited me. I can tell from reading the program and looking at the impressive array of speakers that this has been a comprehensive and informative conference on some cutting-edge issues in the communications industry. In fact, when I realized that I was going to be the last person to speak I was reminded of Adlai Stevenson's quip in a similar situation when he said, ''We're at the point in the program where everything that could be said has been said but, unfortunately, not everyone has had a chance to say it.'' So, I'm especially appreciative that so many of you have stayed around to hear my closing remarks and I hope that, despite the odds, I may be able to add something to the overall discussion.

Let me start by stating the obvious: what we're going through right now in the communications field is truly extraordinary. Technology, globalization, and last year's legislative, executive, and administrative actions have come together to create an environment of rapid change, great opportunity, and considerable risk. We all know that ten years from now things will be very different in the communications industry; we just don't know how they'll differ. From our perspective at the Antitrust Division, we have one, overarching goal—to maximize competition. To be more concrete about that, as I see it, the ideal result would be a variety of different conduits—be it wire, wireless, cable, or what have you—that link people with all kinds of content—be it voice, video, audio, computer, and so on. But envisioning an ultimately desirable competitive market structure is not the difficult part here: what's really hard is how we get there in a market that's transitioning from regulation to competition. And that is the journey that we in the Antitrust Division have embarked upon—at a somewhat dizzying pace. I might add, since the passage of the 1996 Telecom Act a little more than a year ago.

Before I focus in on some of the specifics, let me give you a sense of the breadth of what we're dealing with. In the first place, we've seen a flood of radio mergers now that the 1996 Act has authorized far more liberal ownership rules. I'm advised that there have been over a thousand such mergers in the past year and about 150 of them have been brought before the Division, principally through the hart-Scott-Rodino process, but also through independent inquiry in several non-reportable transactions. We've conducted extensive investigations in many of these cases and, to date, we've sought divestitures in a handful of mergers. And while that's important in terms of the economy the real story here is how much concentration is occurring. In short, the concentration envisioned by Congress is taking place, no doubt allowing the industry to achieve some important efficiencies. And so long as this consolidation doesn't erode competitive opportunities in any market—and, with the application of sound antitrust principles as a guide. I don't think it will—then these mergers may ultimately strengthen the position of radio in the overall communications industry. And, frankly, that's all to the good.

Beyond radio, we're also experiencing consolidation in other areas of the communications industry. The FCC is still evaluating what limits to place on broadcast ownership but, in other areas, we've already seen significant movement. There's been a major Bell Company/cable merger—U.S. West/Continental Cable—which the Division cleared with some modification to the original deal. And we've also seen three major telephone mergers—SBC/Pactel, which we cleared without objection several months ago, and Bell Atlantic/NYNEX and MCI/British Telecom,

which are both still pending before us. These cases raise important questions about potential competition, and also about international interconnection where market conditions may differ significantly in different countries and we have expended, and will continue to expend, considerable time and energy analyzing them and other such mergers that may come before us in the future.

Now, in the time that remains, I'd like to focus in on one particularly challenging aspect of this journey through the communications industry and that is the deregulation of telephone services in this country. This was probably the most significant part of the 1996 Act and it raises enormously difficult questions, questions that we at the Division have, to some degree, been dealing with under the Modified Final Judgment, or the ''MFJ,'' that resulted in the break-up of AT&T and the creation of seven Regional Bell Operating Companies, or ''RBOCs,'' as they are called, with severe restrictions on what they could do beyond providing local telephony within their own service areas. As a result of that lawsuit, there can be little doubt that the Nation has seen significantly improved long distance competition, accompanied by the innovation and downward pressure on prices that results from such competition. That is not to say that everything's perfect in long distance—even more competition would certainly be welcome—but it's important to recognize how far we have come when we have three well-established competitors, hundreds of other resellers, and four fiber-optic systems wiring the country, with a fifth in progress. I can tell you from my personal dealings with officials from other countries that, as a result of the AT&T case, the U.S. is positioned for global competition in a way that is the envy of our current trading partners—whose telephone companies will be our future competitors, I might add.

But now we are charged with taking the next steps—in particular, the Congress, together with the leadership provided by the Clinton Administration, established a statutory framework that is designed to open up local telephone markets to competition and that would allow the local companies to move into in-region, long distance service for the first time. The goal of this process is to have full-scale competition in telephony throughout the nation. In a nutshell, consumers should have as many as possible, but at least several local options, long distance options, and, ultimately, combined local and long distance options (one-stop shopping, if you will). Once again, knowing where we want to get is the easy part: it's getting there that's hard. And to accomplish that goal, the statute puts in place a variety of interrelated steps and assigns responsibility to three separate agencies—the FCC, the various state regulatory commissions, and the Department of Justice. This mix of players, I would suggest, sensibly reflects the fact that telephone regulation has historically been a shared function of the FCC and the state agencies and, quite naturally, both of them are necessary to the deregulatory process as well. And we also belong there, essentially because the goal of the process is competition and we have expertise in that area generally and with respect to telephony, in particular, because of our extensive involvement in the AT&T case.

The vision of the 1996 Act was premised on a simple formula: if the regulatory environment were different, the market for local telephone service—previously thought to be a ''natural monopoly''—would be subject to the discipline of competition, bringing down prices and increasing quality and choices for consumers. On this point, there was widespread agreement, supported by the experience of several states in paving the way for competition in the market for local telephone service. Building on that experience in 1995, the Antitrust Division, along with Ameritech, AT&T, and many other parties proposed, on a trial basis, a waiver of the MFJ, allowing Ameritech to offer in-region, long distance service in return for compliance with some measures designed to open its local market to competition and a demonstration that actual competitive opportunities were expanding. This proposed waiver, like the 1996 Act, contemplated the creation of new, facilities-based, local service as a way to bring real competition to the local telephone market. The Act seeks to do this on a much broader scale, and in so doing, calls for a series of transitional steps. Getting these steps right is no easy task, and although they may not immediately lead to the type of comprehensive facilities-based service that we hope to see over time, we all realize that we should not let the perfect be the enemy of the good here.

As I see it then, implementing the deregulatory vision set out in the 1996 Act involves four basic things: (1) a set of rules that will allow new entrants into local markets—the so-called interconnection rules adopted by the FCC last August and which have now been stayed in significant part by the Eighth Circuit: (2) another set of provisions that establish the criteria necessary to facilitate local competition and with which the RBOCs must comply before they are allowed to provide long distance and one-stop shopping services: (3) access reform, designed to reduce the price paid to local carriers for originating and terminating long distance calls so that this price will reflect the actual cost of providing the service: and (4) a universal service plan that will eventually replace the implicit subsidies contained within the current regulated telephone service system with explicit and competitively neutral subsidies. As to this last point, I should quickly explain that the current system requires some users to pay above-cost rates to subsidize other users who are served at rates below cost: the 1996 Act calls for these implicit subsidies to be made explicit and to be paid for through a competitively neutral universal service fund. Until we fully implement this mandate, some local exchange carriers (or LECs, as they are called) may be required to bear the costs of serving these customers at uneconomic rates and/or we will continue to see inefficient pricing and entry signals which will tend to distort competitive opportunities and thereby hurt consumers.

Now, as I see it, the paradox of this kind of deregulatory effort is that it depends upon a series of regulatory steps—all taken, to be sure, in the name of deregulation—and those regulatory steps, in turn, can significantly affect the long-term prospects for full-scale competition in telephony. There is no formula or equation that one can look to in order to get these things right. They involve the exercise of discretion by government agencies, which in turn requires careful, sound judgments. And, given that these predictive judgments are necessarily based on incomplete information, we should all be somewhat humble in second-guessing those who have to make the calls. Interestingly, the Fifth Circuit, quoting Justice Cardozo, made just this point about a quarter of a century ago in a case evaluating an FCC regulation prohibiting telephone companies from offering cable service in their regions, explaining that: ''[i]n a complex and dynamic industry such as the communications field, it cannot be expected that the agency charged with its regulation will have perfect clairvoyance. Indeed, Justice Cardozo once said, 'Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision.' ''[1]

Against the backdrop of this call for humility, let me now go on to highlight the problems in making the necessary regulatory judgments by examining the four transitional steps that I just mentioned. First, in order to get even some local competition, at least for some period of time, competing carriers will have to either purchase service from the LEC at wholesale and attempt to compete with the same LEC by reselling at retail or it will have to use the LEC's facilities—switches, loops, and the like—in whole or in part. In either case, someone has to set a price for the product—be it wholesale service or the unbundled elements. That price in turn can have important repercussions—set too high, it can unfairly burden new entrants and make local competition impossible; and set too low, it can give new entrants a competitive advantage at the expense of the incumbent LEC. What this all means is not just that one of these companies may make a little (or even a lot) more than the other but that long-term competitive conditions can be seriously affected by these pricing decisions. This particular concern has led to the Eighth Circuit litigation in which the incumbent LECs are challenging the FCC's pricing methodology (as well as the Commission's authority to impose a certain pricing methodology to begin with). Fortunately, at least from our point of view, most of the States have followed the Commission's pricing methodology and so, while the litigation goes forward, the actual prices for wholesale and unbundled elements may not be materially different regardless of who ultimately prevails in the Eighth Circuit. I say that's fortunate from our point of view because we supported the FCC's approach as a sound pricing methodology for stimulating efficient local entry.

The second area where some difficult regulatory decisions must be made in this deregulatory process has to do with the issue of when a particular RBOC is permitted to enter the long distance market. Under the statute, this is a state-by-state determination, made by the FCC, with key inputs from the state regulatory agencies and the Department of Justice. Here, too, you can readily see the significance of the trade-offs in the regulatory decision. If you let the RBOC into long distance prematurely, two bad things can happen. First, you may undermine the chance to ensure a competitive local market since once in long distance, the RBOC's incentive to cooperate with its competitors will diminish—if not altogether, at least significantly. And second and derivatively, a premature entry into in-region, long distance service gives the RBOC an unfair advantage in the offering of one-stop shopping since it can readily combine its local service with one of several long distance services easily available to it in the marketplace, while its potential competitors may not have nearly so easy a time combining their long distance service with local service that has heretofore been unavailable to them. On the other hand, if you keep the RBOC out of long distances for too long a period, you risk giving the long distance carriers an undue competitive benefit, since only they are able to offer customers both local and long distance service for the period of time that the RBOC is denied entry, thereby giving them a first mover advantage. Not surprisingly in this environment both kinds

[1] *General Telephone Co. of Southwest* v. *United States*, 449 F.2d 846, 863 (5th Cir. 1971) (quoting Benjamin Cardozo. The Nature of the Judicial Process 145 (1921)).

of carriers—local and long distance—feel very strongly about the timing of RBOC entry into long distance, even to the point of purchasing significant advertising to make their respective cases.

For our part at the Antirust Division the issue of RBOC entry into long distance has been a special focus. Under the statute, we are expressly charged with evaluating each of the fifty state applications and our competitive assessment must be given ''substantial weight'' by the FCC. What is probably most notable about the process is that we are authorized to make our assessment ''using any standard the Attorney General considers appropriate.'' Now, given that broad swath the first thing we needed to do is to establish a concrete standard so that applicants would know in advance how we'd be evaluating them. We also needed to relate our standard to the other, specific provisions of the statute—such as the 14-point checklist the Section 272 separate-subsidiary requirements, and the Track A and Track B entry provisions, as well as the public interest test that the FCC is charged with applying. In order to meet this challenge, we engaged in an extensive inquiry, soliciting comments from all interested parties and meeting with virtually all the affected players. We received almost seventy-five comments and have met with countless industry officials.

The upshot of this process has been to reach the following conclusion: Our basic standard is that before an RBOC should be allowed to enter long distance, it must be able to demonstrate that its market is truly open (which, I should make clear, is different from saying its market is fully competitive). Before I put meat on the bones of that standard let me first say how we think it integrates with the remainder of Section 271. We believe that the other provisions—the checklist the facilities-based requirement the separate-subsidiary requirement and the option of Track B—are all necessary, though not sufficient, to support entry. These requirements, almost as their names imply, involves fixed points but, by themselves are not sufficiently dynamic to ensure that real competition can take place. That's where we think our approach comes into play; we view it as the dynamic part of the equation looking to ensure that the wholesale support systems for opening up local markets are not simply claimed to be in place, but that they will actually work in fact are scalable, and have been beachmarked, so that competition will be real and not marely theortical. We think this approach is the best way to ensure competitive effectiveness which we take to be our express charge under the statute and we think it dovetails nicely with the ''public interest'' standard that the FCC is charged with applying in making the ultimate decision under 271 whether to approve a particular application. More broadly, we believe that our approach fits well within the overall statutory scheme adopted by Congress, nicely blending the fixed and dynamic requirements to reach an effective result.

