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S. 2686, COMMUNICATIONS, CONSUMER'S CHOICE, AND BROADBAND DEPLOYMENT ACT OF 2006 (PART III)

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 13, 2006

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

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CONTENTS

WITNESSES

APPENDIX

S. 2686, COMMUNICATIONS, CONSUMER'S CHOICE, AND BROADBAND DEPLOYMENT ACT OF 2006 (PART III)

TUESDAY, JUNE 13, 2006

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

The Committee met, pursuant to notice, at 10:07 a.m. in room SH–216, Hart Senate Office Building, Hon. Ted Stevens, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. TED STEVENS, U.S. SENATOR FROM ALASKA

The CHAIRMAN. Thank you very much for coming. Sorry for the delay.

We have a very full hearing today. We'll have two panels, so the Committee can receive diverse opinions on the revisions that my staff and I have suggested, working with Senator Inouye and his staff.

To keep this moving smoothly, I would hope the Committee would agree to this, that Members will use up to 2 minutes before the first panel, or, if they want to forego the opening statement, they may use 7 minutes for questioning the first panel. And, otherwise, in the second panel, each member will have 5 minutes for questions. And if Members have to leave the hearing for a substantial period of time, aside from stepping out for a moment for a phone call or voting or for personal reasons, we are going to treat that as being when the person comes in the second time. That's the order that they would be called on for asking questions of witnesses.

I do thank all the witnesses for coming. And I thank members of the Committee, who have been very helpful in providing comments.

We will print your statements in the record in full. Contrary to what you've heard, we have allocated 5 minutes to each one of you on your statements, and I would appreciate it if Members would confine their first comments to no more than 2 minutes.

Senator Inouye?

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. Thank you very much. May I have my statement made part of the record?

The CHAIRMAN. Senator Inouye's statement will be made part of the record. I don't know what the order is here yet.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Today, we meet again to discuss the issue of telecommunications reform and changes made to S. 2686 by the recent staff draft released late last week by the Majority.

While I recognize and appreciate that the new draft makes a number of improvements to the language contained in S. 2686, I continue to be concerned by the lack of significant progress in a number of key areas that, in my view, are critical components of telecommunications reform legislation.

For example, despite significant changes to preserve the legitimate interests of state and local governments in the franchising process, I remain deeply concerned that further advances are needed so that any new franchising process will preserve important consumer protections, will promote a fair and neutral process for all operators, and will advance the interests of local communities in bringing the benefits of modern communications networks to all of their citizens.

Apart from video franchising, I am also troubled by our failure in the current draft to strengthen existing interconnection requirements, to promote competition in special access markets in the face of clear market failure, and to preserve network neutrality through enforceable provisions that will prevent unfair discrimination by broadband network operators.

That said, I realize that the current draft remains a work-in-progress and appreciate the efforts made by the Chairman and his staff to respond to concerns aired by Members on both sides of the aisle. As a result, I look forward to continuing our work on this legislation in the days and months ahead.

The CHAIRMAN. Senator Burns?

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. Mr. Chairman, can you all hear, out there? Can you? Can you hear, in the back? There are some people up front that would like to trade chairs with you, if you can't.

Thank you, Mr. Chairman, for holding this hearing today and taking the time on the views, as we try to move this legislation forward. I'll submit my full statement for the record.

But I think, you know, in 1996, we worked on the 1935 law, and we figured we were trying to deal with 1990s technology with a 1935 law. It didn't take very long for the technologies to catch up with this one and outdate it a little bit. And now we're back revisiting that same law, just 10 years later. But that's the way technology moves, and that's the way it is, and we have to be flexible with it.

And so, I'm grateful to the Chairman for putting this bill together. Universal service, I have a keen interest in, and most of the U.S.—the NetUSA that was in my Universal Service bill is also in this bill, and he has to be given a lot of credit for, really, offering a far-reaching bill. The goal is to permit competition. And I think it does. And now, we're going to—now we've gone into the video services business, and people have a variety of ways of receiving their video—through cable, through telephone, through satellite. And every now and again they even go to the movies themselves. So, we are contemplating that there'll be a lot of competition in the video business.

As you know, with the telephones going into the video business, and the cables going into the telephone business, that offers up an-

other challenge for policymakers. But under competitive policies, that was expected to happen.

So, lately now we've heard about net neutrality. I will guarantee you, if you walk down Pennsylvania Avenue, or any other street in this town, and you ask 20 people what "net neutrality" is or means, you will get 20 different answers. And some—now, there are just a few, maybe, that understand that, and—but it's nice that we—and probably convenient—that we'll be talking about net neutrality in this bill. And also on video franchising, we will talk about that. And so, it's a far-reaching bill, and I congratulate the Chairman. And I will offer my statement and go away.

The CHAIRMAN. The statement will be printed in the record in full.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Thank you, Mr. Chairman, for holding this important hearing today. I would also like to thank our guests for taking the time to share their views with us.

Congress, and this Nation, have had a commitment to a Universal Service for almost 100 years—a commitment that helps keep telephone service affordable in high-cost areas such as Montana, helps ensure that schools and libraries receive access to the Internet, and helps link rural healthcare facilities to urban medical centers, promoting telemedicine.

I'm grateful to see that Senator Stevens incorporated many important ideas from my NetUSA bill, including the section that will help improve the delivery of telemedicine, which will aid the people living in rural areas of the country, like Montana, by keeping their phone bills low while expediting the spread of new technologies to those rural communities.

The Universal Service Fund remains crucial for the future of rural America—the day has not arrived when technology and the free market can make affordable telecommunications services available everywhere.

Chairman Stevens deserves a lot of credit for introducing such a thoughtful and far-reaching telecommunications bill. I'm very pleased that most of the principles I set forth earlier this year are addressed and adhered to in this piece of legislation in regards to video franchising.

The goal is to promote competition wherever possible. I am well aware of how competition for video services has grown over the past decade, even in rural areas like Montana. Satellite competitors, such as DIRECTV and EchoStar, have had a significant impact on the marketplace, and most of our constituents can now choose among three service providers for their video programming.

Technology has enabled cable companies to compete for telephone customers, and telephone companies are beginning to compete for cable and satellite television customers. A study the GAO put out in March of 2004, shows that cable TV rates are substantially lower (by 15 percent) in markets where competition exists. With this in mind, we have the opportunity to bring even more competition to the marketplace, while at the same time ensuring that our colleagues in local government are able to protect the interests of our communities.

Under existing law, cable operators and telephone companies must obtain a franchise from local governments before they can provide cable service. The franchising process ensures that local governments can continue to manage their rights-of-way. By taking franchising rights away from local governments it would eliminate them from requiring build-out requirements, offering consumer protections, preventing economic redlining, and offering their community public, educational, and governmental programming. But the franchising process must not be permitted to become a barrier to entry.

Lately, we've seen an incredible surge in the argument of net neutrality—it's an issue that's unfortunately become political. It's unfortunate because if you ask ten people what it is, you'll get ten different answers.

I feel the Stevens approach is the best way to effectively protect our Internet without over-regulating, and creating unintended consequences by giving the necessary tools for the Federal Communications Commission to monitor the net neutrality issue, and act to protect consumers accordingly.

Although I agree with the spirit and intent of the legislation Senators Snowe and Dorgan have proposed, I have some serious concerns of unintended consequences that this legislation could have on rural states like Montana.

I have concerns that Congress is not as equipped to be a reliable consumer watchdog as the FCC, which is why I support the Stevens approach to ensuring the issue of net neutrality is properly handled.

It takes a "crime before punishment" angle, as opposed to the Snowe-Dorgan bill, and gives the FCC the tools it needs to carefully monitor and act if large ISPs try to enter into an exclusive deal with a content provider.

Our telecommunications laws are outdated, which is hurting consumers and businesses both large and small. I look forward to the thoughts and opinions of our guests today, and working with the rest of the Committee to craft the best telecommunications bill possible.

The CHAIRMAN. Senator DeMint?

Senator DEMINT. Mr. Chairman, I appreciate all your work on this bill, and I'll withhold my comments until after the testimony.

The CHAIRMAN. Thank you.

Senator Vitter?

STATEMENT OF HON. DAVID VITTER,
U.S. SENATOR FROM LOUISIANA

Senator VITTER. I'll do the same, Mr. Chairman, thank you.

The CHAIRMAN. Senator Dorgan?

STATEMENT OF HON. BYRON L. DORGAN,
U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, let me just take a minute and—first of all, thank you. I received the revisions to your mark, I think, on Friday evening. And I've been traveling—just arrived back in town last evening—but I've looked through it, and I think that you've done some good things on the Universal Service portion of the bill. I think there are some good changes in the video franchising title. There are some areas, I think, with respect to buildout issues, that we ought to address.

I agree with Senator Burns, that probably not a lot of people understand the term "net neutrality," but they certainly understand the open architecture of the Internet, and the opportunity for everybody, no matter where they are, to access the Internet. And perhaps we should call it "Internet freedom." I think maybe most people understand the freedom to move onto the Internet and move wherever they like. And so, I don't—I think it's very important for us to understand that that is an important issue. And I hope that Senator Snowe and I and others will be able to work with you, and with the Vice Chairman, or Co-Chairman, of the Committee on that issue.

Finally, just—this is all very complicated, and these are big stakes. I was here in 1996 when we wrote the 1996 Act. The world has changed a great deal since then. And so, as we now contemplate additional changes, all of us understand that the stakes are very big. These are difficult issues, in many ways. But all of us, I think, want the same thing.

I'd like robust competition to exist. I'd like consumers to have many choices. And I think I'd like—I'd certainly like to continue to incentivize innovation and creativity and progress.

So, Mr. Chairman, thank you very much for calling this hearing. I look forward to hearing the witnesses.

The CHAIRMAN. Thank you very much.
Senator Pryor?

**STATEMENT OF HON. MARK PRYOR,
U.S. SENATOR FROM ARKANSAS**

Senator PRYOR. Thank you, Mr. Chairman. And I really want to just really thank the Chairman and his staff for just spending hours, and hours, and hours in trying to get this bill right, trying to take in—everybody's views into consideration. And I'll have a lot of questions, but, Mr. Chairman, I just wanted to say thank you, and thank you to all the staff members who worked so hard to get us here today.

Thank you.

The CHAIRMAN. Thank you very much.

I've overlooked the Senator from New Hampshire. I apologize. I thought the first Senator——

Senator SUNUNU. That is quite——

The CHAIRMAN.—was my name, not yours.

Senator SUNUNU. Thank you, Mr. Chairman.

**STATEMENT OF HON. JOHN E. SUNUNU,
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator SUNUNU. We do have principles that have already been put forward by the FCC supporting Internet freedom, if that's what we want to call it, supporting Internet access. But what has been contemplated by Senator Dorgan and by others previously, such as Representative Markey in the House, are Internet regulations. And I think that's something that the public can certainly understand.

A few things have happened in the last 3 days, I think, that are important in this area:

First, that that language, imposing regulations on the Internet, was rejected overwhelming in the House of Representatives, a bipartisan coalition. I think nearly 270 votes rejecting that Internet regulation language.

Second, we have the editorial pages of pretty diverse institutions—the *Washington Post* and the *Wall Street Journal*—again, lining up, saying that it is wrong to impose these regulations now. We want to make sure that there is fair competition. We want to make sure that there are reasonable economic incentives for build-out and for other things. We have principles for competition that have been established by the FCC. But I think that the language—Chairman Stevens' markup and the language that has been accepted in a bipartisan fashion in the House—steers it in the right direction. We should be very careful before we start imposing Internet regulations, because if there is anything that the public will understand, it's that a heavy regulatory hand kills incentives to develop new products, to deploy new technologies, and that, ultimately, will be something that consumers feel and respond to in a very negative way.

So, I think, over the last 3 days, we've seen a number of instances that set the right direction for us, and that, I hope, we will continue to heed as we mark up this legislation.

Thank you.

The CHAIRMAN. Thank you very much.

Senator Nelson of Nebraska?

STATEMENT OF HON. E. BENJAMIN NELSON, U.S. SENATOR FROM NEBRASKA

Senator BEN NELSON. Thank you very much, Mr. Chairman. And let me add my appreciation to you and your staff, and to the—to Senator Inouye and his staff, for working on this markup. And I'm anxious to hear the witnesses, so I'll suspend any further comments.