Now, let me add a few words about how we will apply this standard to RBOC applications under Section 271 of the Act Our preference, though we recognize that it may not always occur, is to see actual broad-based—ie, business and residential—entry into a local market. This kind of entry requires not only appropriate agreements between the RBOCs and their potential competitors, but also the wholesale support systems necessary to ensure that when a current customer is switched from the RBOC to the new competitor, the switching process occurs quickly and effectively, so that the customer is satisfied and its new phone company is not blamed for messing up the transfer—or that, after a customer has been switched and she needs any services, such as repair of her phone line, she gets it from the RBOC in a timely and effective manner. The truth is that, no matter how effectively systems are designed and even assuming complete good faith on the part of the RBOC, this kind of transition can have a lot of bugs in it. Once we see successful full-scale entry, however, then we will have reason to believe that the local market is open to competition. This approach doesn't require the shift of any particular amount of market share; nor should it take very long once there is true broad-based entry into the RBOC's market. Rather, using a metaphor that I've become quite fond of, we just want to make sure that gas actually can flow through the pipeline; and the best way to do that is to see it happen.

This approach—i.e., looking for tangible entry—also has two additional virtues: first, once there is such entry, the new entrant certainly should have an incentive to make the process work, since any new customers that are ill-served will blame the new entrant. This will mean that the new entrant is not likely to be gaming the system and, if there are problems, the reason will be that the local market, for some real-world reason—malign or benign—just isn't ready for competition yet. And second, if broad-based competition appears to be working smoothly, as we certainly hope it does, it will establish a benchmark against which future, post-RBOC entry into long distance, performance can be measured. In other words, if competitors can obtain what they need, and what they are legally entitled to get from the RBOC prior to its entry into long distance, but not after it then we will have reason to suspect that something is wrong and we will be able to pursue appropriate remedial action.

Now, an even harder problem arises when the RBOC claims that it's done everything it can to make entry opportunities fully available but, for some reasons, no new entrant has decided to go forward in a significant way. In these circumstances, we will attempt to determine what the problem is. And, purely at the level of speculation, one could imagine a variety of explanations. For example, the prices being charged by the RBOC could be too high to allow effective competition any time soon or its systems may be too uncertain for the new entrant to take the risk of large-scale entry, or the RBOC may not be cooperating with its competitors by providing the necessary wholesale support systems. One the other hand, it may be that, despite reasonable interconnection terms, fully available support systems, and so on, it simply may not make economic sense for a new entrant to come into any given market on a large-scale basis. Or, a more elaborate version of this problem may be that, if the long distance carriers think they are better off preventing the new competition by the RBOC in their market and also think that the best way to achieve this result is to stay out of the local markets, they may simply choose not to enter. On the third hand, if you will, it may be that some other factor—such as a state statute or local regulation—is making large-scale entry infeasible or, at least, very unattractive. These are some possibilities, and I'm sure there are others as well.

In any event, we will carefully examine the facts in any case where there isn't full-scale entry to determine what's actually going on. In such circumstances, of course, we will ultimately have to make a fact-based determination on a case-by-case basis. But I want to be very clear about one thing: we will pay careful attention to see whether any party is trying to game the system for its own parochial reasons. And, if we think that's what's going on, be assured that we'll take appropriate action. We don't have any dog in this fight—just a desire to ensure full-scale competition in telephony in an enduring fashion. Once that occurs, the market can pick the winners and losers.

Let me now quickly turn to the last couple pieces of this deregulatory puzzle—access reform and universal service. These areas, which are related, also raise long-term competitive concerns. Lowering access charges to cost is desirable in a competitive market but, in the process, there are at least a couple of things you need to be alert to—first, you want to ensure that no one gets an undue competitive advantage during the transition process: and second, you need to make sure that the incumbent LEC is fairly compensation for any implicit subsidies in the system that it has to bear and which have previously been supported by above-cost access charges. That is where the universal service funding system kicks in. It is designed to pick up these kinds of subsidies so that, as I said earlier, competition can go forward without unfairly burdening those players that have to bear the costs of such subsidies.

These kinds of issues can be enormously complex—first, how do you sort out implicit subsidies as well as any historic costs that a LEC is entitled to recover in a way that is fair and, second, how do you then collect the money necessary to pay these costs through a competitively neutral system. If you've seen the FCC's Notice of Proposed Rulemaking on Access Charges—a rulemaking that is ongoing as we speak—you probably have some idea of how complicated this whole process is. The Commission has raised important questions about rate structure, about rate levels—including possible market-based as well as prescriptive methods for dealing with these levels—and about rate deaveraging, which means allowing different access charges for different customers. Anyway, the trick is to do this in a way that hastens competitive opportunities but that is fair to all parties. I am confident that the Commission will do just that.

One final point to remember as we move into a deregulated environment is that the Telecom Act explicitly keeps the antitrust laws in force. This serves not only to guard against any anticompetitive consolidation, but also against any other practices that violate the antitrust laws. Once regulation begins moving off center stage, we are prepared for the possibility that antitrust enforcement may be necessary to ensure full and fair competition in these markets. Especially in network industries, questions of exclusive dealing, control over essential facilities and the use of market power can raise significant antitrust concerns. As a result I intend to make sure that the Division keeps fully abreast of the developments in the marketplace and is ready to take any action necessary to prevent abuses of market power or other anticompetitive practices.

Let me close my emphasizing that while I've tried to accurately portray at least some of the difficulties set in motion by last year's Telcom Act I'm very optimistic about the endeavor we have embarked upon. I've seen some recent stories in the press complaining that consumers haven't yet received the benefits of the 1996 Act but frankly, I think such expectations are unrealistic. We've had a regulated system of telephony in this country for over a century; it won't be deregulated in a year and even after it is deregulated, it'll take time for competition to wring all the fat out of the system so that consumers truly get the best service at the lowest prices. But, if we stay the course, I'm confident that we will ultimately realize how wise this legislation was and how much it will benefit our people. I say that because

history has taught us, time and time again, that deregulation is difficult and transitions can be costly, but if our Nation's economy is to be as strong as it can be—indeed, as strong as it must be in an increasingly globalized market—deregulation is not only desirable, it's essential. In short, history is on our side. A little patience is all that's needed.

Mr. HOLLINGS. I thank the distinguished Chair.

Madam President, it is very interesting. I want to refer back to this because that is in regular type. ''Though we may recognize that it may not always occur''—''though we recognize that it may not always occur.'' We are going to refer back to that in just a few minutes because our distinguished chairman of the Communications Subcommittee, Senator CONRAD BURNS, of Montana, wrote Mr. Joel Klein on May 15, 1997.

I ask unanimous consent that a copy of this letter be printed in the RECORD in its entirety.

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

U.S. SENATE,
Washington, DC, May 15, 1997.

Mr. JOEL I. KLEIN,
Acting Assistant Attorney General,
Antitrust Division,
Department of Justice,
Washington, DC.

DEAR MR. KLEIN: I have written to the Senate Majority Leader requesting that a hold be placed on your nomination to be Assistant Attorney General of the Justice Department's Antitrust Division. I have concerns as to whether your views of the implementation of the Telecommunications Act of 1996 are in accordance with Congressional intent.

Section 271(d)(2)(A) of the Telecommunications Act of 1996 gives the Department of Justice a consultative role when the Federal Communications Commission considers petitions filed by the Bell Operating Companies (BOCs) for authorization to provide in-region interLATA service. This summer the FCC will begin ruling on these applications and I have several concerns about how both the Department and the FCC will implement Section 271 of the Act. As you know, both the House and the Senate, in establishing a test for BOC entry into the interLATA business, rejected the imposition of any requirement that a BOC must face ''actual and demonstrable competition'' in the local exchange market before obtaining relief. While the statute allows the Department to apply ''any standard the Attorney General considers appropriate'', a speech you gave in March raises fears the Department and the FCC may attempt to resurrect this test that was rejected in Congress.

My concern arises particularly from your March 11 speech announcing the Antitrust Division's position regarding implementation of Section 271 of the Telecommunications Act of 1996 (47 U.S.C. Section 271). You stated that the Division would take the position that the BOCs should be forbidden to enter long distance under Section 271 until there is ''successful full-scale entry'' into the local market. As you put it, the point of this requirement is to be sure that with respect to local telephone services, ''gas naturally can flow through the pipeline.'' I also read your speech as suggesting that where there has not been full-scale entry, you would oppose BOC entry unless the BOC could show that its competitors are ''gaming the system.''

You have suggested that Section 271 gives you ''broad swath'' to urge whatever position the Antitrust Division likes. Congress, however, gave the Attorney General a role in advising the FCC with respect to public interest issues because of the Department's antitrust expertise. See, for example, Sen. Conf. Rep. 104–230 for a list of some antitrust standards that might be used. A ''gas in the pipeline'' standard is plainly unrelated to the antitrust laws and, even worse, violates congressional intent that the checklist should be the only measure of when local markets are open. Simply stated, the Attorney General's consultation on antitrust issues must be framed by the specific statutory standards for BOC entry, which preclude anything approaching a ''metric test'' like the one Congress rejected.

More fundamentally, the basic point of the Telecommunications Act is that regulators should stand aside and let market forces work once fair competition is possible. Holding up competition in one market because there is not enough competition in another market makes no sense. It is particularly harmful in this context, for local telephone competition may be slow in coming to rural states for reasons that have nothing to do with BOCs' steps to satisfy the checklist. If so, your approach would prevent rural consumers from realizing the benefits of long distance competition that will be available to residents of urban states, just because potential local competitors want to enter profitable urban markets first.

As you prepare to discharge your responsibilities under the Act, I would appreciate your answers to the following questions. This will enable the Subcommittee on Communications to carefully monitor implementation of this portion of the Telecommunications Act.

1. In your speech you used the following terms—''real'' and ''broad-based competitions'', ''actual, broad-based entry'', ''true broad-based-entry'', ''tangible entry'', ''large-scale entry'', and entry on a ''large-scale basis''. What do these terms mean to the Department?

2. How many residential customers have to be served by a competitor to meet the Department's entry test?

3. How many business customers have to be served by a competitor to meet the Department's entry test?

4. Does there have to be more than one competitor in the local exchange market to meet the Department's entry test?

5. Does a BOC have to face competition from AT&T, MCI or, Sprint to meet the Department's entry test?

6. How do you reconcile Congress' rejection of a metric test for BOC entry into the long distance market with our statement that ''successful full-scale entry'' is necessary in order for the Department to ''believe the local market is open to competition?''

7. You have used the metaphor that the Department ''want(s) to make sure that gas actually can flow through the pipeline'' before allowing interLATA entry. How many orders for resold services must be processed by a BOC in order to satisfy this standard?

8. How many orders for unbundled network elements must be processed by a BOC to satisfy this standard?

9. How much market share must a BOC lose to its competitors to demonstrate that ''gas can flow through the pipeline?''

10. FCC Chairman Reed Hundt testified on March 12, 1997, before the Senate Commerce Committee that a BOC that satisfied the checklist but did not have an actual competitor in its market would meet the entry standard. Do you agree with Chairman Hundt?

11. If the Department opposes a BOC interLATA application, do you believe the FCC should reject that application? If so, wouldn't that give the Department's recommendation ''preclusive effect,'' something that the Act specifically prohibited?

12. You have also stated that the checklist, the facilities-based requirement, the separate subsidiary requirement and the option of ''Track B'' (the statement of terms and conditions) are all ''necessary, though not sufficient, to support entry. What more must a BOC demonstrate to obtain the Department's support?

13. Do you believe that Track B can be used only if no one has requested interconnection under Track A?

14. Can a BOC rely on Track B if it has received interconnection requests from potential competitors but faces no ''competing provider'' which is actually providing telephone exchange service to residential and business customers predominantly over its own facilities?

15. What if requesting interconnectors under Track A do not ask for, or wish to pay for, all of the items in the checklist? Can the BOC satisfy the entry test by supplementing their interconnection agreements with a filing under Track B to cover at least all remaining items in the checklist?

Your prompt attention to these questions would be helpful to the Subcommittee.

Sincerely,

CONRAD BURNS,
Chairman,
Senate Subcommittee on Communications.

Mr. HOLLINGS. Madam President, you can read the entire letter. But I can see the thrust of the letter by this language here, and I quote on page 2.

Congress, however, gave the Attorney General a role in advising the FCC with respect to public interest issues because of the Department's antitrust expertise. See, for example, House conference report 104–458 for a list of some antitrust standards that might be used. A gas-in-the-pipeline standard is plainly unrelated to antitrust laws, and, even worse, violates Congressional intent that the checklist should be the only measure of when local markets are open.

We in the majority who wrote this particular bill would demur very, very strongly from that wording by our distinguished friend, the Senator from Montana, in this particular letter.

What occurred is that the nominee, Joel Klein, in the talk, he talked about you can see when competition is present, when you get to see the gas coming through the pipeline. He alludes to the anecdotal situation of gas pipeline cases.

But Senator BURNS differs with that. He says you are supposed to handle this antitrust, and don't give us anything about when competition starts. You can tell his displeasure because, along with the letter, he put a hold on the Joel Klein nomination. You have a hold on the nomination by the chairman of the Communications Subcommittee, and you got a strong letter with a questionnaire that is included, because I have included it in its entirety in the RECORD.

So 5 days later, on May 20, the Department of Justice, Acting Assistant Attorney General Joel Klein sends a letter to Senator BURNS.

Madam President, I quote:

To begin with, I wholeheartedly agree with your statement that the basic point of the

Telecommunications Act is that regulators should stand aside and let market forces work once fair competition is possible. I want to assure you that the Department of Justice shares that view.

Well, both distinguished gentlemen are writing and speaking colloquially. One wants to tell you that competition is present when you can see the gas coming through the pipeline, or smell the gas if you can't see it. Otherwise, the Acting Assistant Attorney General said, ''Oh, yes, I want to let'' —in the Conrad letter, all these expressions about ''let market forces.'' What we are trying to do is ''let market forces.'' He said, ''I agree with you. We have to stand aside and let market forces work.''

That, Madam President, is not the duty of the Acting Attorney General of the United States. He is supposed to stand there by that market and watch it day in and day out. Because there is one thing that will occur if you let market forces work freely, and that is, monopolies will develop. Consolidations and mergers you see afoot right now are occurring every day, and money is talking. People are not suffering yet, but when they get into that monopolistic position, they will, because there won't be any of the rules and regulations, and they will be in their own private businesses.

This group up here that continues to talk about ''let market forces'' operate, this tells me, one, I have a questionable candidate for the Antitrust Department of the Office of the Attorney General of the United States when he starts chanting about monopolies.

Reading on page 2, again, from the Joel Klein letter, I read on page 2, one sentence:

In order to accomplish these goals, almost immediately after I became Acting Assistant Attorney last October, I asked all of the BOCs [the Bell Operating Companies] as well as any other interested party, to give me their views of the appropriate competition standards under section 271.

We set it out. We set out our report. We didn't need an Assistant Attorney General running around rewriting the law. He is talking about, ''Oh, I got them all in. I am going to start developing policy.'' The Congress developed the policy. It took us 4 years to do it.

Here, he says gratuitously in the next sentence on the bottom of page 2—this is Joel Klein, the nominee:

In formulating this standard, I specifically rejected using the suggestion in the conference report that the Department analyze Bell Operating Company applications employing the standard used in the AT&T consent decree objecting to the Bell Operating Company in regional long distance entry ''unless there is no substantial possibility that the Bell Operating Company or its affiliates could use its monopoly power to impede competition in the market such company seeks to enter.''

Bear with me a minute. I know this thing sounds complicated. And those who want to watch a good, loud show they put on around the world, or whatever the dickens they put on in the afternoon, go ahead and turn to it. But this is very, very important.

Judge Greene had what we call in the trade ''the VIII(c) test''—that they couldn't enter these markets until—this is the one rejected by Joel Klein—''there is no substantial possibility that the Bell Operating Company or its affiliates could use its monopoly power to impede competition in the market such company seeks to do enter.''

Madam President, with that particular VIII(c) test, that is how competition starts in long distance that we have today. We don't have any in the local. Ninety-eight percent of the local calls are still controlled by the local Bell Operating Company. They have the monopoly. But this really genius test, the VIII(c) test, became the standard of the discipline, the standard of the industry.

In one hearing, as chairman of the Communications Subcommittee—the Commerce, Science, and Transportation hearing—I had the seven Bells attest. And we will put that in the RECORD, if necessary. They agreed with this particular test. You have the Bell Operating Companies agreeing to that particular test, and that is why we kept it in there. We didn't write it into the formal statute because one former colleague on the House side had held up. He had tremendous influence, Jack Fields of Texas. So we put it in the language. But you follow the course or talk to any of the conferees, you talk to any of the House and Senate Members, they will tell you the VIII(c) test was the test, and we couldn't think of a better one.

Here comes nominee Joel Klein, stating categorically here in May, ''In formulating this standard, I specifically rejected using the suggestion in the conference report that the Department analyze BOC applications employing the standard used''—the VIII(c) standard.

Madam President, when you work this long and you know the industry, you know the monopolies, you know how Judge Greene held control and operated as well as he did, and communications prospered, expanded, and competition burst out all over in the long distance field with this particular standard, and then have a gentleman come in totally green and just write back, just as he got a letter from the chairman who put a hold on his nomination, and said ''I threw that out.'' The Bell Operating Companies tried to throw it out, and they couldn't. They know it because they had already testified in behalf of it.

He goes on to say that ''the VIII(c) standard which has barred Bell Operating Company entry into long distance since their divestiture from AT&T, struck me as insufficiently sensitive to the market conditions, and I was concerned that it would bar Bell Operating Company entry even where it would be competitively warranted.''

I want him to describe that. My understanding is that another Senator, my distinguished colleague from North Dakota—and also I was talking to the Senator from Nebraska. And they have talked with the gentleman, Mr. Klein, and have asked him. And he has yet to come and elaborate about what is more ''sensitive.'' He says this is ''insufficiently sensitive.'' We have yet to find another.

I have met twice with Joel Klein. And he said I was right. He was there with the Attorney General. He understood, and he would get some ensuing opinion, or letter, or some note that he understood, and he could read the language, and it was going to be corrected.

Madam President, let's turn the page and go to Senator CONRAD BURNS' questions and answers, and go to that question. Here is what Senator BURNS questioned, and I quote.

In your speech, you use the following terms: ''Real and broad-based competition,'' ''actual broad-based entry,'' ''true broad-based entry,'' ''tangible entry,'' ''large-scale entry,'' and ''entry on a large-scale basis.''

What do those terms mean to the department?

And I could read it all. The entire letter has been included. But let me read this last sentence.

Thus, in my March 11th speech—

The Acting Attorney General, he knows what we are talking about. He refers to that speech.

In my March 11th speech to which you referred, I stated that ''our preference, though we recognize that it may not always occur, is to see actual broad based, that is, business and residential, entry into a local market.''

Now, Madam President, for all of those unstudied in trying cases with lawyers, watch this particular language because it has the regular language and regular print but he highlights with italic the phrase: ''Our preference, though we recognize that it may not always occur.''

Now, that is in italic, not the rest of it. So the distinguished chairman of the communications subcommittee is given a signal. Watch the play. And then comes the play.

Madam President, on May 21, the next day, he doesn't delay. Oh, that Acting Attorney General for antitrust that held up for weeks the answer to the Dorgan letter and the Kerrey letter, he was prompt; he answered that letter of Senator BURNS in 5 days, gave the signal with the italics.

(Mr. BENNETT assumed the Chair.)

Mr. HOLLINGS. Mr. President, I ask unanimous consent that this docket No. 97–121, in the matter of the application of SBC Communications, be printed in the RECORD.

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

[Before the Federal Communications Commission, Washington, DC, CC Docket No. 97–121]

In the Matter of Application of SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma.

ADDENDUM TO THE EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

Several parties have informally asked the Department to clarify its views concerning

two issues that have arisen in connection with this proceeding: (1) whether we agree with the argument made by some commentors that under Section 271(c)(1)(A) (''Track A''), each separate class of subscribers that must be served to satisfy that entry track, i.e., residential and business, must be served ''exclusively . . . or predominantly'' over the telephone exchange facilities of an unaffiliated provider;[1] and (2) the importance (and meaning) of ''performance benchmarks'' in assessing whether BOC in-region interLATA entry would be in the public interest. To address any confusion on these points, the Department now files this addendum.

I. Section 271(c)(1)(A) does not require that both residential and business customers be served over the facilities-based competitors' own facilities

Section 271(c)(1) requires that a BOC's application to provide in-region interLATA services proceed under one of two distinct tracks. As our evaluation explained, SBC's application is governed by the standards of Track A. 47 U.S.C. §271(c)(1)(A). See SBC Evaluation at 9–20. Under Track A, a BOC must be providing ''access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers.'' The statute further specifies that ''such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.'' 47 U.S.C. §271(c)(1)(A). As we explained in our evaluation, SBC does not meet the standards of Track A because there is no facilities-based competitor offering service to residential subscribers. See SBC Evaluation at 20–21. Brooks Fiber, to which SBC points as a residential service provider, is merely testing its ability to offer residential service by providing uncompensated service to four employees; thus, it does not compete with SBC to serve any residential ''subscribers.'' See id.

Some parties have pressed for rejection of SBC's application on the additional ground that Brooks does not provide residential service to anyone, including its four employees, over its own facilities. In their view, Track A requires, among other things, that residential service is being provided completely or predominantly over a competitor's own facilities. We disagree.

The statute requires that both business and residential subscribers be served by a competing provider, and that such provider must be exclusively or predominantly facilities-based. It does not, however, require that each class of customers (i.e., business and residential) must be served over a facilities-based competitor's own facilities. To the contrary, Congress expressly provided that the competitor may be providing services ''predominantly'' over its own facilities ''in combination with the resale of'' BOC services. 47 U.S.C. §271(c)(1)(A). Thus, it does not matter whether the competitor reaches one class of customers—e.g., residential—only through resale, provided that the competitor's local exchange services as a whole are provided ''predominantly''over its own facilities.

This reading is not only consistent with the language of the statute, but also serves Congress' twin purposes of maximizing competition in local exchange and interexchange telecommunications markets. To ensure that the BOCs truly opened up their local networks to competitors, Congress required that any BOC qualifying for Track A consideration wait until a facilities-based competitor became operational—provided that there is at least one potential competitor proceeding toward that goal in a timely fashion—before that BOC could satisfy the statute's in-region interLATA entry requirements. In mandating that such a facilities-based competitor offer both residential and business service, Congress ensured both that (1) facilities-based entry path is being used wherever requested; and (2) at least one facilities-based competitor is offering service to residential, as well as business, subscribers. See SBC Evaluation at 14–17. Once those two basic conditions have been satisfied, however, there is no reason to delay BOC entry into interLATA markets simply because competitors that have a demonstrated ability to operate as facilities-based competitors, and that are in fact providing service predominantly over their own facilities, find it most advantageous to serve one class of customers on a resale basis. Imposing this requirement would tip unnecessarily the statute's balance between facilitating local entry and providing for additional competition in interLATA services by adding an unnecessary prerequisite to Track A that might foreclose entry in certain cases for no beneficial competitive purpose. Cf. id. at 22.