Thank you very much.

The CHAIRMAN. Thank you, Senator.

We'll now proceed. I believe everyone that's here has been given the chance to comment.

Senator BURNS. Senator Lautenberg just walked in.

The CHAIRMAN. Senator Lautenberg, you got in under the wire. Do you wish to make an opening statement?

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. I wish to take as much time as I can, sir. And so, that means, I guess, I go to the back of the line for the 7-minute inning?

The CHAIRMAN. No, you can take 2 now.

Senator LAUTENBERG. And sacrifice 2 minutes at the end. Is that——

The CHAIRMAN. We add the 2 minutes to the 5, if you don't take them at the beginning.

Senator LAUTENBERG. I'll take 7, sir.

The CHAIRMAN. All right.

Our first witness, then, is Brigadier General Richard Green, retired as the Legislative Director for the National Guard Association.

General Green?

STATEMENT OF BRIGADIER GENERAL RICHARD M. GREEN (RETIRED), LEGISLATIVE DIRECTOR, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

General GREEN. Good morning.

The CHAIRMAN. As I said, all your statements are in the record in full. You may have up to 5 minutes to give us your comments, please.

General GREEN. Chairman Stevens, Members——

Senator BURNS. Pull that mike up to you.

General GREEN. OK. How's that?

The CHAIRMAN. They're hot, but they're not that hot.

General GREEN. All right.

Chairman Stevens, members of the Committee, thank you for the opportunity to testify before you today on issues related to Senate bill 2686, to reduce telephone rates for Armed Forces personnel deployed abroad.

Since 1878, when a group of volunteer officers, veterans of the Civil War from both the North and South, gathered in Richmond, Virginia, to discuss matters of practical reform, which would make the militia a more effective instrumentality of our system of na-

tional defense, the National Guard Association of the United States has served as the voice on Capitol Hill to represent the interests of our citizen soldiers and airmen.

The main thrust of our early founders was to ensure the Guard had the equipment and training necessary to attain desired readiness levels, and those efforts continue. However, since recruiting and retention is so important, a considerable amount of our efforts are now aimed at providing a variety of support for our military families.

During the Cold War years, the Guard was considered a strategic reserve. Today, the National Guard represents 28 percent of the total Army and Air Force, and is considered an operational force.

With boots-on-the-ground for a year or more at a time, members of the Guard are up to the challenge, but it doesn't come without significant strain on families that may not be used to having their loved ones deployed for extended periods of time to dangerous locations.

It is often said that we recruit the member and retain the family; however, when members of the military are deployed, the ability to communicate over the phone with loved ones back home can be confusing and expensive. Additionally, the inability to communicate with a spouse on a regular basis can result in family issues that, if allowed to fester, could ultimately affect the family's perception of life in the military, and negatively impact retention.

The ability to use e-mail has helped, but nothing compares to the voice of your loved one having the ability to exchange thoughts and feelings, or to discuss an important issue person-to-person over the phone.

It has been the custom of the military to establish "welfare and morale" phone lines that are free-of-charge at deployed locations. But many times these services are extremely limited or inconvenient, resulting in some deployed members running up expensive phone bills. This is not a Guard-specific issue. It applies to all members of our Armed Forces. However, on behalf of the men and women of the National Guard who are serving our country, we both applaud and enthusiastically support your efforts to find creative ways to reduce the cost of calling home for Armed Forces personnel.

Doing whatever we can to support those who risk their lives to defend freedom is always the right thing to do. And the National Guard Association stands firmly behind your Committee's efforts to help provide more cost-effective means for our members to stay in touch with those back home.

Mr. Chairman, members of the Committee, I sincerely thank you for your time and look forward to your questions.

[The prepared statement of General Green follows:]

PREPARED STATEMENT OF BRIGADIER GENERAL RICHARD M. GREEN (RETIRED), LEGISLATIVE DIRECTOR, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES

Chairman Stevens, members of the Committee, thank you for this opportunity to testify before you today on issues related to S. 2686, the Communications, Consumers' Choice, and Broadband Deployment Act of 2006, to reduce telephone rates for Armed Forces personnel deployed abroad, cited in Title I—War on Terrorism, Subtitle A, Sec. 101–102 as "Call Home."

Since 1878, when a group of volunteer officers, veterans of the Civil War from both the North and South, gathered in Richmond, Virginia, to discuss "matters of practical reform which would make the Militia a more effective instrumentality in our system of National Defense", the National Guard Association of the United States has served as the voice on Capitol Hill to represent the interests of our citizen soldiers and airmen.

The main thrust of our early founders was to ensure the Guard had the equipment and training necessary to attain desired readiness levels, and those efforts continue. However, since recruiting and retention is so important, a considerable amount of our efforts are now aimed at providing a wide variety of support to our military families.

During the Cold War years, the Guard was considered a "Strategic Reserve." Today, the National Guard represents 28 percent of the total Army and Air Force and is considered an "Operational Force."

With "boots-on-the-ground" of a year or more at a time, members of the Guard are up to the challenge. But, it doesn't come without significant strain on families that may not be used to having their loved one's deployed for extended periods of time to dangerous locations.

It is often said that we "recruit the member and retain the family." However, when members of the military are deployed abroad, the ability to communicate over the phone with loved ones back home can be confusing, and is almost always expensive.

Additionally, the inability to communicate with a spouse on a regular basis can result in family issues that, if allowed to fester, could ultimately affect the family's perception of life in the military and negatively impact retention.

The ability to use e-mail has helped. But, nothing compares to the "voice" of the one you love, and having the ability to exchange thoughts and feelings, or to discuss an important issue person-to-person over the phone.

It has been a custom of the military to establish "welfare and morale" phone lines that are free of charge at some overseas locations. But, many times these services are extremely limited or inconvenient, resulting in some deployed members running up expensive phone bills.

This is not a Guard-specific issue. It applies to all members of our Armed Forces. However, on behalf of the brave men and women of the National Guard who are serving our country, we both applaud and enthusiastically support your efforts to find creative ways to reduce the cost of calling home for Armed Forces personnel stationed outside the United States.

Doing whatever we can to support those who risk their lives to defend freedom is always the right thing to do. And, the National Guard Association stands firmly behind your Committee's efforts to help provide more cost-effective means for our members to stay in touch with those back home.

Mr. Chairman, members of the Committee, I sincerely thank you for your time and look forward to your questions.

The CHAIRMAN. Thank you very much.

Our next witness is Dr. John Rutledge, the President of Rutledge Capital, Consultant to the United States Chamber of Commerce.

Dr. Rutledge?

STATEMENT OF JOHN RUTLEDGE, PH.D., PRESIDENT, RUTLEDGE CAPITAL; PRESIDENT, MUNDELL INTERNATIONAL UNIVERSITY BUSINESS SCHOOL IN BEIJING, CHINA; ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Dr. RUTLEDGE. Mr. Chairman and members of the Committee, thank you for inviting me to testify today.

My day job is Rutledge Capital, which is a private equity firm, buying and selling companies, leveraged buyouts. Beside that, I'm President of the Mundell International University of Entrepreneurship in Beijing. So, I advise both Chinese companies and the Chinese Government on energy and technology issues, and deal with issues on both FOX News and CNBC relating to economics.

I'm here to testify, invited on behalf of the U.S. Chamber of Commerce. I was one of the authors of a study the U.S. Chamber of

Commerce did on telecom reform which was conducted, reaching the conclusion that a broadbased deregulatory reform of the communications industries in the U.S. over a 5-year period could generate $58 billion of capital spending, $634 billion of extra GDP, $113 billion of extra taxes, 200,000 additional jobs, and make the U.S. more competitive. The Chamber has asked me to testify today on their behalf regarding the telecom legislation.

My summary is really very simple. The communication network is the central nervous system of all economic activity in the country. Virtually 100 percent of growth in the U.S. economy in the next 5, 10, 20, and 50 years will occur in the information-driven service sectors. We talk a lot about competing for jobs with China and India, but the fact is, we're not competing for jobs, we're competing for capital. Every farmer knows you can't eat more than you grow. You also cannot take home more than you produce in a factory. Productivity is the only number that matters, in terms of people's paychecks. Productivity depends on workers' access to tools. So, competing for capital with others is the issue.

The U.S. Chamber of Commerce opposes the net neutrality reregulatory concept, on the grounds that it would harm capital spending on infrastructure, slow productivity growth, and slow overall growth. And I'd like to talk about why for a moment.

I like to think of the global economy as a set of washtubs like my mother used to have. There was a washing tub and a rinsing tub. If you put water in one of them and not in the other one, it'll stay that way for a long time. But if you put a hole in the wall between them, the water will become even on both sides. We call that "water seeks its own level." It's really the second law of thermodynamics. It's the same thing that drives markets with price differentials. It drives capital markets with return differentials, as well.

Most of the capital in the world is bottled up in the U.S., Western Europe, and Japan. Most of the people in the world are bottled up in Asia. We are now connected not only through international trade, which means ships, but also via fiber optic cable that now can transmit an almost infinite amount of value at the speed of light between countries. That transfer of value is what we've all been thinking of as out-sourcing, and it has been disrupting the economy.

Competing for paychecks is a matter of competing for capital, especially tech capital. In my work in China, I have understood and learned that the Chinese Government understands this issue, is aggressively competing to attract capital from the U.S. and Western Europe, especially technology capital. They have a particular reason for that. The reason is that the air is very dirty, and they're running out of coal, gas, and oil. The only way they can deliver 8 to 10 percent growth is to deliver $60 billion of foreign direct investment a year. To do that, they need tech capital that will grow the economy without using more oil. The way you win that game is with rates-of-return, taxes, and regulations. By making returns—returns are already high in China, but by making taxes and regulations attractive, they're attracting large sums of tech capital.

We need the fastest, deepest information network in the world. We don't have it. Asia and Europe are both investing much more

heavily than we are. Wall Street, so far, is unimpressed with the measures that have been taken. The most important thing you could do is to pass this bill, which would not allow re-regulation of the Internet or price controls on information distribution.

Thank you.

[The prepared statement of Dr. Rutledge follows:]

PREPARED STATEMENT OF JOHN RUTLEDGE, PH.D., PRESIDENT, RUTLEDGE CAPITAL; PRESIDENT, MUNDELL INTERNATIONAL UNIVERSITY BUSINESS SCHOOL IN BEIJING, CHINA; ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. Chairman and Members of the Committee, thank you for inviting me to testify today. My name is John Rutledge, and I am the President of Rutledge Capital and President at the Mundell International University Business School in Beijing, China. I have spent a significant amount of time over the past few years researching issues related to the impact of technology on the economy, and I was one of the authors of the U.S. Chamber of Commerce's telecommunications study, *Sending the Right Signals: Promoting Competition through Telecommunications Reform.* In this regard, I developed a macroeconomic model of the impact of the regulatory climate on jobs, the economy, and international competitiveness. The U.S. Chamber of Commerce has asked me to testify today on their behalf. The U. S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

Moreover, the U.S. Chamber, in partnership with the National Association of Manufacturers, the National Black Chamber of Commerce, and the United States Hispanic Chamber of Commerce, leads TeleCONSENSUS, a coalition of more than 190 trade associations, chambers of commerce, telecommunications providers, and equipment manufacturers, businesses, and consumers, formed to educate policymakers, the business community, and the public about the need for modernized Federal telecommunications laws, and the importance of advanced telecommunications services to the U.S. economy, and our ability to effectively compete with other nations for jobs and capital.

Impact of Telecommunications on the Economy

This year, Congress will have a unique opportunity to set aside partisan politics and choose growth and prosperity for our citizens by voting to reform our archaic telecommunications laws. A legislator who votes to continue second-guessing innovation and regulate competitive communications technology services is voting to send U.S. businesses and jobs overseas. It is time for the United States to take a stand for growth.

Telecommunications is the central nervous system of today's global economy; it is the way all businesses communicate and do business with our workforce, our suppliers, and our customers. Fast, accurate communications networks have become a crucial competitive tool. It is absolutely critical that our businesses have the tools to compete for customers and to keep jobs and paychecks growing here at home.