II. The Importance of performance benchmarks

In articulating the Department's approach to assessing BOC applications for in-region, interLATA authority, we stated that the existence of ''performance benchmarks'' serves an important purpose in demonstrating that the market has been ''irreversibly opened to competition.'' To better explain the role of ''performance benchmarks,'' ''performance standards,'' and ''performance measures'' in our analysis, we have outlined further the definition and importance of these concepts below.[2]

At bottom, a ''performance benchmark'' is a level of performance to which regulators and competitors will be able to hold a BOC after it receives in-region interLATA authority. The most effective benchmarks are those based on a ''track record'' of reliable service established by the BOC. Such benchmarks may reflect either the BOC's performance of a wholesale support function for a competitor, or, in areas where the BOC performs the same function for its competitors as it does for its own retail operations, a benchmark may also be established by the BOC's service to its own retail operations. In instances where neither type of benchmark is available, the Department will consider other alternatives that would ensure a consistent level of performance, such as, for example, a commitment to adhere to certain industry performance standards and/or an audit of the BOC's systems by a neutral third party. Such benchmarks are significant because they demonstrate the ability of the BOC to perform a critical function—for example, the provisioning of an unbundled loop within a measurable period of time. Thus, benchmarks serve, as explained in our evaluation, the important purpose of foreclosing post-entry BOC claims that the delay or withholding of services needed by its competitors should be excused on the ground that the services or performance levels demanded by competitors are technically infeasible. See SBC Evaluation at 45–48.

To make ''performance benchmarks'' a useful tool for post-entry oversight, we also expect the BOC to adopt the specific means and mechanisms necessary to measure its performance—i.e., ''performance measures.'' That is, if there are no such systems in place, it will be considerably more difficult to ensure that the BOC continues to meet its established performance benchmarks. Finally, we acknowledge that there may be areas in which the present industry standards will be updated, requiring new levels of performance. Accordingly, the Department will also focus on the importance of commitments by BOCs to adhere to ''performance standards,'' even when they will be imposed upon it post-entry.

FOOTNOTES

[1] See, e.g., Opposition of Brooks Fiber Properties, Inc. to Application of SBC Communications, Inc., CC Docket No. 97–121, at 8–9 (May 1, 1997).

[2] To reflect this typology, our evaluation should be modified as follows:

Page 45 line 2 of heading ''b.'' (and Table of Contents), ''standards'' to ''benchmarks'';

Page 47 line 3, ''measures'' to ''benchmarks'';

Page 47 line 5, ''measures'' to ''benchmarks'';

Page 48 line 9, ''measures'' to ''benchmarks'' and add ''as well as its commitment to adhere to certain performance standards'' to the end of the sentence;

Page 60 line 9, ''measures'' to ''benchmarks''; and

Page 60 line 11, 15, 18 ''measures'' to ''benchmarks''

Respectfully submitted,

Donald Russell, Chief; Joel I. Klein, Acting Assistant Attorney General, Antitrust Division; Andrew S. Joskow, Deputy Assistant Attorney General, Antitrust Division; Lawrence J. Fullerton, Deputy Assistant Attorney General, Antitrust Division; Philip J. Weiser, Senior Counsel, Antitrust Division; Carl Willner, Jonathan D. Lee, Stuart H. Kupinsky: Attorneys, Telecommunications Task Force; Gerald B. Lumer, Economist, Competition Policy Section; Antitrust Division, U.S. Department of Justice, 555 4th Street, N.W., Room 8104, Washington, D.C. 20001.

Certificate of Service

I hereby certify that I am an Attorney for the United States in this proceeding, and have caused a true and accurate copy of the foregoing Addendum to the Evaluation of the United States Department of Justice to be served on all petitioners in this proceeding and other interested parties as indicated on the attached service list, by first class mail, on May 21, 1997.

JONATHAN D. LEE,

Attorney, Telecommunications Task Force, Antitrust Division, U.S. Department of Justice.

Service List

Richard Metzger, General Counsel, Association for Local Telecommunications Services, 1200 19th Street, NW., Washington, DC 20036.

John Lenahan, Ameritech Corporation, 30 South Wacker Drive, Chicago, IL 60606.

Mark Rosenblum, AT&T Corporation, 295 North Maple Ave., Basking Ridge, NJ 07920.

Susan Miller, Esq., ATIS, 1200 G Street, NW., Suite 500, Washington, DC 20005.

James R. Young, Bell Atlantic, 1320 N. Courthouse Road, 8th Floor, Arlington, VA 22201.

Walter Alford, BellSouth, 1155 Peachtree Street, NE., Atlanta, GA 30367.

Edward J. Cadieux, Director, Regulatory Affairs—Central Region, Brooks Fiber Properties, Inc., 425 Woods Mill Road South, Town and Country, MO 63017.

John Windhausen, Jr., General Counsel, Competition Policy Institute, 1156 15th Street, NW., Suite 310, Washington, DC 20005.

Genevieve Morelli, Executive Vice President and General Counsel, The Competitive Telecommunications Association, 1900 M Street, NW., Suite 800, Washington, DC 20036.

Laura Phillips, Dow, Lohnes, and Albertson, PLLC, 1200 New Hampshire Ave., NW., Suite 800, Washington, DC 20036, Counsel for Cox Communications.

Footnotes at end of article.

Russell M. Blau, Swidler & Berlin, chartered, 3000 K Street, NW., Suite 300, Washington, DC 20007–5116, Counsel for Dobson Wireless.

Gregory M. Casey, LCI International Telecom Corp., 8180 Greensboro Drive, Suite 800, McLean, VA 22102.

Rocky Unruh, Morgenstein & Jubelirer, One Market, Spear Street Tower, 32d Floor, San Francisco, CA 94105, Counsel for LCI Telecom Group.

Anthony Epstein, Jenner & Block, 601 13th Street, NW., Washington, DC 20005, Counsel for MCI.

Susan Jin Davis, MCI Telecommunications Corporation, 1801 Pennsylvania Ave., NW., Washington, DC 20006.

Daniel Brenner, National Cable Television Association, 1724 Massachusetts Ave., NW., Washington, DC 20036.

NYNEX Telephone Companies, Saul Fisher, 1095 Ave. of the Americas, New York, NY 10036.

Cody L. Graves, Chairman, Oklahoma Corporation Commission, Jim Thorpe Building, Post Office Box 52000–2000, Oklahoma City, OK 73152–2000.

Mickey S. Moon, Assistant Attorney General, Oklahoma Attorney General's Office, 2300 North Lincoln Boulevard, Room 112, State Capitol, Oklahoma City, OK 73105–4894.

Robert Hoggarth, Senior Vice President, Paging and Narrowband PCS Alliance, 500 Montgomery Street, Suite 700, Alexandria, VA 22314–1561.

James D. Ellis, Paul K. Mancini, SBC Communications, Inc., 175 E. Houston, Room 1260, San Antonio, TX 78205.

Philip L. Verveer, Wilkie, Farr & Gallagher, 1155 21st Street, NW., Washington, DC 20036, Counsel for Sprint.

Richard Karre, U S West, 1020 19th Street, NW., Suite 700, Washington, DC 20036.

Charles D. Land, P.E., Executive Director, Texas Association of Long Distance Telephone Companies, 503 W. 17th Street, Suite 200, Austin, TX 78701–1236.

David Poe, LeBoeuf, Lamb, Greene & MacRae, LLP, 1875 Connecticut Ave., NW., Suite 1200, Washington, DC 20009, Counsel for Time Warner.

Janis Stahlhut, Time Warner Communications Holdings, Inc., 300 First Stamford Place, Stamford, CT 06902–6732.

Danny Adams, Kelley, Drye & Warren LLP, 1200 19th Street, NW., Suite 500, Washington, DC 20036, Counsel for USLD.

Catherine Sloan, WorldCom, Inc., 1120 Connecticut Ave., NW., Washington, DC 20036–3902.

Charles Hunter, Hunter Communications Law Group, 1620 I Street, NW., Suite 701, Washington, DC 20006, Counsel for Telecommunications Resellers Association.

Mr. HOLLINGS. I thank the distinguished Chair. And again now on page 3 here the fellow has gotten the signal, and I read on page 3—the entire matter is in the RECORD.

It does not, however, require that each class of customers, business and residential, must be served over a facilities based competitor's own facilities. To the contrary, Congress expressly provided that the competitor may be providing services predominantly over its own facilities in combination with the resale of Bell Operating Company services (47 USC 271 (c)(1)(A)). Thus, it does not matter whether the competitor reaches one class of customers, namely residential, only through resale provided that the competitor's local exchange services as a whole are provided predominantly over its own facilities.

Well, Mr. President, there it was. Bell Operating Companies through the distinguished Senator from Montana got what they wanted in black and white. They just totally refuted 4 years of work, the most important part of the checklist, the most important part that provided for competition in the long distance market, the most important part that we included. We talked about it. We discussed it. We debated it. I was in these conferences. They were in the conferences, like I tried to emphasize. The Bell Companies met all one day with our staffs on both sides and the long distance companies met all one day, and it was worked out. But do not take the word of the Senator from South Carolina.

Mr. President, I ask unanimous consent that a letter to the Honorable Reed Hunt, Chairman of the Federal Communications Commission, from Chairman TOM BLILEY, Congressman from Virginia, and chairman of the Commerce Committee over on the House side, be printed in the RECORD.

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

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
Washington, DC, June 20, 1997.

Hon. REED HUNDT,
Chairman, Federal Communications Commission, Washington, DC.

DEAR CHAIRMAN HUNDT: I recently read with interest and dismay the Department of Justice's additional comments regarding SBC Communications Inc.'s (SBC's) application to provide in-region, interLATA services in the State of Oklahoma. The Department therein clarified its views on section 271(c)(1)(A) of the Communications Act, as amended. As the primary author of this provision. I feel compelled to inform you that the Department misread the statute's plain language. As you rule on SBC's application and future BOC applications, you should not overlook the clear meaning of section 271 or its legislative history.

The Department argued that a BOC should be allowed to enter the in-region, interLATA market under ''Track A'' (*i.e.,* section 271(1)(A)) if a competing service provider offers facilities-based services to business customers and resale services to residential customers, so long as the combined provision of both services is predominantly over the competing service provider's facilities. In other words, the Department wrongly takes the view that section 271(c)(1)(A) is satisfied if a competitor is serving either residential *or* business customers over its own facilities.

Section 271(c)(1)(A), however, clearly requires a different interpretation. To quote the statute, a competing service provider must offer telephone exchange service to ''residential and business subscribers . . . either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities.'' Track A is thus satisfied if—and only if—a BOC faces facilities-based competition in both residential *and* business markets. Neither the statute nor its legislative history permits any other interpretation; I know this because I drafted both texts.

In the end, the Department's recent misinterpretation of section 271 reinforces a point I frequently made during Congressional debate over the Telecommunications Act of 1996: the Department of Justice does not have the expertise to make important telecommunications policy decisions. The FCC, by contrast, *does* have the necessary expertise, which explains why Congress gave you and your colleagues—and no one else—the ultimate authority to make important decisions, such as the decision to interpret section 271. I remind you that the Department's role in this matter is a consultative one, and should be treated as such.

Let me conclude by noting that, while this letter focuses exclusively on Department's interpretation of section 271(c)(1)(A), it should not be construed to mean that the balance of the Department's comments were either consistent or inconsistent with Congressional intent.

Sincerely,

TOM BLILEY,
Chairman.

Mr. HOLLINGS. This is dated June 20, 1997.

Dear Chairman Hunt:

I recently read with interest and dismay the Department of Justice's additional comments regarding SBC Communications' application to provide in-region interLATA services in the State of Oklahoma. The department therein clarified its views on section 271(c)(1)(A) of the Communications Act, as amended. As a primary author—

Let me emphasize that. This is Chairman BLILEY—

As a primary author of this provision, I feel compelled to inform you that the department misread the statute's plain language. As you rule on SBC's application and future Bell Operating Company applications, you should not overlook the clear meaning of section 271 or its legislative history. The Department argued that a Bell Operating Company should be allowed to enter the in-region interLATA market under track A, that is, section 271(c)(1)(A) if a competing service provides office facilities based services to business customers and resale services to residential customers, so long as the combined provision of both services is predominantly over the competing service provider's facilities.

In other words, the Department wrongly takes the view that section 271(c)(1)(A) is satisfied if a competitor is serving either residential or business customers over its own facilities. Section 271(c)(1)(a), however, clearly requires a different interpretation. To quote the statute, ''A competing service provider must offer telephone exchange service to residential and business subscribers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities. Track A is thus satisfied if and only if a Bell Operating Company faces facilities based competition in both residential and business markets. Neither the statute nor its legislative history permits any other interpretation. I know this because I drafted both texts.

Mr. President, that is Chairman BLILEY. I do not know how you can make it more clear. He talks of the history. He talks of the conference report. He talks of the actual language. And anybody reading it can see exactly that. In essence, Mr. Klein sort of quietly acknowledged it. I was waiting because I met with him individually and then I met with him with the Attorney General, I can tell you here and now for those who watch this and follow it. And I ask unanimous consent the recent editorial in the New York Times entitled ''A Weak Antitrust Nominee'' be printed in the RECORD.

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

[From the New York Times, July 11, 1997]

A WEAK ANTITRUST NOMINEE

The next head of the Justice Department's antitrust division will have a lot to say about whether the 1996 Telecommunications Act breaks the monopoly chokehold that Bell companies exert over local phone customers. He will rule on mergers among telecommunications companies and advise the Federal Communications Commission on applications by Bell companies to enter long-distance markets. Thus it is disheartening and disqualifying that President Clinton's nominee, Joel Klein, is scheduled to come up for confirmation today in the Senate with a record that suggests he might knuckle under to the powerful Bell companies and the politicians who do their bidding.

Senators Bob Kerrey, Ernest Hollings and Byron Dorgan have threatened to block the vote today and put off until next week a final determination of Mr. Klein's fate. But the Administration would do its own telecommunications policy a favor by withdrawing the nomination and finding a stronger, more aggressive successor.

Mr. Klein, who has been serving as the Government's acting Assistant Attorney General for Antitrust, demonstrated his inclinations when he overrode objections of some of his staff and approved unconditionally the merger of Bell Atlantic and Nynex. That merger will remove Bell Atlantic as a potential competitor for Nynex's many dissatisfied customers. Mr. Klein refused even to impose conditions that would have made it easier for state and Federal regulators to pry open Nynex's markets to rivals such as AT&T.

Worse, Mr. Klein sent a letter to Chairman Conrad Burns of the Senate communications subcommittee, who runs political interference for the Bell companies, that committed the antitrust division to pro-Bell positions in defiance of the 1996 act.

That act invites the Bell companies to provide long-distance service, but only if the Bells first open their systems to rivals that want to compete for local customers. Yet in the letter to Mr. Burns, Mr. Klein explicitly rejected Congress's interpretation of requirements to be imposed on the Bells in favor of his own, weaker standard.

In a subsequent submission to the Federal Communications Commission, Mr. Klein further weakened a requirement that before the Bells enter long-distance service they face a competitor that is serious enough to build its own switches and wires. Mr. Klein has also upset some senators by seeming to minimize the importance, provided in the 1996 Telecommunications Act, of Justice's advice to the F.C.C. on applications by Bell companies to enter long-distance.

True, Mr. Klein has blocked applications by two Bell companies, SBC and Ameritech, to offer long-distance service before they had opened their local markets to competition. But by pandering to Mr. Burns, he has created strong doubts that he can provide aggressive antitrust leadership.

Mr. HOLLINGS. I ask unanimous consent that the Consumer Federation of America letter of July 14, 1997, on this score be printed in the RECORD.

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

CONSUMER FEDERATION OF AMERICA,
July 14, 1997.

DEAR SENATOR: With cable rates rising almost three times faster than inflation and massive consolidation in cable, radio and telecommunications markets, your efforts to promote competition through the 1996 Telecommunications Act are backfiring.

Acting Assistant Attorney General for Antitrust Joel Klein bears significant responsibility for these unintended, monopolistic results. Unless you demand that the Justice Department's Antitrust Division reverse course and engage in strict antitrust enforcement (see attached New York Times editorial: ''A Weak Antitrust Nominee''), consumers will face vastly inflated telephone and cable rates from increasingly entrenched monopolies.

After antitrust officials allowed the seven local Bell telephone monopolies to consolidate into four bigger monopolies; permitted Time Warner and TeleCommunications Inc. (TCI) to unite companies service almost one-half of all cable customers through a combination with Turner Broadcasting; and approved hundreds of radio mergers, consumers are seeing no appreciable increase in either competition or pocketbook savings from the Telecommunications Act.

While Acting Assistant Attorney General Joel Klein described some of this activity as ''the concentration envisioned by Congress'' (remarks to Glasser Legalworks Seminar, March 11, 1997), we believe you were hoping antitrust enforcement would foster increased competition rather than concentration.

Contrary to promises they made to Congress in return for more market freedom, large cable, telephone and other telecommunications companies are not vigorously entering each other's markets:

AT&T appears to be throwing in the towel on the notion of competing with the local Bell monopolies, as it pursues mergers with the Bell companies.

MCI is losing money hand-over-fist in its failed efforts to jump-start local phone competition.

After failing to start a competitive satellite alternative to cable monopolies, Rupert Murdoch decided to join forces with the cable giants through deals with TCI's John Malone, Primestar and Cablevision.

Finally, local phone companies have pulled the plug on most of their grandiose efforts to enter the cable business, and cable companies have retreated just as quickly from entering the phone business.

And while all this market entrenchment goes on, cable rates are skyrocketing and many local phone companies seek a doubling of local phone rates in anticipation of ''competition.''

It is more obvious than ever before that the Telecommunications Act will be an abject failure unless Congress makes sure that the Antitrust Division reverses course and reinvigorates its enforcement practices.

Sincerely,

HOWARD M. METZENBAUM,
Chairman, Consumer Federation of America, former chairman, Senate Subcommittee on Antitrust, Business Rights and Competition.

GENE KIMMELMAN,
Co-Director, Consumers Union.

DR. MARK COOPER,
Research Director, Consumer Federation of America.

Mr. HOLLINGS. Consumer Federation and others who have followed this thing have been on the phone and otherwise just fighting to make sure that this was really held up and defeated. And in all fairness, I am sorry, after we see the exchange of letters here recently, that I did not fight this nomination. I put a hold on it. I thought that Members would listen, that they would want to learn and they would want to understand. But evidently the jury has been fixed.

Mr. President, I ask unanimous consent that two letters, one by Senator KERREY to the Attorney General dated June 23, and the letter back from the Office of the Attorney General dated July 14 to Senator DORGAN be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

U.S. SENATE,
Washington, DC, June 23, 1997.

Hon. JANET RENO,
U.S. Department of Justice,
Washington, DC.

DEAR MADAM ATTORNEY GENERAL: Not too long ago, I met Joel Klein and found him to be an intelligent, talented attorney and a dedicated public servant. I would like very much to support his nomination for Assistant Attorney General for Antitrust but have some very serious concerns about the Administration's telecommunications policies and Mr. Klein's interpretation of the Telecommunications Act of 1996. I am hopeful you can clarify the Department's official views for me.

I am particularly concerned about recent comments made by Acting Assistant Attorney General Klein regarding the Department of Justice's (DOJ) role in facilitating competition in the wake of the Telecommunications Act of 1996. As you know, my support of the Telecommunications Act was contingent upon a strong role for DOJ in shaping a competitive telecommunications market. I did not stop the work of the United States Senate with a filibuster in order for the Department of Justice to take its responsibilities lightly. In the contrary, I expected DOJ to use every ounce of its authority, including those powers granted outside of the Telecommunications Act, to ensure the competitive integrity of the new telecommunications market.

In response to questions by the Chairman of the Senate Communications Subcommittee, Mr. Klein said that he ''specifically rejected using the suggestion in the Conference Report that the Department analyze Bell Operating Company (BOC) applications employing the standard used in the AT&T consent decree''. This standard would reject BOC entry into in-region long distance unless ''there is a substantial possibility that the BOC or its affiliates could use its monopoly power to impede competition in the market such company seeks to enter.'' The Telecommunications Act gave you the authority to choose any standard you see fit to evaluate BOC entry into in-region service. Winning that discretion was a hard fought battle. Is the Department using its discretion to chose a weak standard? Does Mr. Klein's statement mean that a Bell Operating Company should be allowed to enter the in-region long distance market even if there is a ''substantial possibility that he BOC or its affiliates could use monopoly power to impede competition?''

Mr. Klein's comment to the Chairman that ''we think that the openness of a local market can be best assessed by the discretionary authority of the FCC, relying in part on the Department of Justice's competitive assessment, and based on the evaluation of the particular circumstances in an individual state.'' I fought hard to include DOJ in this process because of the legal and economic expertise of the Antitrust Division. Is the Department abdicating its role in this area? The Federal Communications Commission (FCC) is not the only agency equipped to

make decisions about the openness of markets. Can a market be competitive if it is not open? The Department's responsibility under the act and the nation's antitrust laws is most serious and should be aggressively pursued by the Antitrust Division. Although the ultimate decision lies with the FCC, the Department should accept its important role as the expert in competition and market power and adopt a meaningful entry standard based on pro-competitive principles. I am not convinced that the Department has done that.

On a separate but equally important competition issue, I remain very concerned about recent mergers between large telecommunications providers. The decision by Justice to approve the Bell Atlantic/NYNEX merger without any conditions is troubling. I am also concerned about rumors circulating about a possible reconstruction of the old Bell system. Reports of AT&T efforts to bring two BOC's back into its fold should give everyone pause. Such a merger will likely lead to a new round of large telecommunications mergers which could greatly reduce any chance for the swift adoption of a vibrant, competitive telecommunications market. Competitive entry could be frozen while real and potential competitors court, woo and marry each other.

Finally, I am pleased with Mr. Klein's emphasis on ensuring that the BOC's take the necessary steps to allow competition in their markets. The Department of Justice should use its authority to ensure that no one creates or uses artificial impediments to block competitive entry. Interconnection agreements are pending in all fifty states, but at this time no significant competition has developed. The era of telecommunications monopolies should be over, not recreated. Market forces, not market power should motivate all telecommunications carriers to work night and day to win and keep customers. Interconnection should be made as simple and efficient as possible. It should be very easy for a telecommunications entrepreneur to gather a group of customers and easily, efficiently and expeditiously begin providing them service through interconnection or resale.

The telecommunications industry is at a critical point in its history. The Department's commitment to using its full authority to promote competition is important to achieving an environment where consumers come first and entrepreneurs are encouraged to challenge the status quo. Thank you for your careful consideration of my concerns and would appreciate your views on these matters. I look forward to your response.

Sincerely,

J. ROBERT KERREY.

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, July 14, 1997.

Hon. BYRON L. DORGAN,
U.S. Senate,
Washington, DC.

DEAR SENATOR DORGAN: The President has requested that I respond to your recent letter to him regarding the nomination of Joel Klein to be Assistant Attorney General for Antitrust and the Administration's telecommunications policies.

At the outset, I want to emphasize my appreciation and that of the Department as a whole for your strong and unwavering support for the important role provided for the Department in the implementation of the Telecommunications Act of 1996. I remember how hard we fought together to secure the DOJ role. As a consequence, I share with you a keen interest in ensuring that the Department carries out its role under the Telecommunications Act effectively.

Let me begin by assuring you that the Department of Justice takes its role under the Telecommunications Act of 1996 extremely seriously. We have devoted substantial resources to preliminary investigations all across the nation on a state-by-state basis to understand the competitive conditions in each state. We have devoted even more resources to our review and evaluation of specific Section 271 applications. We prepared extensive, even exhaustive, analyses of SBC's Section 271 application for in-region long distance authority in Oklahoma and Ameritech's Section 271 application for in-region long distance authority in Michigan.

Our actions in these matters make absolutely clear that the Department is firmly committed to ensuring that local markets are fully and irreversibly open, so that competition can take hold there and flourish, and that long distance markets are as competitive as possible. We share your view that this is crucial for consumers in this country. To this end, we have adopted a procompetitive standard for evaluating Section 271 applications, and we are providing the FCC with meaningful guidance on competition policy in specific cases. The FCC relied heavily on our analysis in its only decision to date, its recent decision denying SBC's application.

You have specific questions regarding the standard used by the Department in evaluating Bell Operating Company (BOC) FCC applications to provide in-region long distance service.

After a careful evaluation of public input, the Department adopted a standard that the local market had to be ''fully and irreversibly open to competition.'' I assure you that this is not a weak standard. It is a meaningful standard based on strong procompetitive principles and is designed to ensure and protect competition in both local and long-distance markets. It ensures that no one can create artificial impediments to entry, and it ensures that BOCs are not able to provide in-region long distance service prematurely, when they might have unfair competitive advantages over competitors. Otherwise, the promise of fully competitive local and long distance markets would be delayed.