Inadequate investment in high-speed telecommunications networks has the potential to severely undermine our competitiveness. For the past decade, policies in Washington have discouraged investment by undermining the return on capital invested in U.S. telecommunications assets, and adding a great deal of regulatory uncertainty to the investment process. During that time, the United States has gone from 5th place to 16th place among global economies in access to high-speed telecommunications networks. America's eroding telecommunications position is quietly reducing our workers' standard of living.

There is an intense global competition for capital underway. Workers in the United States are not competing with other states for jobs. Our workers and businesses are competing with China, India, Korea, and other Asian economies for the capital to build businesses. Jobs go where the businesses go. With fiber-optic connections, service jobs from customer service in a call center to radiologists reading x-rays can be done over fiber-optic cable from anywhere in the world at the speed of light. China, India, and Korea are taking steps every day to make themselves a destination resort for capital. They have made high-speed telecommunications a national priority because they understand the role telecom plays in driving productivity and economic growth. Ironically, it is easier today to outsource work to companies in Beijing or Bangalore than to many small towns in America, simply because foreign telecommunications infrastructure is better than it is here.

In the old game, the capital and the workers were less mobile and our stable, well-developed markets and well-trained workers attracted the capital that made U.S. workers more productive and earn bigger paychecks than any place in the world. But the game has changed.

Radical advances in technology have changed the way we all communicate and do business. Markets around the world are now connected. Capital can move easily and invisibly, in search of higher returns and service jobs can move across country lines independent of immigration policy. But policymakers have continued to regulate communications as if we were still in the 1950s.

It's time for policymakers in Washington to allow consumer choice and innovation to drive the deployment of new technology, not government regulation. In a June 12, 2006, article in *The New York Sun,* former FCC Commissioner Harold Furchtgott-Roth illustrated the impact of the Internet on the U.S. economy when he stated that:

> Fees for Internet access services pale in comparison to the commercial transactions conducted on the Internet. The most recent government report calculates that in 2004 nearly $1 trillion in manufacturing shipments, or 23.6 percent of the total manufacturing, were attributable to electronic commerce. For the wholesale sector, more than $825 billion in sales were electronic commerce, or more than 17 percent of the total. Selected services, including airline ticket sales, had revenue of nearly $60 billion in sales.[1]

Congress has the opportunity this year to abandon the misguided ideas that they have the ability to predict new technologies, and that regulation encourages competition. Reforming telecommunications regulations will encourage new investment, innovation, and jobs and will free wireline and wireless service providers to engage in the capital spending they need to grow, and to ensure that the capabilities of their networks are in sync and responsive to user needs. This will do more to solve the problem of outsourcing than any form of protectionism, or for that matter, practically any other step the Federal Government may take to preserve jobs in this country.

"Net Neutrality" and the Economy

"Net neutrality" suggests that the Internet should be operated in a neutral manner—meaning that users should be free to visit their choice of legal websites, to connect video game systems and other such devices to the Internet, and to access online applications, without interference from service providers, content providers, or the Federal Government. The Federal Communications Commission (FCC) has adopted a policy statement that outlines four "net neutrality" principles designed to encourage broadband deployment, and preserve and promote the unrestricted nature of the Internet.

The FCC principles are straightforward and clear:

1. Consumers are entitled to access the lawful Internet content of their choice;
2. Consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
3. Consumers are entitled to connect their choice of legal devices that do not harm the network; and
4. Consumers are entitled to competition among network providers, application and service providers, and content providers.

While the FCC's "Four Freedoms" statement does not formally establish rules, *they do reflect the core beliefs that each member of this Commission holds regarding how broadband Internet access should function,* according to FCC Chairman Kevin Martin.[2] The press statement that accompanies the Policy Statement notes that . . . *although the [FCC] did not adopt rules in this regard, it will incorporate these principles into its ongoing policymaking activities.*[3] FCC Commissioner Michael Copps has stated that while he would have . . . *preferred a rule that we could use to bring an enforcement action,* the Policy Statement . . . **lays out a path forward under which the Commission will protect network neutrality so**

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[1] Harold Furchtgott-Roth, "The 'Network Neutrality' Battle," *The New York Sun,* June 12, 2006, page 10.

[2] "Appropriate Framework for Broadband Access to the Internet over Wireline Facilities", News Release, 2005 FCC LEXIS 4494 (rel. Aug. 5, 2005) (Chairman Kevin J. Martin Comments on Commission Policy Statement).

[3] "Appropriate Framework for Broadband Access to the Internet over Wireline Facilities," (FCC Adopts Policy Statement).

that the Internet remains a vibrant, open place where new technologies, business innovation, and competition can flourish.[4]

In granting the Verizon/MCI and SBC/AT&T mergers, the FCC went further and declared as enforceable certain voluntary "net neutrality" commitments by the parties. These obligations state that:

- The applicants committed, for a period of three years, to maintain settlement-free peering arrangements with at least as many providers of Internet backbone services as they did in combination on the Merger Closing Dates.
- The applicants committed for a period of two years to post their peering policies on publicly accessible websites. During this two-year period, the applicants will post any revisions to their peering policies on a timely basis as they occur.
- The applicants committed for a period of two years to conduct business in a way that comports with the Commission's [Policy Statement].[5]

Moreover, there has only been one instance in the United States of a company trying to block users from accessing a website or application. In that case, a small telephone carrier tried to prevent its customers from accessing a Voice over Internet Protocol (VoIP) service provider. Public outrage and FCC action quickly caused the company to halt this behavior. Simply put, the market reacted much more quickly to foolish practices than any Federal agency ever could.

Therefore, based on the FCC's principles, the commitment of the companies, and the fact that the market quickly resolved foolish conduct, there is no reason this country should assume the unintended risks (loss of investment, innovation, jobs, and competitiveness) by imposing a "net neutrality" law.

The Internet is like a highway. Without enough lanes to accommodate the volume of cars, traffic jams occur. Widening the highway reduces congestion. The same principle applies to the Internet. Unless we invest in the infrastructure of the Internet, businesses and consumers will face massive traffic jams on the information superhighway as increasing amounts of high-volume traffic, like video, which has the potential to clog the existing transmission lines. Traffic flowing through our Nation's information superhighway will increase 500-fold by 2020 as demand for multimedia applications increases. Internet content providers and dozens, if not hundreds, of startups will find themselves without the network capacity necessary to offer new services and applications. Therefore, this Nation has a choice. It either adopts a policy that fosters the build-out of the infrastructure, or it must be content to exist with today's limited system and force all traffic over lines not built for the convergence of Internet, television, video, and massive amount of data. This latter outcome will deny U.S. businesses and workers the information tools they need to compete globally.

As part of the larger "net neutrality" discussion, some members of Congress have announced their intent to introduce legislative language that would deter the investment necessary to avoid these traffic jams and realize wide-scale broadband deployment. "Net neutrality" legislation would, for the first time, impose government regulation on the Internet, inviting other countries to do the same—something that the Bush and Clinton Administrations have steadfastly opposed.

The U.S. Chamber opposes the enactment of "net neutrality" legislation and believes that telecommunications markets should be driven by advances in technology, competition between telecommunications companies, and consumer choice, not by government regulation. The United States cannot afford for its economy to be stuck at an Internet red light. The Internet has succeeded precisely because it has not been burdened with government regulation.

In the final analysis, the Internet is still evolving rapidly in both infrastructure and applications. Regulation would freeze current infrastructure in place, new applications would crowd the existing structure, and eventually those applications would run on more advanced systems in other parts of the world, thus harming our competitiveness. Simply put, as stated by Charles H. Giancarlo of Linksys in a June 8, 2006, *Wall Street Journal* article:

> Regulation would lock in rules and practices that might seem correct today, but could create havoc tomorrow. Instead, we should allow massive convergence to

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[4] In the Matter of: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, (Statement of Michael J. Copps, Concurring), Docket No. FCC–05–150, 20 FCC Rcd 14853, 14979. (rel. Sept. 23, 2005).

[5] In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05–65, 20 FCC Rcd 18290 (Rel. Oct. 31, 2005). In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05–75, 20 FCC Rcd 18433 (rel. Oct. 31, 2005).

Internet technology to continue unabated, and regulators should address specific problems on a case-by-case basis.

Therefore, if this Nation truly seeks to compete in a world economy in which there will be continuing battles over jobs and money, we must ensure that our industries have an incentive to create the best telecommunications system in the world. That innovation and investment can only be achieved by allowing the market-driven convergence of telephone, TV, computers, Internet services, and software applications without government regulation.

The CHAIRMAN. Thank you, Dr. Rutledge.

Our next witness is Ben Scott, who is the Policy Director for Free Press, here in Washington, D.C.

Mr. Scott?

STATEMENT OF BEN SCOTT, POLICY DIRECTOR, FREE PRESS

Mr. SCOTT. Thank you, Mr. Chairman and members of the Committee. I thank you for the opportunity to testify.

I sit on this panel today as a consumer advocate and a representative of a public-interest organization, a national nonprofit group with over 250,000 members. I think all of us on this panel, and all of you on the dais, agree on the goal of this legislation, if not always on the means to reach it. We all want to expand access to competitive video and broadband services, and we want to bring those services to the consumers who need them most. This bill takes some welcome steps in the right direction.

First, the bill protects the right of municipalities to offer broadband service. It removes the barriers to entry that stand between broadband services and the people who need them.

Second, the bill gives those communities the spectrum they need to bring broadband to their citizens. Opening the empty broadcast spectrum for unlicensed use will spur innovation, and bring affordable access to broadband technologies to millions of Americans.

Third, the bill includes positive reform to stabilize and manage the Universal Service Fund toward a broadband future. We think it might even go farther in that direction.

Fourth, the bill beefs up the nondiscrimination rules for video distributors to guarantee that popular programming reaches all consumers, especially regional sports.

Yet, ultimately, we believe this bill has very significant weaknesses. Our haste to bring competition into the video market must not simply jettison public policies that both enhance competition and protect consumers. This could easily leave us with more anticompetitive activity in the marketplace, and not less.

We see two of the most important issues in the bill remain unresolved: First, strong network neutrality protections; and, second, reasonable buildout requirements in video franchising. I fear that a franchising framework without reasonable buildout requirements will cement the digital divide into statute. It will allow telephone companies to cherrypick the most profitable franchises in the country and ignore all the others, including rural areas. It also gives the incumbent cable operators an incentive to lower prices in those areas where competition arises, and to raise them in those areas where there is no competition. The bill strips some basic protections against rate discrimination without conditioning that change on effective competition.

At best, we could see competition in a patchwork quilt of the most lucrative markets in the country, but those less prosperous in rural areas may be left out. The unintended consequences could well be systematic redlining on a national scale, a result I think none of us would welcome.

On the question of network neutrality, this principle of nondiscrimination has been the cornerstone of Internet policy since the birth of the network technology. Nondiscrimination has made possible the greatest successes of the Internet. Its removal could well take them away.

Once the practice of network discrimination begins, it will be very, very difficult to reverse. Consumers favor the lightest-possible regulatory touch that still guarantees the preservation of Internet freedom. I urge this Committee not to overlook the importance of this baseline protection and its impact on the future of the Internet.

Notably, the principle of nondiscrimination is applied throughout the bill in several different titles. It is used to prevent abuses in the marketplace and to promote competition. For example, local franchising authorities must treat competitive video providers in a nondiscriminatory manner. Local governments that build broadband networks must not use local ordinances to discriminate against competitors. Cable operators may not use their market power to make discriminatory deals with programmers. Telecommunications networks must not give discriminatory treatment to other facilities-based VoIP providers.

It seems to me that the only section of the bill that does not enjoy this protection against discrimination is the Internet, which is the most dynamic marketplace in our telecommunications economy. The very same network owners that oppose nondiscrimination through network neutrality embrace it when it benefits their own properties and purposes.

We believe that the principles of nondiscrimination should be applied in an evenhanded fashion. The move toward discrimination and exclusivity on the Internet will mean higher prices, fewer choices, and a gatekeeper standing astride the Internet for the first time. With this new legislation, Congress has a great opportunity to bring broadband and video services that are competitive and affordable. However, if we are going to make policy that solidifies a duopoly of wireline triple-play network providers, we must also protect consumers with network neutrality and systemwide buildout requirements.