As demonstrated by our evaluations of SBC's Section 271 Oklahoma application in May, and of Ameritech's Section 271 Michigan application in late June, we will not support long distance entry until local markets are fully and irreversibly open to competition. Our position (and our standard) is one that is tough but fair and designed to promote the maximum amount of competition in all markets. The Department is fully committed to ensuring that all telecommunications markets become as competitive as possible.

In closing, let me say Joel Klein is an extremely intelligent and talented attorney and a dedicated public servant. The President and I hope he is rapidly confirmed by the United States Senate to be the Assistant Attorney General for Antitrust.

Sincerely,

JANET RENO.

Mr. HOLLINGS. Now, you see every effort has been made to try to clear that record, and you can read the Attorney General's letter, and for the purposes at hand it is not worth the paper it is written on. You can throw it away. It says nothing—that she believes in competition. Now, she is a lawyer. She knows how to read emphasized italics language. She saw the pitch. I told her about the pitch and how it occurred. I showed her the talk that Klein made. We went down the whole thing. So Senator KERREY, and I understand, of course, Senator DORGAN wrote a letter, and we were waiting for a letter back and we had to wait several weeks. Not the Senator from Montana. His letter and addendum and opinion were all put out immediately. But when Senators who worked on the bill as diligently as we did tried to meet with him and then put down in black and white our misgivings, write the Attorney General's department and ask, please, now, let's see your position here on the plain, clear language, they write back—''I believe in competition.'' Just two pages of nothing. I have that in the RECORD.

Mr. President, I should have, like I say, politicked this nomination for its defeat.

Let me ask unanimous consent that the ''Dear Colleague'' letter of July 10 by Senator DORGAN of North Dakota and myself be printed in the RECORD.

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

U.S. SENATE, COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC, July 10, 1997.

DEAR COLLEAGUE: The Senate may soon move to consider the nomination of Joel Klein to be the Assistant Attorney General in charge of the Antitrust Division. Because of statements and actions by Mr. Klein in his acting capacity at the Department of Justice we are very concerned with the direction of the Administration's policies with respect to its interpretation of certain provisions of the Telecommunications Act of 1996. We believe that these issues need clarification before Mr. Klein's nomination should be brought to a vote in the Senate. We urge you to support us in our desire to resolve the issues surrounding Mr. Klein's actions before his nomination is brought to the Senate floor for debate.

Whether or not robust competition develops in the local telephone service market depends upon the Administration's commitment to vigorously enforce these critical provisions of the Telecommunications Act. Unfortunately, while serving as acting chief of the Antitrust Division, Mr. Klein has explicitly contradicted specific statutory mandates and conference report directions that we, working with the White House, fought again all odds to have added to the Telecommunications Act of 1996. We have asked Mr. Klein, Attorney General Reno, and the White House to review our concerns and demonstrate that the Antitrust Division will follow the explicit meaning of the Telecommunications Act. So far, we have not received a satisfactory response to our concerns.

Our misgivings about Mr. Klein go to the very heart of whether the Telecommunications Act achieves its goal of promoting more competition and lower prices for consumers. In response to White House requests (and a very specific veto threat) we made sure that nothing in the Telecommunications act in any way undermined the antitrust laws. In fact, to address these concerns, we gave the Justice Department new authority to rule on mergers of telecommunications common carriers (power previously reserved for the Federal Communications Commission), and we gave the Justice Department a substantial role in determining when a local Bell telephone monopoly could enter the long distance market because it had sufficiently opened its market to competition. However, under the leadership of Mr. Klein, the Justice Department has abdicated its responsibility and failed to use

these tools to promote the level of competition that we and the Clinton Administration believed should be developing in telecommunications markets.

By interpreting the Telecommunications Act in a manner that fails to ensure that both consumers and businesses receive competitive choices from separate local phone companies; by abandoning the Department of Justice's traditional standard for measuring competition to make it easier for the Bell companies to enter long distance; and by approving the largest merger in telecommunications history without even a policing mechanism to ensure that competition would be enhanced, Mr. Klein has sent the wrong signal to the marketplace and undermined the core principles that are the foundation upon which the Telecommunications Act was constructed.

In a letter describing his final concerns about our bill and the bill passed by our colleagues in the House, President Clinton wrote that the final bill ''should include a test specifically designed to ensure that the Bell companies entering into long distance markets will not impede competition.'' This test described by President Clinton is actually a stronger test than the VIII(c) test contained within the Modified Final Judgment. Yet, Mr. Klein rejected both these tests recently and decided to develop his own lesser standard of ''irreversibly open to competition.''

In another more compelling matter, Mr. Klein has turned the statute on its head in his interpretation of the facilities-based entry test for long distance. The statute requires that a facilities-based provider serve both business and residential customers before the Bell company can enter long distance. Mr. Klein, however, believes the statute can be interpreted to mean that a facilities-based carrier need only provide service to business or residential customers. Yet again, another instance where Mr. Klein has weakened the protections that the Congress fought hard to enact into law to protect consumers from premature entry into long distance.

We will insist that any Administration nominee support the consumer protection we fought hard to put into place. Mr. Klein's interpretation of the law will result in more consolidation, less choice and higher costs to consumers. We therefore want to ensure that this or any Administration nominee implement the letter of the law and follow the steps that we and the Administration outlined in achieving a consensus during deliberations on the Telecommunications Act's conference report.

Sincerely,

BYRON L. DORGAN.
ERNEST F. HOLLINGS.

Mr. HOLLINGS. It is not my intent to take further time. I can tell that this was called. I had checked after the last rollcall. They said it wasn't going to be called until after 6 o'clock. When they filed it, they filed cloture immediately before there was any kind of debate whatever. They have not only lost their senses with respect to reality, calling deficits listed in the document as $179.3 billion as balanced, but they have lost their manners and their courtesy. Usually you have the Senator who had the hold and caused the particular confusion put on notice, but I had a staffer watching the TV and saw our friend from Utah, Senator HATCH, was talking. So there we are, just right in the middle.

You did not need cloture. At the time we put on a hold and were asked: Do you want to be identified as the one having the hold, I said absolutely. I am not playing games, tricks or anything of that kind. I would be glad if you called it this afternoon. That was weeks ago where I would have a chance to explain exactly what occurred. But, of course, you can see what has occurred. They have politically worked it, got the votes, got cloture. Don't waste time. Let us get on with this.

And then when the rates go up, when you get consolidation instead of competition and those rates go up, and you don't get competition in the local market and you don't get what we intended in the Telecommunications Act, don't come around like in Gramm–Rudman-Hollings and say it didn't work. Gramm–Rudman-Hollings worked up until 1990 when they went out to Andrews Air Base and they put in the categories and so-called ceilings—we haven't reached those ceilings yet—and repealed the across-the-board cuts, the sequester language. On October 21 at 1:40 a.m. I made the point of order that you are now repealing the thrust of Gramm–Rudman-Hollings. Today, this afternoon, I am making the same point. You are repealing the competitive feature of the Telecommuncations Act of 1996.

I hope the nomination is defeated and we get somebody here who can read.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I yield 4 minutes to the distinguished Senator from South Carolina.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise today in support of the nomination of Joel I. Klein to serve as Assistant Attorney General for the Antitrust Division of the Department of Justice. Mr. Klein is a fine man and is an outstanding nominee for this important position. I am pleased to support him.

Mr. Klein achieved an excellent academic record at both Columbia College in New York and Harvard Law School. He then served as a law clerk for the Chief Judge of the D.C. Circuit Court of Appeals and later for U.S. Supreme Court Justice Lewis Powell. Afterward, he developed a distinguished reputation in private practice, where he argued important cases before the U.S. Supreme Court.

For the past several months, he has served as the Acting Assistant Attorney General for the Antitrust Division. During that time, he has shown that he is firmly committed to enforcing our nation's antitrust laws. For example, under his leadership, the Antitrust Division has greatly increased its collection of criminal fines. Thus far this fiscal year, which almost coincides with Joel Klein's tenure, the Antitrust Division has collected over $192 million dollars in criminal fines, compared to only about $27 million for all of fiscal year 1996.

Mr. President, I am confident that Mr. Klein is within the mainstream of antitrust law and doctrine, and will exercise his responsibilities fairly and within the dictates of the law. He is committed to upholding our free enterprise system and to protecting consumers from anti-competitive conduct.

Under Chairman HATCH's distinguished leadership, the Judiciary Committee held a hearing on Mr. Klein's nomination in April, and his nomination was reported out of the Committee unanimously in May.

In short, I strongly believe that Mr. Klein is a man of unquestioned integrity and great ability. I urge my colleagues to vote in favor of this nomination.

Mr. President, in closing I want to commend Senator HATCH, the able chairman of the Judiciary Committee for the position he has taken on this particular nomination.

Mr. President, I yield the floor.

Mr. KOHL. Mr. President, let me make a few brief points. First, it is kind of ironic that Joel Klein's nomination has nearly universal Republican support, but has divided many Democrats. After all, he is the President's choice for the job and any Presidential nominee for an executive branch appointment—Democrat or Republican—deserves the benefit of the doubt. More than that, Mr. Klein has the support of many prominent Democrats, among them Judge Abner Mikva, Former Deputy Attorney General Jamie Gorelick, Lloyd Cutler, and others. I ask unanimous consent that a letter from them—and from prominent Republicans—in support of Joel Klein be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

JULY 14, 1997.

Hon. TRENT LOTT,
Senate Majority Leader, Washington, DC.

Hon. TOM DASCHLE,
Senate Minority Leader, Washington, DC.

DEAR SENATOR LOTT AND SENATOR DASCHLE: We are lawyers, academics, and former government officials with differing views on various legal and public policy issues. We are united, however, in our belief that Joel I. Klein is a superbly and uniquely qualified nominee to be the Assistant Attorney General for Antitrust at the Department of Justice. We are confident that as Assistant Attorney General Joel Klein would vigorously enforce the nation's antitrust laws and effectively serve the public interest. We urge the Senate to act upon this nomination promptly and confirm Mr. Klein to this important post.

Sincerely,

Donald B. Ayer, Former Deputy Attorney General, Former Deputy Solicitor General; Warren Christopher, Former Secretary of State, Former Deputy Attorney General; Lloyd N. Cutler, Former Counsel to the President; Alan Dershowitz, Professor of Law, Harvard Law School; Peter Edelman, Professor of Law, Georgetown Law Center; Eleanor Fox, Professor of Law, NYU Law School; Jamie Gorelick, Former Deputy Attorney General; Carla A. Hills, Former United States Trade Representative, Former Secretary of Housing and Urban Development; Charles James, Former Assistant Attorney General, Antitrust Division.

Harry McPherson, Former Counsel to the President; Abner J. Mikva, Former Counsel to the President, Former Chief Judge, United States Court of Appeals for the District of Columbia, Former Member of Congress; Newton N. Minow, Former Chairman, Federal Communications Commission; Leon E. Panetta, Former White House Chief of Staff, Former Member of Congress; Deval Patrick, Former Assistant Attorney General, Civil Rights Division; Robert B. Reich, Former Secretary of Labor; James Rill, Former Assistant Attorney General, Antitrust Division; Richard E. Wiley, Former Chairman, Federal Communications Commission.

Senator ORRIN HATCH,
U.S. Senate.

We are writing to express our support for the nomination of Joel Klein as Assistant Attorney General for Antitrust.

We are a group of economists who are working actively to help break down entry barriers and bring competition in the telecommunications sector, as Congress intended in passing the Telecommunications Act of 1996. Collectively, we have served as economic experts for interexchange carriers, wireless companies, and Bell operating companies. The signatories below include four recent Economics Deputies from the Antitrust Division and the two most recent Chief Economists at the Federal Communications Commission.

Although we have our differences in the interpretation of various economic evidence, and in our recommendations for telecommunications policies, we all believe that Joel Klein will make an excellent Assistant Attorney General. He is fair and thoughtful, he understands and uses economic arguments and analysis effectively, and he is dedicated to enforcing our antitrust laws and promoting competition in our economy.

Sincerely yours,

JOSEPH FARRELL,
Prof. of Economics, U. of California at Berkeley.

MICHAEL KATZ,
Prof. of Business Administration, U. of California at Berkeley.

CARL SHAPIRO,
Prof. of Business Strategy, U. of California at Berkeley.

RICHARD GILBERT,
Prof. of Economics, U. of California at Berkeley.