I thank you for your time and attention, and I do look forward to your questions.

[The prepared statement of Mr. Scott follows:]

PREPARED STATEMENT OF BEN SCOTT, POLICY DIRECTOR, FREE PRESS

Summary

Free Press,[1] Consumers Union,[2] and Consumer Federation of America[3] appreciate this opportunity to testify on the revised draft of the Communications, Consumer's Choice, and Broadband Deployment Act of 2006 (S. 2686). We strongly support the goal of this legislation: to expand consumer choice and access to competitive video and broadband services. American consumers currently face high prices and very little competition in both the video and broadband Internet markets. Monopoly and duopoly provision of these essential communications services limits innovation,

widens the digital divide, and permits rates to rise beyond the reach of many households. As the United States falls further behind in the global race to lead the world in broadband, action must be taken to remedy the failures of the 1996 Telecommunications Act, and bring vigorous competition to video and broadband that will enhance the diversity of media choices for consumers. This is a window of opportunity to make broadband and video services available and affordable with robust content choices for all Americans.

However, our haste to bring competition must not result in a blind giveaway to one industry or another. Such action would simply yield anti-competitive activity in another direction and leave our problems unresolved. S. 2686 takes many positive steps, but leaves much undone. Without substantial changes to the bill, the benefits of video and broadband competition will not reach many American households—particularly in the low-income and rural areas which need those benefits the most. The bill opens the door to competition, but doesn't ensure that new networks will be built universally. Key public interest protections and services have been abandoned, the most important of which is Network Neutrality—the foundation of the free and open Internet.

Any franchising framework without reasonable build-out requirements cements the digital divide into statute. On the one hand, it allows telephone companies to cherry-pick the most profitable franchise areas in the country and ignore all the others. On the other, it gives the incumbent cable operators an incentive to lower prices in competitive areas and raise them in non-competitive ones. Without regard to conditions of effective competition, the bill would eliminate prohibitions against discriminatory cable pricing. The end result will be that the most lucrative markets in the country will have video competition, new technologies and lower prices. But less prosperous and rural areas will be left out of the new networks and may well experience higher prices for the monopoly service still available. The unintended consequence will be systematic redlining on a national scale—leaving millions of consumers with empty promises.

On the question of Network Neutrality, this bill applies the most important principle in communications law—nondiscrimination—indiscriminately, leaving out its most important application. The firewall of Network Neutrality, which protects competition, maximizes consumer choice, and guarantees fair market practices, has been abandoned on the Internet space—endangering the most important engine for economic growth and democratic communication in modern society. Nondiscrimination made possible the grand successes of the Internet. Its removal can take them away. This will not happen immediately, of course. But once the practice of network discrimination begins, it will be virtually impossible to reverse. The loss of Network Neutrality will be a perpetual regret to all consumers and producers of Internet content and services, as well as to this Congress. Yet, S. 2686 merely instructs the FCC to study the process that will destroy the Internet as we know it.

Notably, nondiscrimination is applied throughout this bill as a critical protection against abuses in the marketplace and a promoter of competition. The bill has it right in each case, but fails to bring the same logic to the Internet. For example, local franchising authorities must treat competitive video providers in a nondiscriminatory manner in the use of the public rights-of-way. Local governments that propose to build broadband networks must not use local ordinances to discriminate. Under the program access rules in S. 2686, cable operators may not use their market power to make exclusive or discriminatory deals with programmers that are denied other operators. Telecommunications providers must treat facilities-based VoIP providers in a nondiscriminatory manner. Universal Service Fund (USF) support must be distributed according to principles of competitive-neutrality. The only sector that does not enjoy this protection against discrimination is Internet content, applications and service providers—the most dynamic marketplace in our economy.

We should apply the principles of nondiscrimination everywhere in an even-handed fashion. We must protect Internet freedom by preventing the telephone companies and cable operators from putting toll booths on the information superhighway. It is both just and reasonable to apply nondiscrimination protections across the communications sector. Everyone loves nondiscrimination until it is applied to their own properties. The same telephone and cable companies that demand nondiscrimination in program access and interconnection hypocritically deny its importance in the broadband market. This duplicity must not be codified into law. The move toward discrimination and exclusivity for Internet content spells disaster for consumers—meaning higher prices, fewer choices, and a gatekeeper standing astride what was heretofore been a truly free market.

This legislation also takes some positive and welcome steps. First, we applaud S. 2686 for opening up more unlicensed spectrum for innovative wireless broadband applications. The empty broadcast channels represent a massive public asset for

next-generation communications that is ready for immediate use. This type of spectrum reform contained in this bill is much needed and overdue.

Second, we also strongly support the protections against pre-emption given to municipalities that would offer broadband to their constituents, either via public networks or the public-private partnerships already enjoying success in hundreds of communities. It is critical to remove all barriers to the development of broadband services.

Third, we believe that the reforms of the Universal Service Fund proposed in this bill are steps in the right direction. The expansion of the base of contributions, and insertion of stringent accountability and audit measures will help stabilize a critical public-service program. We also support the application of USF funds to broadband in underserved areas. However, we are disappointed to note that the requirement for USF-supported networks to become broadband compatible has been removed from the bill. The USF programs must evolve to bring the dominant communications technology to all American households.

Fourth, we support the establishment of mandatory channel allocations and funding for public, educational, and government access television. This bill will bring online thousands of new channels that will provide an important public service and dedicate funding to support them. We must ensure that our most successful access channels—those currently operating at budgets above the 1 percent franchise fee allocation—are not harmed by this bill.

Finally, we support a rigorous application of non-exclusivity and nondiscrimination requirements to Multichannel Video Programming Distribution (MVPD) programming. Consumers have long been denied choices in video programming because of the anti-competitive activities of the system operators. This bill recognizes that the program access rules must be strictly applied and expanded to prevent MVPDs from using market power to execute anticompetitive practices. The terrestrial loophole certainly should be eliminated, but Congress should also move toward expanding diversity of programming through an a la carte pricing system and reform of the retransmission consent rules.

The Communications, Consumers' Choice, and Broadband Deployment Act of 2006 presents Congress with a great opportunity to make broadband and video services competitive, affordable, and open to all content, applications and services that flow over the networks to consumers. In many ways, this bill is a step in the right direction. However, the lack of build-out requirements and the failure to protect Network Neutrality are severe flaws. If left unaddressed, they will undermine the positive outcomes of this bill and leave consumers worse off than they were before. No reform of communications law that solidifies a duopoly of wireline triple-play providers can be pro-consumer without Network Neutrality and system-wide build-out requirements.

Assessment

USF Programs Must Be Stabilized, Held Accountable, and Applied to Broadband—Title II—Universal Service Reform; Interconnection

The key requirements for reforming USF for the 21st century are a stable base of contributions, rigorous standards of accountability, and the modernization that extends the programs to broadband. To that end, we applaud the provisions in S. 2686 that expand contributions into the Universal Service Fund to all providers of communications services. We will monitor the Federal Communications Commission's choice concerning which methodology of collection to use, and we support the adjustments to protect low-volume customers from disproportionate fees. Expanding the base of contributions will improve equity on a technology-neutral basis, and address the economic inefficiencies that exist in the current contributions system. Most importantly, it will rectify shortfalls in the revenue needed to adequately execute USF programs. We support the injection of accountability standards, performance measures, and audits into the system. We hope that the FCC will work to resolve the problems of parity surrounding the compensation of Competitive Eligible Telecommunications Carriers (CETCs) and rate-of-return carriers that has stressed the financial viability of the Fund. This will ensure that the fees that consumers pay into USF are commensurate with the benefits of an expanded network available to every household.

We support the creation of the account for funding broadband in unserved areas, but we do not believe that alone will be sufficient to solve our rural broadband problem. For example, if the per-line cost of deployment is $1,000, approximately 500,000 lines could be added per year—about a 1 percent increase in broadband penetration. We regret to note the removal of the provisions in the prior draft of S. 2686 that would have required providers receiving USF contributions to provide broadband service within five years of passage. To achieve the goals of universal

broadband, it will be critical that carrier eligibility for USF be contingent on making broadband available to all of its customers.

We also suggest the following additional provisions: First, we recommend that municipal broadband systems be made explicitly eligible for funding from the Broadband for Unserved Areas Account, enabling communities to finance the construction of broadband networks where private players refuse to invest. Second, we recommend that Congress instruct the FCC to explore expanding the Lifeline and Link-Up programs to broadband. A major factor curtailing broadband penetration in the United States is the price of connectivity. Removing this barrier could greatly expand the reach of the technology and the opportunities it brings. The Fund for unserved areas will not likely bring universally-affordable broadband. A complementary program will be necessary to address the rich-poor digital divide in addition to the rural-urban digital divide. For similar reasons, we recommend thirdly that a requirement for USF eligible networks to become broadband compatible within 60 months be reinstated in the bill. Finally, we recommend that all network operators that receive public subsidies through USF programs be subject to nondiscrimination rules with regard to the content, applications, and services that they transmit.

New Franchising Practices Must Include Build-Out Requirements—Title III—Streamlining Franchising Process

We strongly support policies that will bring video competition to all consumer households as rapidly as possible. However, we must take great care not to abandon our commitment to public service requirements and to expanding competition as broadly as possible. A duopoly is better than a monopoly in wireline video services, but it is not a competitive marketplace. By creating new franchising processes to ease new market entry, we run the risk of creating a lowest common denominator of public service policies that do a disservice to localities while failing to maximize competition.

In principle, we support the policy of keeping the franchising authority at the local level. Localities know best how to manage their own rights-of-way, administer fees, protect local consumers, and offer public services like PEG channels. However, the Federal framework that now guides these local franchising agreements must provide for adequate safeguards and consumer protections to maximize availability and quality of service. As we have testified before on this issue,[4] the franchising section of S. 2686 contains many liabilities in this regard.

The legislation removes too many public service protections upon the entrance of a second wireline competitor into a market. It immediately allows incumbent cable providers to jettison their existing franchise obligations without any demonstration of effective competition. The standardized franchise agreement would then apply to both the cable incumbent and the newcomer, requiring neither to hold to build-out, upgrade, or basic tier regulations. Allowing incumbent providers to backslide on their existing franchise obligations would have devastating impacts in any community where the new video entrant is not providing service throughout the community. If a telephone company offers its video service in only an affluent part of a franchise area, as allowed under the legislation, an incumbent cable provider will have both the ability, and the financial incentive, to offer service upgrades only to competitive areas, while denying them to customers in neighborhoods not served by the new entrant. While the National Cable and Telecommunications Association has pointed out the importance of providing network upgrades in an equitable and nondiscriminatory manner,[5] it has refused to pledge that cable providers will not deny service upgrades or withdraw service to currently served areas, if a national system of franchising is adopted.[6]

S. 2686 appropriately prohibits redlining based on income, race, and religion. However, it opens up substantial loopholes that will render these protections all but meaningless. The limitations in Section 642, under which discriminatory service provision will be permitted, are broad and indeterminate. Service may be denied because of "technical feasibility," "commercial feasibility," and "operational limitations." It is hard to imagine how an operator could fail to construe its decision to redline under one of these vague categories. This puts the burden-of-proof squarely on the victims of discrimination and gives them little hope of redress. Further, even in a best-case scenario, anti-redlining protections will only ensure that service is provided throughout the franchise areas selected by the telephone companies. We will very likely see a patchwork quilt of affluent Local Franchising Authorities (LFAs) with service agreements, while neighboring towns and counties (particularly those in rural areas) will languish without competition.

Skepticism that telephone companies will offer their video services to just the wealthiest counties is particularly warranted given statements by SBC (now AT&T) last year that it would roll out Project Lightspeed, the company's Internet Protocol

Television (IPTV) video offering, to 90 percent of its "high-value" customers (those willing to spend up to $200 on communications services per month). These high-value customers make up just 25 percent of its subscriber base. SBC also contended it would provide the video service to just 5 percent of "low-value" customers who constitute 35 percent of its customer base.[7] Assurances that lowvalue customers would still be able to receive satellite video through SBC's affiliation with Dish Network ring hollow, given the failure of satellite to provide meaningful price discipline. Instead, SBC's statements suggest it will offer services only in mostly affluent areas, disregarding communities made up predominantly of rural or lower-income residents.

Similarly, Verizon's conduct to date strongly suggests it is seeking franchise agreements for its FiOS service in only the wealthiest counties. For example, Verizon has negotiated, or signed franchise agreements with largely affluent local franchise areas—such as in Fairfax County, Virginia, (where it has four franchise agreements in place for Herndon, Fairfax County, Fairfax City and Falls Church); Howard County, Maryland; Massapequa Park in Nassau County, New York; Nyack and South Nyack, in Rockland County, New York; and Woburn in Middlesex County, Massachusetts In terms of median family income, Fairfax County ranks Number 1 nationally; Howard ranks 4th; Nassau 10th; Rockland 12th and Middlesex 17th.[8]

Unfortunately, in the absence of meaningful and enforceable requirements to build out services throughout a franchise area, the porous anti-redlining provisions of S. 2686 will be not be sufficient to prevent redlining by video providers. Existing Title VI anti-redlining provisions have only been effective because they exist *in tandem* with the ability of local franchise authorities to require service throughout the franchise area over time. Without requirements for build-out, anti-redlining provisions provide inadequate incentives or enforcement tools to ensure that all American households receive the same benefits from service provision. Our policy goal must be to deliver competitive video services as widely as possible, not as widely as a duopoly market will accomplish of its own volition.

Incremental Build-Out Across System-Wide Franchises

We strongly recommend that the Committee amend S. 2686 to include a build-out requirement that addresses the *service territory* of the Incumbent Local Exchange Carriers (ILECs) entering the video marketplace. The concept of the system-wide franchise is appealing for a variety of reasons. It is elegant in its simplicity—everywhere an ILEC has a telephone line, it must make available a video service over a reasonable period of time. Most importantly, it would provide for build-out across its existing service territory in a state, rather than just permitting build-out in a patchwork of counties and cities with the most desirable economics and demographics for a network operator. Variations of this model have been adopted by legislatures in Virginia and New Jersey.

A build-out requirement for a system-wide franchise cannot be executed all at once for obvious reasons of scale. There must be incremental steps to ensure that there is sufficient revenue to make the investment in the next round of expansion. The key is finding the right balance that will *both* permit the ILEC to expand its fiber infrastructure on a schedule that makes business sense, *and* maintain a commitment to universal availability of the service, over time and across each state. Further, in the interest of the level playing field, the same kind of build-out requirement would need to apply to the cable incumbent, if and when it chooses to upgrade its lines to compete with the new fiber offerings from an ILEC.

The balance in each case could be found by applying an incremental build-out plan (based on market-share) on a state-by-state basis across the provider's service territory in that state. For the first few years of deployment, the ILEC would be permitted to establish its own service area. After a period of time, if 15 percent of the market was captured, that measure of effective competition would trigger a build-out requirement. This requirement would be to reach an additional 20 percent of the service territory in the state over several years. There would then be another check for market share capture, and the subsequent trigger for a further 20 percent build-out would repeat every few years. If the ILEC failed to capture sufficient market share (and, therefore, did not have an established revenue stream), the build-out benchmark would not be triggered. Eventually, all lines in the state service territory would be reached with the new, upgraded system (subject to density-based limitations).

The overall rules for the franchise would be Federal. The authority of oversight and enforcement of the build-out would be at the State and local level. This model also provides a legislative framework that would integrate with the USF reform plans that extend to broadband. The overall public policy goal would be to ensure that high-capacity networks carrying voice, video, and data reach all American

households over time, making universal the benefits of video competition and high-speed broadband.

Consumer Protection and Public Services in the Franchise

Under current law, states and localities have authority to establish more stringent cable customer service standards than required by Federal law. Localities are able to enforce those standards through the terms of their local franchising agreements. Many franchise authorities have staff and offices dedicated to resolution of cable complaints that provide for speedy resolution of customer billing concerns, service outages, and more. Penalties in the form of liquidated damages or mandatory discounts for customers harmed by a provider's violation of customer-service standards are not uncommon.

Establishing baseline Federal consumer-protection rules is not a bad thing, provided they are strong and permit local governments to add additional protections to meet local needs. However, S. 2686 strips states and localities of the authority to establish consumer protections that exceed Federal minimum standards, and eliminates the ability of localities to use the franchise agreement itself as an enforcement tool. The legislation provides no guarantee that federally established consumer protection standards would take into account unique local needs, or be able to respond quickly to adapt regulations to novel anti-consumer behaviors.

Any national franchise legislation should retain some state and local authority to establish customer-service standards and consumer protections. When facing billing errors, failures to make service repairs, property damage by cable employees, and other related hassles, consumers need a means for timely and local resolution of complaints against their service providers. Federalizing rules and appeals of local consumer protection decisions is not the most consumer-friendly solution. The FCC is ill-equipped to establish regulations in a timely manner to protect consumers, nor can it handle the thousands of potential cases brought on appeal.

We are pleased to see the recognition that public, educational, and governmental (PEG) video channels are an important local service, and should be preserved and extended to all franchise holders. We strongly support minimum channel allocations, dedicated funding for PEG channels, and all of the technical requirements needed to bring this programming to local consumers. This bill will create thousands of new channels and public services where none existed before. We also believe that those access centers that currently rely on funding in excess of the 1 percent franchise fee set-aside in the bill should not be harmed. There is no public benefit from punishing the most successful PEG producers and their audiences with a hefty budget cut.

Video Programming Should Be Available to All Providers on a Nondiscriminatory Basis and to All Consumers Exclusive of Bundles—Title IV—Video Content

The 1992 Cable Consumer Protection Act banned cable companies from refusing to make their programming available, but the "terrestrial loophole" and lax enforcement have allowed cable operators to use control of programming to frustrate new competition. The situation has always been a fierce battle between cable incumbents and Direct Broadband Satellite (DBS)—and consumers often have been denied the programming they want. The entry of the ILECs into the video market should lead to reform.

We strongly support a rigorous application of non-exclusivity and nondiscrimination requirements to MVPD programming. This bill recognizes that the program access rules must be strictly applied to prevent MVPDs from using market power to promote anti-competitive practices. We are particularly pleased to see these nondiscrimination requirements apply to dominant MVPDs that have made exclusive arrangements with *unaffiliated* programming and unfairly denied access to other distributors. This is notable because it recognizes the ability of a monopoly or duopoly distributor to distort the free market of content even when that content is not affiliated with the distributor.[9]

The elimination of the terrestrial loophole is the first in a series of steps that Congress must take to maximize choice and diversity in the video content market. Congress also must take up a la carte programming and retransmission consent. In each case, as in non-exclusivity requirements, the policy goal is to maximize diversity, lower barriers to entry for independent content providers, and thwart the anti-competitive activities of vertically integrated network operators that use market power to distort the content choices available to consumers.

The content and distribution markets are both badly in need of new, pro-competitive policies. As the cable distribution market consolidated through mergers, concentration in video programming has increased dramatically. Broadcast giants and cable programmers have merged; broadcast and satellite distributors have merged;

and cable distributors increasingly offer their own programming, or have gained ownership stake in other video programmers.

The premise of video franchise reform policy is to bring ILECs into competition with cable incumbents to drive down prices. To realize this goal, we must also deal with the problem of bundled programming, or offering programming in a package which artificially inflates prices. Innovative programming deals that offer consumers smaller bundles or a la carte pricing would differentiate new entrants in the market. Surveys have shown that the majority of consumers want the option to buy video service channel-by- channel.[10] In countries where such choice exists, cable prices are significantly lower. For example, according to FCC's chief economist, Hong Kong consumers who select channels a la carte, pay 50 percent less than those who buy programming tiers.[11] However, program carriage-contracts preclude cable competitors from offering consumers smaller bundles or individual channels. These bundling requirements have contributed to increased size and price of the expanded basic tier, which has increased in cost by two and a half times compared to the basic tier.[12]

Media companies can secure these commitments because of their market power. Six media giants, including the top four broadcasters, dominate the programming landscape, accounting for three-fourths of the most-popular primetime channels.[13] Four are networks (ABC, CBS, FOX, and NBC) and two are cable operators (Time Warner and Comcast). The networks use the retransmission consent negotiations for carriage of the local stations they own and operate to leverage local cable carriage of their other channels. These six companies also completely dominate the expanded basic tiers and the realm of networks that have achieved substantial cable carriage. They account for almost 80 percent of the more than 90 cable networks with carriage above the 20 million subscriber mark.

Moreover, cable operators are majority owners of one-fifth of the top 90 national networks.[14] The Government Accountability Office found that vertically integrated distributors, or those affiliated with media companies, are more likely to carry their own programming, contributing to the size and cost of the expanded basic tier.[15] Program ownership by dominant incumbent cable distributors also provides the incentive to withhold carriage of cable networks they own from competitive video distributors. This is the basis of Verizon's recent complaint against Rainbow Media and Cablevision over sports-channel carriage.[16] Independent, unaffiliated video service providers that do not own their own programming have consistently expressed concerns about exclusionary tactics, contractual bundling requirements, and coercive retransmission consent negotiations that limit their ability to respond to customer demand for lower prices and more choice in program packages.[17] Telephone companies attempting to enter and compete in new markets will face these same barriers.

It is, therefore, essential that Congress address the anti-competitive practices of cable operators in any franchise legislation that hopes to expand competition in video markets. Failure to do so will impede the ability of any new video market entrant, including Verizon and AT&T, to compete on price or packages. They will be forced to buy the same channels their competitor is carrying; pay the same or greater licensing fees; and offer the same packages. Worse, they will be precluded from offering channels individually or in specialty tiers, even though doing so may give them an opportunity to differentiate their services from the incumbent cable monopoly, and respond to strong consumer demand for greater channel choice. The entrance of the ILECs into the video market is an excellent opportunity to expand the diversity of channels offered to consumers—but only if the gatekeepers are eliminated.

Public Broadband Providers Should Face No Prohibitive Barriers to Market Entry—Title V—Municipal Broadband

The provisions in S. 2686 regarding municipal broadband have been greatly improved in this revised draft. We applaud these changes. We strongly support S. 1294, the Community Broadband Act, sponsored by Senators Lautenberg and McCain. The new language in S. 2686 approaches the spirit of S. 1294 and looks to accomplish the same goals. We look forward to working with the Committee on this important Title.

We are pleased that S. 2686 now prohibits state pre-emption of municipal broadband networks—a critical component of any legislation that seeks to foster competition in data, video, and voice services, and expand affordable high-speed Internet access to all Americans. The bill encourages public-private partnerships in broadband networks, and opens the door for local governments to serve their constituents. This type of network has been among the fastest-growing sectors of the communications industry. In the past few years, more than 300 towns and cities

have built public and public-private broadband networks to bring low-cost services to consumers.

These community Internet networks are a critical part of reaching President Bush's stated goal of achieving universal, affordable access to broadband technology by 2007. These networks have a proven track record of promoting economic development, especially in rural and underserved urban areas. They offer many consumers and businesses an affordable broadband connection, bringing economic and social opportunities to communities in need. In a larger frame, these networks are a critical part of the effort to improve global competitiveness in broadband. These networks will provide an essential catalyst for market competition, economic development and universal, affordable Internet access for all Americans.

Congress Should Open Empty Broadcast Channels for Unlicensed Wireless Innovation—Title VI—Wireless Innovation Networks

We strongly support Title VI of S. 2686, and we applaud the continued efforts of Senators Stevens, Allen, Kerry, and other supporters of opening unused spectrum for innovative, unlicensed use. Congress has a crucial opportunity to foster universal, affordable broadband Internet services by tapping an underutilized, but valuable, public resource—the empty broadcast channels, known as "white spaces." Unlocking the public airwaves would allow entrepreneurs to provide affordable, competitive, high-speed wireless Internet services to consumers that lack access completely, or have access only to services so expensive they remain out of reach.