JANUSZ ORDOVER,
Prof. of Economics, New York U.

ROBERT WILLIG,
Prof. of Economics and Public Affairs, Princeton U.

Mr. KOHL. Second, while it is unfortunate that Eric Holder is being held ''hostage'' to Joel Klein's nomination, the truth is that the sooner we confirm Mr. Klein, the sooner we can move forward and confirm Eric Holder. The Department of Justice, and the American people, will be better off with a confirmed Deputy Attorney General.

Third, I respect the efforts of my colleagues, Senator HOLLINGS, Senator DORGAN and Senator KERREY, who have fought long and hard for consumers on telecommunications matters. Like me, they clearly want someone in charge of the Antitrust Division who will bring about the kind of competition promised in—but not yet delivered by—the Telecommunications Act. They have sent a strong message to Joel Klein on how to interpret Section 271 of the Act, and I believe he understands that message and will work hard to promote vigorous competition in the telephone industry—and all other industries.

My hope is that Joel Klein, as a confirmed appointee, will surprise his critics and please his supporters in his enforcement of the antitrust laws. I urge my colleagues to support him.

Mr. KENNEDY. Mr. President, I give my strong support to Joel Klein's nomination to serve as Assistant Attorney General of the Antitrust Division at the Department of Justice. Mr. Klein's background and experience have prepared him well to serve the country in this capacity.

After graduating magna cum laude from Columbia University and Harvard Law School, Mr. Klein served as a law clerk for both D.C. Circuit Judge David Bazelon and Supreme Court Justice Lewis Powell. He later served with great distinction as a public interest lawyer, Deputy White House Counsel, and Principal Deputy of the Antitrust Division where he is now the Acting Assistant Attorney General.

Mr. Klein's work in the Antitrust Division has earned wide praise. Leading economists, including two former Chief Economists of the Federal Communications Commission, believe that he will be an excellent Assistant Attorney General who is ''dedicated to enforcing our antitrust laws and promoting competition in our economy.'' Mr. Klein wins similar high praise from State and Federal officials and many members of the American Bar Association active in the Section of Antitrust Law.

This praise is well deserved. Mr. Klein has won substantial criminal fines against large companies guilty of price-fixing. He has challenged anticompetitive practices and anticompetitive mergers that harm consumers. He has given new emphasis to antitrust enforcement overseas to help open more markets for U.S. businesses.

I have had the opportunity to work closely with Mr. Klein on several issues, including a recent ''East-West Initiative,'' which brought together business leaders, government officials, and Republican and Democratic Senators from Massachusetts, North Carolina, Washington, Utah, and California to discuss cooperative efforts by government and business to help consumers. Mr. Klein's participation in this effort was key to its success, and I have the greatest respect for his ability and his commitment to public service.

I urge the Senate to approve his nomination. His outstanding record makes him an excellent nominee for this position. I hope that the strong bipartisan support already expressed by many Senators on both sides of the aisle will lead to further cooperation in expediting action on other nominees for the Department of Justice, and for long overdue bipartisan action on judicial nominations as well.

Mr. WYDEN. Mr. President, the position of Assistant Attorney General for Anti-Trust is one of the most critical to assuring American consumers enjoy the benefits of competition. The decisions made by the individual who holds this title affect billions of dollars and the ability of our companies to compete in the global economy. They affect corporate profit and loss sheets and the course of the stock market. But most importantly, they affect the prices consumers pay for basic services, from telephone calls to transportation and television.

No area holds more promise for competition than communications, and that was the major impetus for the 1996 Telecommunications Act. The Act was intended to eliminate monopolies, spur new entrants and bring down prices. Eighteen months later, we have seen pitifully little progress. The Administration has not moved aggressively to promote competition. The vote I will cast today is meant to send a signal to the Administration that those of us in Congress who supported the 1996 Telecommunications Act want to see competition rather than concentration.

As a member of the Commerce Communications Subcommittee, I had hoped the 1996 Telecommunications Act would unleash a torrent of competition. Instead, we have seen prices outpace inflation in many areas. Each day the paper seems to carry yet another announcement of one giant company's plans to merge with another. Companies are spending millions of dollars on litigation and negative advertising. The situation reminds me of the African proverb: when elephants fight, the grass gets trampled. The grass here is the American consumer.

Perhaps the overwhelming array of choices has lulled the consumer into a sense of complacency. We hear about 500 channel broadcast satellite and video-on-demand. We see pages and pages of advertisements for cellular phones and CD ROM's, interactive computers and digital cameras. The pace of progress is incredible.

But if one peeks behind the smorgasboard, there is a very disturbing trend. The trend is toward concentration and media mega-mergers. Today's competitors are becoming tomorrow's partners.

Mr. President, this is why the position of Assistant Attorney General for Anti-Trust is so crucial. The individual who sits in that office plays a pivotal role in assuring our anti-trust laws produce robust competition rather than rogue concentration. Consumers need a champion for choice in communications.

I like Mr. Klein personally and believe him to be a skilled lawyer. It is the Administration's failure to move aggressively to promote competition that disturbs me. I hope my vote today

sends a clear message to the Administration that the trend toward increased communications concentration needs to be thorougly examined and challenged. For this reason, Mr. President, I will not be able to support the Administration on this vote.

Mr. TORRICELLI. Mr. President, I rise in support of the nomination of Joel Klein because of my confidence in his ability to be the kind of antitrust law enforcer the Justice Department and the country need to protect consumers and ensure vigorous competition.

My confidence comes from Mr. Klein's record of great success during the past nine months during which he has headed the Antitrust Division. He has proven to be a strong advocate in promotion of competition. His accomplishments include suing Rochster Gas and Electric for impeding competition for electric power, suing to block a hospital merger that would have raised prices for patients on Long Island, NY, obtaining indictments of an insulation company executive for price fixing, blocking an acquisition that would have created a dominant provider of asphalt concrete in New Hampshire and Vermont, and blocking an acquisition by Gulfstar Communications that would have created unacceptable media concentration.

His record also includes numerous guilty pleas and fines and settlements from antitrust violators, including a record $5.6 million penalty from German and Brazilian companies for violating pre-merger notification rules.

With an already strong record in an acting capacity, we can look forward to great things from Mr. Klein should he be confirmed by the Senate.

Mr. HATCH. Mr. President, I must say I find some irony in the criticisms I am hearing today regarding Mr. Klein's efforts to implement the Telecommunications Act. In essence, it is being suggested that Mr. Klein's interpretation of the Act would permit local Bell companies to enter the long distance market prematurely, or too easily.

In fact, however, Mr. Klein has weighed in against Bell entry into long distance in the 2 applications that have, to date, come before him—that is, the SBC and Ameritech applications. So it is curious to me that, while Mr. Klein's only actions in this regard have been contrary to the Bells, his confirmation is being opposed on the ground that he is being too lax on the Bells. This puzzles me.

But the broader point here is that Mr. Klein has demonstrated a studied, fair approach to interpreting the law, as a general matter.

I may well disagree with particular decisions Mr. Klein makes, but I am persuaded he will make a top-flight antitrust chief. So I urge my colleagues to join me in supporting this nomination.

Mr. BURNS. Mr. President, I rise this evening to offer may support for nomination of Joel Klein to assume the position of Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice.

There has been much debate here this evening over my letter to Mr. Klein dated May 15, 1997, and his subsequent letter in response dated May 20, 1997. I'd like to take this opportunity to offer my two cents.

When Mr. Klein's nomination was first reported out of the Judiciary Committee, I was concerned for three primary reasons. First, I had recently read Mr. Klein's paper entitled ''Preparing for Competition in a Deregulated Telecommunications Market,'' which he presented at the Willard Inter-Continental Hotel in Washington, DC, on March 11, 1997, and his interpretation in that paper of Section 271 of the Telecommunications Act of 1996 troubled me. Because I chair the Subcommittee on Communications, I felt that I could not, in good conscience, allow his nomination to move forward; consequently, I placed a hold upon his nomination and sent a letter to him asking him to explain his statements concerning 271 applications. He promptly responded with a comprehensive explanation of his statements, and, while I did not at that time nor do I now, necessarily agree with his assessment of the DoJ's role in the 271 application process, I understood the basis of his convictions.

Second, in addition to the questions raised in my letter, I also telephoned him and expressed concern over what had been reported to me—both by press accounts and by a wide range of industry representatives—as a total failure on the part of the Antitrust Division to investigate allegations that Microsoft Corporation was in violation of the Consent Decree entered into with the Department of Justice on August 21, 1995. I have here one of several newspaper articles detailing these allegations and seek unanimous consent for its introduction into the RECORD. Subsequently, I met with Mr. Klein and he assured me that he would investigate these allegations.

Finally, I had been contacted by a number of radio broadcasters who had complained that the Antitrust Division was misinterpreting the radio ownership provisions of the Telecommunications Act, but, after meeting with Mr. Klein, and discussing the issue at length, I was satisfied with his approach in this matter.

Consequently, based upon both his written and verbal responses to my concerns. I am satisfied that he will be a fine Assistant Attorney General for the Antitrust Division, and I support his nomination.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. DORGAN. Mr. President, if there is a cure for insomnia, as I said the other day, this kind of debate surely must be it. This is so arcane and technical, to be talking about antitrust issues and VIII(C) and section 271, and all of these issues that almost no one understands. They seem not very important to many, I am sure. I suppose most who would listen to this would think it incredibly boring. But, in fact, it is very, very important. We have a market system in this country that works only when there is competition. When you don't have competition, the market system doesn't work.

We have something called a referee several places in this Government: One at Justice, in the Antitrust Division; we have a referee function in the Federal Trade Commission. In fact, we have 1,000 attorneys, roughly, I understand, whose job it is to deal with antitrust issues and the issues of monopoly and so on. The purpose is to make sure that we don't have enterprises, where people come in and grab markets and develop trusts or monopolies and extract from the consumers a price that is unfair, a price that is not set in an open market or an open competition. That is what this antitrust enforcement is about.

Mr. Joel Klein is, by all accounts, capable, smart, and a fellow with a distinguished career. I have met him. I think he is a nice fellow. We should not be voting on this nomination at this point. We should not have been voting on a cloture motion on this nomination either, as we did a week ago. Why? Because there are substantial questions that a number of us have raised about the nomination of Mr. Klein that have not been answered. I feel I must vote against this nomination. I don't like that position, but I don't intend to vote for a nomination with the kind of questions that remain about a number of positions that have been taken, a number of things that have been written and said by this potential nominee on antitrust issues, that give me great concern.

I intend to speak only briefly because I think my colleagues have covered this subject. After I complete my presentation I will yield back the remainder of our time. But I want to make a couple of important points.

The fight on the Telecommunications Act, which was the first major reform of the telecommunications laws in this country in five or six decades, was a substantial battle between behemoths in our country—organizations that provided local service that are collecting tens and tens of billions of dollars of revenue, and organizations that are involved in long distance telephone service that are just as big. These titans then clashed as we wrote a Telecommunications Act. One of my concerns as we wrote this act was that we would end up, not with more competition, but, instead, with more concentration. If you have less competition and more concentration you will have higher prices.

My colleague from Nebraska held up something that was in the paper this morning in Nebraska, ''So Far, Consumers Losers in Battle for Dial-Tone Dollars; basic rates for telephone service are up for 93 percent of Nebraska

residential customers the past year.'' I don't know much about Nebraska, but I fear what will happen if we don't have aggressive antitrust enforcement at the Justice Department, something I fought very hard for, as did the Senator from South Carolina, as did the Senator from Nebraska, when we passed the Telecommunications Act. We were the ones standing out here on the floor talking about the VIII(C) test. We are the ones who fought for a role for the Justice Department in all of these issues. Were it not for us, it would not have been there.

Now, the Justice Department role is critical, as is the role of the Federal Communications Commission. If we have a Federal Communications Commission that does the wrong thing, or we have a Justice Department that doesn't do the right thing in antitrust enforcement, I guarantee the result of the Telecommunications Act last year will not be more competition and lower prices, it will be more concentration, fewer companies, and higher prices. I guarantee it.

This is important. This is about billions and billions and billions of dollars of additional charges that consumers may or may not have to pay in the future, depending on antitrust enforcement in the Justice Department and on thoughtful, responsible decisions in the Federal Communications Commission that properly implement the Telecommunications Act. There will be more discussion about that because we also have some disagreements about nominations to the Federal Communications Commission.