The digital divide in the United States is severe in rural areas. Prices are often higher and the quality of service is lower in rural states. More disturbingly, the rural digital divide has not been closing. According to the latest data from the Pew Research Center, 39 percent of urban households have broadband, compared to only 24 percent in rural areas. This gap of 15 percent has remained constant for several years. Also worrying, according to Pew, is that 32 percent of the adult population does not use the Internet—a figure that held steady for the first half of 2005.[18]

These trends must be addressed immediately, and spectrum reform is an important part of the solution. Rural areas typically have very few broadcast stations and a large number of empty broadcast channels—that is, a lot of "white spaces." The logic is simple: The places that need broadband the most also have the largest amount of unused airwaves available to provide it.

Even after the digital television (DTV) transition ends in early 2009 (when the number of broadcast channel allocations will be reduced), every one of the Nation's 210 TV markets will have unassigned and vacant channels reserved for broadcasting but not being used. Many markets will have dozens of open channels. Vacant TV channels are perfectly suited for WiFi and other unlicensed wireless Internet services. Access to vacant TV channels would facilitate a market for low-cost, high-capacity, mobile wireless broadband networks. Using these white spaces, the wireless broadband industry could deliver low-cost, high-quality Internet access to every American household.

Summary Analysis—White Space in Sample of U.S. Media Markets

(The fall analysis of each market with channel data is available at ***www.spectrumpolicy.org***.)

Market	No. of Vacant Channels Between Chs. 2–51 After DTV Transition	Percent of TV Band Spectrum Vacant After DTV Transition
Juneau, Alaska	37	74
Honolulu, Hawaii	31	62
Phoenix, Arizona	22	44
Charleston, West Virginia	36	72
Helena, Montana	31	62
Boston, Massachusetts	19	38
Jackson, Mississippi	30	60
Fargo, North Dakota	41	82
Dallas-Ft. Worth, Texas	20	40
San Francisco, California	19	37
Portland, Maine	33	66
Tallahassee, Florida	31	62
Portland, Oregon	29	58
Seattle, Washington	26	52
Las Vegas, Nevada	26	52
Trenton, New Jersey	15	30
Richmond, Virginia	32	64
Omaha, Nebraska	26	52

Summary Analysis—White Space in Sample of U.S. Media Markets—Continued
(The fall analysis of each market with channel data is available at ***www.spectrumpolicy.org***.)

Market	No. of Vacant Channels Between Chs. 2–51 After DTV Transition	Percent of TV Band Spectrum Vacant After DTV Transition
Manchester, New Hampshire	23	46
Little Rock, Arkansas	30	60
Columbia, South Carolina	35	70
Baton Rouge, Louisiana	22	44

Enforceable Network Neutrality Protections Are Essential to Any Reform Package—Title IX—Internet Neutrality

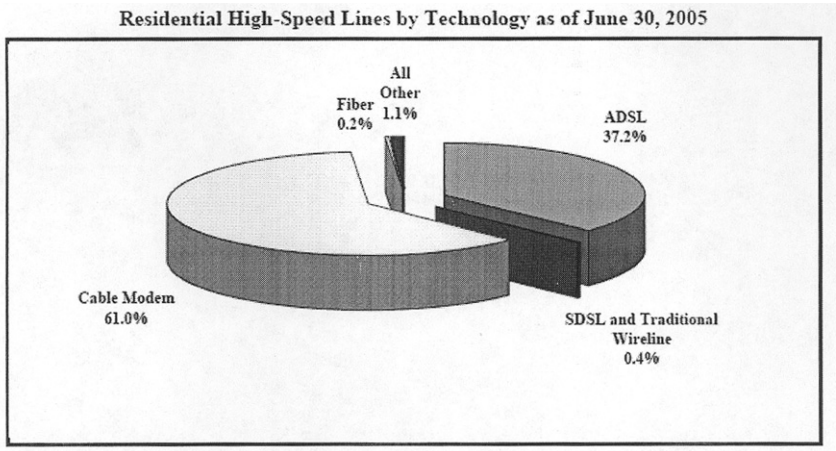
The most significant shortcoming in S. 2686 is its failure to preserve Network Neutrality. The consequences of this mistake will be irreversible, and we urge the Committee to give the issue the attention and remedy it requires. As drafted, S. 2686 appears to recognize that their may well be a problem if network operators follow through on their promises to create discriminatory tiers of service. The bill orders a study of the issue, but it provides no remedy until years after the problem has been documented. By then, it will be far too late. Once discrimination has been introduced into the architecture of the Internet, there is no going back. The genie will not go back in the bottle.

The history is clear. The Internet was born in a regulatory environment that guaranteed strict nondiscrimination. The physical wires were regulated separately from the content flowing over them. The reason was simple: to keep monopoly or duopoly owners of infrastructure from using market power to distort the free market of services on the Internet. This simple protection worked brilliantly. For two decades, the Internet has thrived with low barriers to entry and equal opportunity. It is the greatest engine of economic growth and democratic communication in modern times.

About a year ago, the FCC yanked the rug out from under the Internet, removing the nondiscrimination protections. Soon afterward, the network operators inevitably announced that—free of limitations on abuse of their market power—they would change the Internet forever and begin offering discriminatory tiers of service. The owners of the Internet's wires would become the gatekeepers of the Internet's content. Is this wild speculation? Far from it. The CEOs of major telephone companies have publicly announced their intentions.[19]

This is a disaster for consumers and producers of Internet content. The egalitarian Internet is far too valuable, and far too successful, to be sacrificed for the benefit of creating an extra stream of revenue for cable and telephone giants. As they have indicated, if and when Congress ratifies the FCC's decision, the network owners will use their market power to discriminate against Internet content and services. Tiers of service will establish first- and second-class citizens online. For the first time, the equal opportunity network will be a thing of the past. Barriers to entry will rise up and stifle innovation. End-user costs will increase as tollbooth fees are passed along to consumers.

Some argue that it is not in the interest of the network operator to offer exclusive and discriminatory deals, or to block and degrade access to certain websites and services. They say consumers would simply drop them and move to another network. But this argument assumes that there is competition in the broadband market. There is not, and there won't be any in the foreseeable future. According to the latest data from the FCC, cable providers and telephone companies currently dominate more than 98 percent of the residential broadband market—a slight *increase* in total market share from last year.[20] Cable and telephone companies operate in regional fiefdoms, virtually assuring that every community has a maximum of two viable providers. The GAO confirmed this reality, reporting that the median number of available broadband providers for American households is just two.[21] We have attached, as an appendix to this testimony, a study on the question of Network Neutrality by Dr. Trevor Roycroft that addresses the central economic issues at stake in this policy debate.[22]



The principles of nondiscrimination and competitive-neutrality are present throughout S. 2686. They are applied throughout this bill to protect consumers and promote free competition—except with respect to the Internet. Under the bill, local franchising authorities must treat competitive video providers in a nondiscriminatory manner in the use of the public rights-of-way.[23] Local governments that propose to build broadband networks must not use city ordinances to discriminate.[24] Under the new program access rules for sports programming, cable operators may not use their market power to make exclusive or discriminatory deals for programming that is denied to other operators.[25] Telecommunications providers must treat facilities-based VoIP providers in a nondiscriminatory manner.[26] USF support must be distributed according to principles of competitive-neutrality.[27] Even copyright control technologies under the broadcast flag must be licensed in a reasonable and nondiscriminatory manner.[28]

The only sector that does not enjoy this protection against discrimination is Internet content, applications and services—the most dynamic marketplace in our economy. We should apply the principles of nondiscrimination everywhere in an even-handed fashion. This is the only means to guarantee pro-competitive policies across the communications sector that do not favor one technology or industry over another.

Without anti-discrimination legislation, or the threat of meaningful competition, cable and telephone companies that own and control broadband networks now have both the incentive and the ability to discriminate against other content, services and applications transmitted over the wires. We strongly encourage the adoption of amendments to S. 2686 that will guarantee meaningful and enforceable Network Neutrality. The Internet Freedom Preservation Act (S. 2917), sponsored by Senators Snowe and Dorgan, provides an admirable solution to the problem. Its exclusion from the bill is a glaring liability.

Conclusion

The goals of this bill are admirable. Consumer organizations support the introduction of new competition into the video and broadband markets. We support the expansion of USF programs and their transition to broadband technologies. We support nondiscrimination rules for cable television programming and protections for public-access cable channels. We support municipal broadband networks and opening unused spectrum for unlicensed use. We believe all of these policies will move us toward our overall goal—universally affordable broadband technologies.

However, we must not give away fundamental consumer protections and pro-competitive policies in one arena to bring the prospect of competition in another. Similarly, we must not sacrifice lower prices and service quality for some consumers to bring them to others. There are major problems in this bill which must be remedied to ensure that all consumers benefit from the new policies. The uniform application of nondiscrimination principles and a commitment to universal availability of new technologies must be central to new legislation.

We strongly urge the Committee to incorporate the following key components that are currently absent from S. 2686: (1) meaningful and enforceable Network Neutrality that will preserve the free, open, and nondiscriminatory Internet; (2) reason-

able but mandatory build-out requirements for all holders of franchises under the Federal framework; (3) consumer protection structures in which local and state authorities can strengthen and enforce Federal minimum standards; (4) reforms to cable programming rules that break open the programming bundle and reform retransmission consent; and (5) application of USF programs to broadband. Without these changes, consumers will end up worse off than where they started, with high prices for television and broadband and fewer choices between content and services.

ENDNOTES

[1] Free Press is a national, nonpartisan, nonprofit organization with more than 300,000 members working to increase informed public participation in crucial media and communications policy debates.

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality-of-life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports,* its other publications and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] The Consumer Federation of America is the Nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power, and cooperative organizations, with more than 50 million individual members.

[4] Testimony of Consumers Union, Free Press, Consumer Federation of America, Senate Committee on Commerce, Science, and Transportation, May 18, 2006, *http://commerce.senate.gov/public/__files/kimmelman051806.pdf.*

[5] National Cable & Telecommunications Association, 2006, "The Bell Monopolies Want a Special Break to Enter the Video Business," *http://www.ncta.com/pdf__files/Bell__Myths__FINAL__03.06.06.pdf.*

[6] Comments of *NCTA,* Hearing on Committee Print of the Communications Opportunity, Promotion, and Enhancement Act of 2006, Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, March 31, 2006.

[7] "Cable, Phone Companies duke it out for customers," *USA Today,* June 22, 2005.

[8] U.S. Census Bureau. Median Family Income; Counties within the U.S., 2004 American Community Survey.

[9] S. 2686, Section 628(4)(D), (page 98).

[10] "How we pay for cable may be about to change; 'A la carte' programming picking up support over expanded-basic bundle," *USA Today,* March 2, 2006.

[11] "FCC Top Economist Trumpets a la Carte," *Multi-Channel News,* May 10, 2006.

[12] Mark Cooper, *Time to Give Consumers Real Cable Choices,* Consumer Federation of America & Consumers Union, July 2004, (p. 5).

[13] MM Docket No. 92–264, Comments of CFA, CU, Free Press, *In the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits and Attributions Rules,* August 8, 2005.

[14] "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," October 2003, GAO–04–8 *http://www.gao.gov/new.items/d048.pdf,* p. 27.

[15] Id. at 29.

[16] "Verizon Seeks FCC Intervention to Free Cablevision's Stranglehold on Sports Programming," March 21, 2006, *http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93328*.

[17] EchoStar Communications Corporation, Testimony of Charles Ergen, Chairman & CEO, EchoStar Communications Corporation before the Senate Committee on Commerce, Science, and Transportation, January 19, 2006; Testimony of Bennett Hooks, Chief Executive Officer, Buford Media Group on behalf of the American Cable Association, before the Subcommittee on Telecommunications and the Internet, July 14, 2004.

[18] See John Horrigan, "Rural Broadband Internet Use," Pew Internet and American Life Project, February 2006, *http://www.pewinternet.org/pdfs/PIP__Rural__Broadband.pdf;* and John Horrigan, "Broadband in the United States: Growing but Slowing," Pew Internet and American Life Project, September 21, 2005, *http://www.pewinternet.org/PPF/r/164/report__display.asp.*

[19] See for example: "At SBC, It's All About 'Scale and Scope'," *BusinessWeek Online,* November 7, 2005; Jonathan Krim, "Executive Wants to Charge for Web Speed," *Washington Post,* December 1, 2005; Dionne Searcey and Amy Schatz,

"Phone Companies Set Off a Battle Over Internet Fees," *Wall Street Journal,* January 6, 2006.

[20] "High-Speed Services for Internet Access: Status as of June 30, 2005," FCC, Wireline Competition Bureau, *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–264744A1.pdf* (Chart depicted, p. 8).

[21] "Broadband Deployment is Extensive Throughout the United States, but it is Difficult to Assess the Extent of Deployment Gaps in Rural Areas," GAO, May 2006, *http://www.gao.gov/new.items/d06426.pdf.*

[22] See Appendix: Trevor Roycroft, "Economic Analysis and Network Neutrality," June 2006.

[23] S. 2686, Section 331(a)(2)(B): "A State or local government shall apply its laws or regulations in a manner that is reasonable, competitively neutral, nondiscriminatory, and consistent with State statutory police powers . . ." (p. 60); Section 331 (b)(a): "A franchising authority may not discriminate among video service providers in imposing or collecting any fee assessed under this section." (p. 61–62).

[24] S. 2686, Section 502(d)(1): A public provider of broadband must apply its ordinances and rules "without discrimination in favor of itself or any other advanced telecommunications capability provider that such public provider owns . . ." (page 115–116).

[25] S. 2686, Section 628(b), "It is unlawful for an MVPD, an MVPD programming vendor in which an MVPD has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition . . ." (page 92); Section 628(c)(2)(B), "The regulations required under paragraph (1) shall—prohibit discrimination by an MVPD programming vendor in which an MVPD has an attributable interest . . ." (page 93–94).

[26] S. 2686, Section 715 (a): "A telecommunications carrier may not refuse to transport or terminate IP-enabled voice traffic solely on the basis that it is IP-enabled." (page 26).

[27] S. 2686, Section 253: "Competitive Neutrality Principle"; (7) "Universal service support mechanisms and rules should be competitively neutral." (page 34–35).

[28] S. 2686, Section 452 (d) (3).

The CHAIRMAN. Well, thank you very much, Mr. Scott.

Our next witness is Dave McCurdy, the President and Chief Executive Officer of the Electronic Industries Alliance.

Mr. McCurdy? Dave?

STATEMENT OF HON. DAVE MCCURDY, PRESIDENT/CEO, ELECTRONIC INDUSTRIES ALLIANCE (EIA); ON BEHALF OF TELECOMMUNICATIONS INDUSTRY ASSOCIATION (TIA)

Mr. MCCURDY. Mr. Chairman, thank you very much. I'm pleased to accept your invitation to testify today on behalf of both the Electronic Industries Alliance and the Telecommunications Industry Association, and my good colleague and friend, Matt Flanagan.

I'd like to first applaud your leadership in drafting a pro-competition bill that will remove barriers, and provide incentives for all providers to deploy next-generation broadband capability, a 20-fold increase in capacity. We believe that the Stevens-Inouye bill will significantly accelerate broadband deployment and capture the consumer welfare benefits of competition in the cable television space. We're also pleased your bill makes the streamlined franchise process available to existing cable TV providers, as we think this step is important to encourage investment by all providers and to spur healthy competition. Both urban and rural communities will reap the benefits.

Next-generation broadband enables voice, data, video, and other multimedia services to be offered over single and multiple infrastructures. Technology integration, expanded broadband technology communications infrastructure, and seamless mobility of communications and computing are expected to bring enormous economic

and societal benefits, and improve the quality of life of all consumers.

Video service is the application driver for the deployment of next-generation broadband, because video uses an enormous amount of bandwidth. The telephone companies want to deploy video over new broadband networks as a new business model in a changing market. However, the local franchise process is a regulatory barrier to entry that impedes timely investment in new facilities and capabilities and slows delivery of competitive and innovative services to consumers.

We are supportive of Title III, the video franchise portion of your draft, because it replaces the local franchising process with a uniform Federal system that will be managed by the FCC with limited input by existing local franchise authorities. We have spent a significant amount of time analyzing the effects of various local franchise requirements on next-generation broadband deployment, and we conclude that three impediments exist: delay in granting franchises, buildout requirements, and extraneous costs imposed on providers. Your bill reduces these barriers.

Mr. Chairman, with regard to the municipal broadband provision in your draft, EIA and TIA support, as a longstanding principle, legislation that allows municipalities to deploy broadband and provide video services on a transparent and nondiscriminatory basis, thereby removing barriers for yet another competitor's entry into this marketplace.

Mr. Chairman, I want to commend Senators McCain, Lautenberg, and Ensign for their agreement on removing the right-of-first-refusal provision that was in the original draft, and I thank you for that leadership.

We'd also like to express our support for a provision included in the minority draft allocating a specific sum to basic telecom research and interoperability. We hope to see this provision included in the final bill, as it will contribute to U.S. competitiveness and innovation.

With regard to the debate over net neutrality, we fully understand the concerns that have been expressed over the possibility of abuses in the marketplace; however, we are not aware of any significant evidence of abuses that require preemptive legislation. Accordingly, we believe this issue is speculative and premature; and, thus, support the study approach taken in this bill to answer a number of important questions before legislating.

I'd like to refer you to TIA's broadband Internet access connectivity principles, which state that subscribers should be able to get the capacity for which they pay to connect to the Internet, access any content on the Internet, as long as such content is lawful, use any applications they choose, as long as such use does not hurt the network or other users, and attach to the network any device they choose, as long as it does not harm the network.

We believe that the FCC has jurisdiction to vigilantly monitor the broadband Internet access service market and expeditiously review any complaint of anticompetitive activity.

Let me emphasize that we believe unaffiliated content providers, as consumers of bandwidth, should benefit from connectivity principles just like retail subscribers.

Mr. Chairman, you have a wonderful opportunity to achieve real success this year that will accelerate deployment of next-generation networks, and benefit consumers through lower prices and improved services. Franchise reform, for example, is long overdue, and is an area in which there is great consensus. Net neutrality, on the other hand, is an issue on which there is little clarity and even less consensus. I'd propose that Congress continue to examine the net neutrality issue until it's clear what the problem is, if, in fact, there is a problem, and what the solution should be.

On behalf of both EIA and TIA, I respectfully urge the Committee to act quickly on video franchise reform and other issues on which there is a consensus, so we can enact them this year. With such action, we can capture the benefits of accelerated broadband deployment and the consumer welfare benefits of competition now.

Thank you very much.

[The prepared statement of Mr. McCurdy follows:]

PREPARED STATEMENT OF HON. DAVE MCCURDY, PRESIDENT/CEO, ELECTRONIC INDUSTRIES ALLIANCE (EIA); ON BEHALF OF TELECOMMUNICATIONS INDUSTRY ASSOCIATION (TIA)

Mr. Chairman, I am pleased to accept your invitation to testify today on behalf of both the Electronic Industries Alliance (EIA) and the Telecommunications Industry Association (TIA).

As you know, EIA is an alliance of several trade associations representing nearly 1,300 companies from the full spectrum of U.S. technology manufacturers. Our member companies' products and services range from the smallest electronic components to the most complex systems used by government and industry. Among our Alliance associations, TIA represents the communications sector, providing a forum for over 600 member companies, the manufacturers and suppliers of products and services used in global communications. Many TIA members manufacture and supply products and services used in the deployment of the broadband infrastructure that enables the distribution of information in all its forms including video programming.

We believe that the objective of the legislation before you should be to ensure that broadband networks and services operate in a minimal regulatory environment, which is critical for the continued deployment of broadband, and innovation in both next-generation network facilities and the services they empower. Currently, there is a consensus among legislators and regulators that competition in the video services market is a good thing. We are in support of this consensus view, and would like to see the momentum continued so that we achieve facilities-based competition in the interest of both producers and consumers.

Benefits of Competition

The ability to offer voice, data, video, and other increasingly intermingled multimedia services over single or multiple infrastructures is becoming more prevalent. This means that competing infrastructure platforms will be able to provide essentially similar multimedia experiences. The question that Congress can help answer is: how long will it take to make these converged and competing services available to consumers at lower prices?

Integration, broadband technology communications infrastructure, and seamless mobility of communications and computing are expected to bring enormous economic and societal benefits to the U.S. and the world, and improve the quality of life for all consumers. With that in mind, I think it is helpful to review the recent history of broadband technology.

The Evolution of Technology

The first evolution of broadband technology is from dial-up Internet access to current-generation broadband access. This is characterized as a shift from 56 kilobit-per-second narrowband capability to around 1.5 megabit-per-second (Mbps) broadband capability—roughly a 20-fold capacity expansion.

Current-generation broadband technology has been deployed as the result of market-driven, deregulatory actions taken by Congress and the FCC. The Federal Government played a positive and significant role in promoting competition through de-

regulation. House passage of the Tauzin-Dingell bill,[1] in February 2002 spurred three major decisions by the FCC that created a favorable environment for broadband investment: the cable modem decision of 2002,[2] the Triennial Review Order of 2003,[3] and, most recently, the DSL decision of 2005.[4] Thus, the pro-competitive, deregulatory actions taken by this body and by the Commission, have worked to encourage the first evolution of broadband technology.

The next growth spurt from current-generation to next-generation broadband access is characterized by yet another 20-fold increase in capacity, from 1.5 Mbps to as much as 25–30 Mbps. Both are massive expansions, but the second evolution to next-generation broadband is what allows for future growth. Among developed nations worldwide, the U.S. is behind in broadband deployment, and a second evolution is necessary to offer new and competing services to consumers.

Thanks to many technology drivers, current-generation broadband access is well on its way. Progress in technology deployment is often measured by the substitution of the new for the old. By this measurement, tremendous progress has been made in the deployment of current generation broadband, where U.S. subscribership increased by more than 700 percent from 5.1 million in 2000 to 39.1 million in 2005, while dial-up subscribership peaked at 47.3 million in 2002, and has since declined to about 35.2 million subscribers in 2006, the level that existed in 2000.[5]

The second broadband technology shift has just begun and involves a number of different technologies, including fiber-to-the-premises (FTTP), fiber-to-the-node (FTTN), fiber-to-the-curb (FTTC), very high-speed digital subscriber line (VDSL) for increasing broadband rates over telco platforms, high speed data interfaces for cable systems such as DOCSIS 2x and DOCSIS 3.0, and satellite and wireless broadband technologies, such as WiFi and WiMax. All of these technologies hold great promise and are in various stages of development and deployment.

To best promote widespread deployment of next-generation technology, Congress should continue its pro-competitive, deregulatory stance. And indeed, you have already taken steps in this direction. Most recently, with leadership from this Committee, Congress adopted a "hard date" for the DTV transition,[6] which will release prime spectrum for the development of new wireless solutions. Congress has also encouraged the FCC to facilitate competition in the wireline voice market by applying the light hand of regulation for VoIP, which will enable cable companies and new entrants to compete with incumbent telephone companies.[7]

Deregulation in the video realm is the next logical step. Video is the application driver for the deployment of next-generation broadband because video uses an enormous amount of bandwidth. The telephone companies want to deploy video over new broadband networks to gain additional revenue as their core markets rapidly change. The local franchise process is a regulatory barrier to entry that impedes timely investment in new facilities and capabilities, slowing delivery of competitive and innovative services to consumers. This process requires service providers to negotiate and obtain individual and unique authorizations in thousands of jurisdictions. Federal legislation facilitating entry of new video providers will result in the deployment of more robust infrastructure, increased competition, and consequent consumer benefit.

Problems With the Video Franchise Process

The local franchise process should be replaced with a uniform, Federal system that will be managed by the FCC with limited input by existing local franchise authorities. We have spent a significant amount of time analyzing the effects of various local franchise requirements on next-generation broadband deployment, and I will summarize our thoughts in that regard here and provide a more detailed discussion in an annex to this testimony.

The first problem is delay by local franchise authorities in awarding franchises, as it adversely affects broadband deployment and video competition. Prompt entry into the video market is a key predicate to justifying construction of new broadband facilities, regardless of the network architecture, because the extra revenue potential of video (as well as ancillary offerings such as video-on-demand, HDTV, and per-

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[1] *See* United States. Cong. House of Representatives. *Internet Freedom and Broadband Deployment Act of 2001.* 107th Cong. H.R. 1542. Washington: GPO, 2001.