Mr. President, I ask unanimous consent to have printed in the RECORD at this point a letter that I have written to Mr. Joel Klein dated July 15, asking some questions about the interpretations that have been made on the VIII(C) test—the VIII(C) standards, rather, relative to the new standard called ''irreversibly open to competition.''

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

U.S. SENATE,
Washington, DC, July 15, 1997.

MR. JOEL KLEIN,
Acting Assistant Attorney General, U.S. Department of Justice, Washington, DC.

DEAR MR. KLEIN: Last night, I received a letter from Attorney General Janet Reno responding to a letter I sent to President Clinton relating to issues that I have with respect to your nomination. While I appreciate the fact that the Administration has acted to respond to my inquiry, the response was very general and lacks sufficient specificity to alleviate my concerns.

I expect that you will be confirmed by the Senate on Thursday. However, before I can vote in your favor, I still need to resolve some concerns with respect to the role of the Justice Department in the antitrust aspects of telecommunications policy. In particular, your assurance to other Senators that you reject the VIII(C) standard with respect to the Justice Department's evaluation of a Section 271 application by a Regional Bell Operating Company (RBOC) needs further explanation. I would like a more detailed and specific analysis from you on how the ''irreversibly open to competition'' standard relates to the VIII(C) standard, which was recommended in the Conference Report on the Telecommunications Act of 1996. How does the ''irreversibly open to competition'' standard differ from the VIII(C) standard with respect to assessing adequate local competition and the impact of RBOC entry into long distance services on long distance competition.

In our meeting last week, you said that the standard that you and the Antitrust Division have developed is stronger than the VIII(C) standard, and more appropriate in your judgement. I would like your analysis why this is the case. I want to assure you that I have an open mind on this subject. My position is not absolutely wedded to the VIII(C) standard as the only test for evaluation of a Section 271 application by an RBOC. Rather, I become concerned when an Administration official adopts a position that differs from previous Administration policy—which I fought for in the debate over the Telecommunications Act—and I would like to better understand the new position.

As I said on the Senate floor last Friday, I do not doubt your abilities nor your integrity. I simply would like some clarification on some issues that I fought hard to secure in the Telecommunications Act at the request of the Administration before the Senate votes on your nomination to be Assistant Attorney General for the Antitrust Division.

Thank you for your assistance and cooperation.

Sincerely,

BYRON L. DORGAN,
U.S. Senate.

Mr. DORGAN. I have sent Mr. Klein this letter.

Let me say this. It may well be that the irreversibly open to competition standard is a tougher standard, as they allege. I don't have the foggiest idea. I don't know. Nobody knows. And I am not prepared to have someone say, ''I reject the standard that Congress determined to be the standard when it passed the Telecommunications Act, and I create my own standard,'' and none of us know what that means here—I am not prepared to say, ''Yes, let me sign up for that. Let me be a partner in that process.'' I am not willing to do it.

It may be, at the end stage of this process, maybe it is proven to us that Mr. Klein was right. I hope so. I hope that is the case. But if he is not right, if we are right, what is going to happen is everybody in this country who uses a telephone, everybody in this country who is a consumer of telecommunications services, is going to end up paying higher prices. That's the test.

Mr. President, one final point and then I will conclude. During the debate on the Telecommunications Act, something happened to me that was a real learning experience. All of us in the Senate have learning experiences, despite the fact that some say we never seem to be able to learn.

I offered an amendment on the floor of this Senate on the issue of concentration, because the bill that came to the Senate said, ''Let's take the limits off. Let's let these companies marry up. The more weddings the better. Let three companies become one. Let two companies become—let's have mergers, let them go off and get married—it is just terrific.'' That is what the bill was. So I offered an amendment on the floor of the Senate and said, ''Let's put these limits back on at this point.'' I don't support taking the limits off how many television stations you can own, how many radio stations you can own.

We had a vote and guess what? Guess who won? I won. My amendment prevailed. I was so surprised I could hardly stand, and it was about 4 o'clock in the afternoon. The then-majority leader did not support my position. He was on the opposite side. He changed his vote—had another Member change his vote, and asked for reconsideration after dinner, 3 hours later. And do you know what happened? There were four, five, or six Members of the Senate that went out to have dinner—Lord only knows what they ate—they came back and 3 hours later they had some sort of epiphany that allowed them to vote against my amendment, so I lost.

I learned that winning around here sometimes means you only win for 3 hours. It felt good from 4 to 7, but the fact is I lost. Then the bill went to conference and the bill had enough in it to make me feel that maybe we will move in the right direction. But I would rue the day of supporting any portion of this telecommunications act if we don't have the most aggressive antitrust enforcement and the best decisions, the most thoughtful decisions comporting with what we decide is in this act from the Federal Communications Commission.

I have a lot more to say but I know there are other times when Members will be anxious to hear it, and I will save it for those times.

Let me compliment the Senator from South Carolina and the Senator from Nebraska.

Let me say a word, finally to the nominee. I expect the Senate will cast a favorable vote for this nominee. I hope this nominee succeeds. I hope this nominee proves that the standard that he has developed is a tough, no-nonsense standard. If he does, I will come to the floor at some point in the future and say, ''Hurrah for you. I support what you have done.'' I think we should not be voting on this nominee today. I wish we had more time. If we had more time, maybe some of these votes would have been different.

Mr. President, I yield the floor and yield the remainder of our time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, do I understand the other side is willing to yield back the remainder of their time and we are prepared to yield back the remainder of our time?

Mr. HOLLINGS. Mr. President, we yield the remainder of our time.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I yield back the remainder of our time. I ask unanimous consent that upon the completion of debate or the yielding back

of time on the Klein nomination, we proceed to a rollcall vote on the nomination and then, after that vote we proceed to vote on Executive Calendar No. 139, the nomination of Eric Holder to be Deputy Attorney General of the United States.

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

Mr. LEAHY. May I ask for the yeas and nays on both.

Mr. HATCH. On both nominees.

The PRESIDING OFFICER. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. LEAHY. I ask unanimous consent the yeas and nays be ordered on both.

The PRESIDING OFFICER. Is there objection to the ordering of the yeas and nays on the second nomination?

Without objection, it is so ordered. Is there a sufficient second?

There is a sufficient second.

The yeas and nays were ordered.

Mr. HATCH. I yield the remainder of my time.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Joel L. Klein, of the District of Columbia, to be an Assistant Attorney General. On this question the yeas and nays have been ordered. The clerk will call the roll.

The yeas and nays have been ordered.

The clerk will call the roll.

The legislative clerk called the roll.

The result was announced, yeas 88, nays 12, as follows:

[Rollcall Vote No. 187 Ex.]

YEAS—88

Abraham	Frist	McConnell
Akaka	Glenn	Mikulski
Allard	Gorton	Moseley-Braun
Ashcroft	Graham	Moynihan
Baucus	Gramm	Murkowski
Bennett	Grams	Murray
Biden	Grassley	Nickles
Bingaman	Gregg	Reed
Bond	Hagel	Reid
Boxer	Hatch	Robb
Breaux	Helms	Roberts
Brownback	Hutchinson	Rockefeller
Bryan	Hutchison	Roth
Burns	Inhofe	Santorum
Campbell	Jeffords	Sarbanes
Chafee	Johnson	Sessions
Coats	Kempthorne	Shelby
Cochran	Kennedy	Smith (NH)
Collins	Kerry	Smith (OR)
Coverdell	Kohl	Snowe
Craig	Kyl	Specter
D'Amato	Landrieu	Stevens
Daschle	Lautenberg	Thomas
DeWine	Leahy	Thompson
Dodd	Levin	Thurmond
Domenici	Lieberman	Torricelli
Durbin	Lott	Warner
Enzi	Lugar	Wellstone
Faircloth	Mack	
Feinstein	McCain	

NAYS—12

Bumpers	Dorgan	Hollings
Byrd	Feingold	Inouye
Cleland	Ford	Kerrey
Conrad	Harkin	Wyden

The nomination was confirmed.

NOMINATION OF ERIC H. HOLDER, JR., TO BE DEPUTY ATTORNEY GENERAL

Mr. HATCH. Mr. President, I am pleased today that we are finally voting on the nomination of Mr. Eric Holder, nominated to serve as Deputy Attorney General. Mr. Holder was reported out of the Judiciary Committee unanimously on June 24. I support Mr. Holder for this position, and I urge my colleagues to vote in favor of his confirmation.

This is a position which is vitally important to the efficient and effective management of the Justice Department, as well as to this committee and its many dealings with the Department. The Deputy Attorney General plays a critical role in the day-to-day oversight, management, and administration of the Justice Department, typically handling the Department's most important and sensitive matters. The deputy has ultimate responsibility for the office of the Solicitor General, who represents the United States before the Supreme Court, as well as all of the Department's civil and criminal divisions, including, for example, the civil rights, tax and antitrust divisions, the criminal division, the Federal Bureau of Investigation, and all U.S. attorneys. In short, a broad array of policy and law-enforcement decisions that are critical not just to our legal system but to the Nation as a whole, ultimately pass through the Deputy Attorney General.

Mr. Holder comes to us with a distinguished record in the law and in the administration of justice. After graduating from Columbia Law School in 1976, he served for 12 years as a prosecutor in the public integrity section of Justice Department's Criminal Division, after which he served for 5 years as a associate judge for the District of Columbia Superior Court. Since 1993, Mr. Holder has served as U.S. attorney for the District of Columbia, our Nation's largest U.S. Attorney's Office, which employs over 300 attorneys and prosecutes over 10,000 cases each year. I believe these positions provide especially useful experience for a person who would serve as Deputy Attorney General.

I would like to emphasize how important it is to the Senate and the Judiciary Committee in particular, on both sides of the aisle, to have a close and cooperative working relationship with the Deputy Attorney General. I believe that one of the Department's greatest assets over the past several years has been its former deputy, Jamie Gorelick, who successfully fostered and maintained a cooperative, honest, and responsive relationship with this committee. I cannot overestimate how valuable this relationship has been in the virtually daily interactions between the committee and the Department, and I am hopeful, and confident, that Eric Holder will, like his predecessor, work closely with the committee to ensure that the Department maintains the highest level of professionalism and independence in its commitment to enforcing our Nation's laws. I have spoken with Mr. Holder on numerous occasions since his nomination, and am struck that, in addition to being eminently qualified for this position, he is a candid, forthright individual of character and integrity who will be a positive force in steering the Justice Department and in seeing to it that our laws our faithfully and impartially enforced. The Nation expects and deserves nothing less, and I believe they will get as much from Mr. Holder.

While I have often given Attorney General Reno due credit for the fine work and accomplishments of the Justice Department, not the least of which is the recent trial and conviction of Timothy McVeigh, the Department, like any large agency, also has its share of problems, many of which fall on the Deputy Attorney General's desk.

Moreover, the Department has been, and inevitably will be, the subject of some rather intense political pressure, and, quite frankly, I am somewhat disturbed by a growing sense that, in a number of instances, there is at least the appearance that political pressures may have won out over the fair and impartial enforcement of the law. After a rather public display by the White House of its displeasure that the Attorney General had previously sought the appointment of four independent counsels, we now see the Attorney General steadfastly refusing to appoint an independent counsel to conduct the campaign finance investigation—the one case where an independent counsel is most called for to ensure public confidence in the investigation and the Department itself. And, after the Attorney General expressly adopted one interpretation of the independent counsel statute, and I challenged that interpretation, we now receive a letter explaining that she has, notwithstanding statements to the contrary, been applying the same standard I articulated. The Justice Department issues bizarre statements seeking to put particular spins on information disclosed by Chairman Thompson in connection with the campaign fundraising hearings. The Justice Department has filed briefs taking rather dubious positions in politically sensitive cases, including its appeal brief in the litigation over California's proposition 209, and its very recent brief defending Mrs. Clinton's invocation of a governmental attorney client privilege in response to independent counsel Starr's request for certain documents. And the FBI Director is in the position of refusing to brief the White House on national security matters because of its pending investigation. While each of these instances, standing alone, might have a legitimate explanation, taken together they create an appearance that politics is influencing what should be a neutral, independent enforcement of our Nation's laws.