[2] *See* FCC GN Docket No. 00–185, CS Docket No. 02–52, (rel. March 15, 2002).

[3] *See FCC CC Docket No. 01–338,* (rel. Aug. 21, 2003).

[4] *See* FCC CC Docket No. 02–33. (rel. Sept. 23, 2005).

[5] *See* Telecommunications Industry Association , *Telecommunications Market Review and Forecast,* 2005.

[6] *See* Deficit Reduction Act of 2005, Pub. L. 109–171, Title III Digital Television Transition and Public Safety.

[7] *See* FCC CC Docket No. 04–267. (adopted Nov. 9, 2004).

sonal video recording capability) is necessary to justify the multi-billion dollar investment such networks require.

The delayed entry of these competitive video providers results in less competition, less consumer welfare benefit, and delay in the second evolution of broadband technology. The solution is to automatically issue a franchise within a set period of time.

The second major problem with the current video franchise process is the practice of requiring new entrants to build out facilities beyond the area they find economical. In the case of a telephone company entering the video market, video deployment logically follows the existing wire center footprint, which typically does not follow franchise area boundaries. As a result, build-out requirements present entrants with a choice between building out an entire service area and incurring losses associated with providing service where it is not economic to do so, or not building out at all and instead choosing to use limited resources as a competitor in communities that do not have build-out requirements. The solution, we believe, is to establish a franchise process that does not require such counterproductive build-out requirements.

The third problem is the prevalence of extraneous obligations. Congress has already indicated its intent to limit payments for franchises by establishing in Title VI of the Communications Act that the 5 percent statutory franchise fee is a ceiling for payments "of any kind."[8] Yet, franchise authorities often seek payments that far exceed the 5 percent fee. These extraneous requirements increase costs, and discourage the investment in next-generation broadband capability, thereby delaying the second evolution of broadband technology. The solution, we believe, is to prohibit the imposition of extraneous cost beyond 1 percent of gross revenues.

If a bill is enacted this year that adequately addresses these issues, as the Stevens-Inouye bill appears to do, we believe it will significantly accelerate deployment of next-generation broadband capability and capture the consumer welfare benefits of competition in the cable TV space.

We are also pleased that the Stevens-Inouye bill would make its streamlined franchise process available to existing cable TV providers, as we think this step is important to encourage investment by all providers and to spur healthy competition.

Municipal Broadband

As a long-standing principle, EIA and TIA support legislation that allows municipalities to deploy broadband, and provide video services on a transparent and nondiscriminatory basis, thereby removing barriers for another competitor's entry into the marketplace. Particularly in fiber-to-the-premises municipalities were among the early leaders, although recent court decisions have slowed deployment in a number of states. Although we believe municipalities should consider all options before entering the telecom field, if municipal leaders feel that they must build their own networks in order to provide satisfactory broadband services to their constituents, they should have the freedom to make those decisions.

The draft bill before the Committee includes a statutory clarification to allow municipal entry, subject to a right of first refusal provision requiring consideration of private sector offers to provide desired services. While we encourage private sector deployment where possible, we are concerned that the right of first refusal requirement could create uncertainty and opportunities for litigation that delay broadband deployment for protracted periods.

Net Neutrality

Mr. Chairman, the issue of net neutrality has become a central focus of telecom reform in this Congress. Last week, the House overwhelmingly passed video franchise reform legislation that included an appropriate, cautious response to net neutrality concerns. EIA and TIA support the study element of the approach taken in the Stevens-Inouye bill to answer a number of important questions on this issue before legislating. However, if you determine the net neutrality study presently included in S. 2868 is insufficient, we urge this Committee to adopt the approach taken by the House. When no two stakeholders can agree on a definition of net neutrality, and no stakeholder can point to a tangible problem, policymaking with respect to the Internet must begin with the principle of "first, do no harm." The net neutrality provision in H.R. 5252 establishes appropriate safeguards against problems that may arise, while doing no harm.

The value of a network is determined by its adoption by consumers. As leading manufacturers of network equipment, TIA and EIA member companies share an interest in ensuring that broadband networks are both deployed and used. If consumers are unsatisfied with the service they are receiving, the incentive to build

[8] *See* U.S.C. Sec. 542(g)(1).

new networks is lost. Network equipment generally goes unnoticed by the consumer, but it is clearly the consumer that drives its demand.

Accordingly, EIA, TIA and other members of the High-Tech Broadband Coalition (HTBC) created the network *Connectivity Principles* several years ago, and urged the adoption of the principles by Federal policymakers. The FCC did so in 2004, under Chairman Michael Powell as principles of "Network Freedom," and again in the Summer of 2005, under Chairman Kevin Martin as the Commission's "Policy Statement."

This spring, TIA determined that additional principles were necessary to support the interests of not only consumers, but also unaffiliated content providers, and therefore, released new *Broadband Internet Access Connectivity Principles*. We attach a copy hereto for your use.

In short, TIA's *Broadband Internet Access Connectivity Principles* state that subscribers should be able to get the capacity for which they pay to connect to the Internet, access any content on the Internet as long as such content is lawful, use any applications they chose as long as such use does not hurt the network or other users, and attach to the network any device they choose as long as it does not harm the network. TIA believes that the FCC has jurisdiction to vigilantly monitor the broadband Internet access service market and expeditiously review any complaint of anticompetitive activity. Let me emphasize that we believe unaffiliated content providers, as consumers of bandwidth, should benefit from the *Connectivity Principles* just like retail subscribers.

It is the interest of some to go beyond these principles in an effort to safeguard against a problem that, at this point and in the foreseeable future, is nonexistent. Advocates of stronger net neutrality language are clearly concerned about what they view as potential violations of net neutrality, as opposed to legitimate violations of net neutrality.

We find this troubling because legislating against potential misdeeds can have unfortunate, unintended consequences, as we experienced after the 1996 Telecom Act, when the FCC's use of an unbundling regime discouraged investment in local broadband access by incumbent local exchange carriers. This was an unintended negative consequence, and we are loathe to see similar outcomes from net neutrality legislation, however well-meaning the intent.

The lesson of unbundling is instructive. If policymakers take actions that disturb the business models of the companies deploying next-generation networks, the result may well be to delay or stop deployment. Then we all will suffer—the carriers, equipment vendors, content providers, and consumers.

To understand the thought process of a service provider building a new network to offer new advanced services and how its business model may be affected by strong net neutrality regulations, one would have to determine what specifically the unaffiliated application providers want, what it will cost, and who will ultimately pay.

It may be that unaffiliated application providers want carriers to offer them the same bandwidth, speed, and additional capabilities that carriers offer retail subscribers. This could force the carriers to internalize the revenue lost to provisioning the networks to meet their demands, and ultimately force the consumer to make up for lost revenue.

While this is clearly a hypothetical, the net neutrality debate lives in the realm of hypothetical, and this is one possibility that does not bode well for consumers, service providers, or equipment providers. The system described above would surely weaken the incentive for service providers to deploy new advanced networks, thereby slowing investment in network equipment, and the process through which consumers will be offered lower prices and more choices for digital services.

For Congress, the question of who will pay is undoubtedly the most important. Certainly, Congress does not want to require carriers to build excess capacity into their networks and pass the cost on to retail consumers. If this were to occur, most Americans who use Internet access for simple applications such as e-mail would carry an enormous, unfair burden. Clearly, if unaffiliated applications providers want network capability—bandwidth, speed, quality of service, and content—it is in the interest of the consumer that the unaffiliated application providers must pay for it.

We are unaware of any analysis that answers the questions of what the unaffiliated application providers want, what it will cost, and who will ultimately pay. Because of this lack of analysis, we support the study element of the approach taken in the Stevens-Inouye bill. If the Committee finds this approach insufficient, we suggest that the approach taken in the House bill is the appropriate alternative.

Conclusion

In conclusion, we feel that it is crucial for Congress to continue the momentum towards legislation that has been driven by consensus support for competition in the video services market. We believe that legislation consistent with the foregoing positions will increase investment and competition, create jobs, and enhance American competitiveness.

Regarding net neutrality, let me stress to this committee how important it is that Congress should proceed only where there is consensus and continue to work on issues where consensus does not exist. You have an opportunity to achieve real success this year that will accelerate deployment of next-generation networks, and benefit consumers through lower prices and improved services. Franchise reform, for example, is long overdue and is an area in which there is great consensus. Net neutrality, on the other hand, is an issue on which there is little consensus and even less clarity. I would propose that Congress continue to examine the net neutrality issue until it is clear what the problem is—if there in fact is a problem—and what the solution should be.

On behalf of both EIA and TIA, I urge the Committee to act quickly on video franchise reform and other issues on which there is a consensus, so we can enact them this year. With such action, we can capture the benefits of accelerated broadband deployment and the consumer welfare benefits of competition now.

Annex 1: Detailed Discussion of Specific Problems With the Current Video Franchise Process

Problem 1: Delay

Unfortunately, the current video franchise process does not facilitate the entry of new video providers in a timely fashion. The franchise-by-franchise negotiation process established under the old monopoly framework is simply too slow and unwieldy to encourage the speedy entry of new providers. Verizon has filed documents with the FCC establishing that, to serve its entire target area with video service, it must negotiate between 2,000 and 3,500 franchises, excluding those in Texas.[9] Verizon began negotiations with 320 franchise authorities in November 2004, and, as of February 2005, had only 26 franchises other than those that were automatically issued in Texas.[10] For those franchises that have been successfully negotiated, negotiation time has ranged between two months and 17 months, with an average of 7.65 months.[11] The more important focus, however, is the negotiations in which Verizon has *not* been successful: in over 80 percent of the franchise negotiations Verizon initiated in November 2004, a franchise still has not been granted.[12]

BellSouth faces a similar situation, which may need to negotiate 1,000 franchises. As of last month, BellSouth had 20 franchises, requiring between 1.5 months and 32 months of negotiation time for each, at an average of 10 months.[13]

Moreover, this is not just a problem for the Regional Bell Operating Companies. Smaller companies such as Knology, Grande Communications, Guadeloupe Valley Telecommunications Cooperative, and the Merton Group have all reported a similarly protracted period of franchise negotiations, ranging between 9 months and 30 months.[14]

The delayed entry of these competitive video providers results in less competition, less consumer welfare benefit, and delay in the second evolution of broadband technology.

Problem 2: Build-Out

The second major problem with the current video franchise process is the practice of requiring new entrants to build out facilities beyond the area they find economical. For example, in the case of a telephone company entering the video market, video deployment logically follows the existing wire center footprint, which typically

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[9] *See* FCC MB Docket No. 05–311, *Comments of Verizon on Video Franchising,* Feb. 13, 2006, Attachment A at 5.

[10] *See* FCC MB Docket No. 05–311, *Comments of Verizon on Video Franchising*, Feb. 13, 2006, Attachment A at 4.

[11] *See* FCC MB Docket No. 05–311, Comments of Verizon on Video Franchising, Feb. 13, 2006, Attachment A, Exhibit 1.

[12] *See supra* footnote 11.

[13] *See* FCC MB Docket No. 05–311, *Comments of BellSouth Corporation and BellSouth Entertainment,* LLC, Feb. 13, 2006, at 10, 11.

[14] *See* FCC MB Docket No. 05–311, *Comments of the Fiber-to-the-Home Council,* Declarations of Felix Boccucci, Andy Sarwal, Jeff Mnick, Terrence McGarty.

does not follow franchise area boundaries.[15] If a telephone company wants to offer video service throughout a wire center which covers 30 percent of a local franchise area, for example, the requirement to build out to the entire franchise area might well make it economically infeasible to provide video service *at all* within that franchise area.

This is not merely a whimsical example. We recently analyzed telephone company wire centers in Texas—where the characteristics of wire center deployment are typical of the Nation on average—and found that only 3 percent of the wire centers completely overlap the geographic area of franchise areas.

Therefore, the requirement that new entrants build out to an entire franchise area will result, in many instances, in potential competitors delaying or even abandoning plans to enter new video markets.

Again, this is not just a Bell Company problem. The National Telecommunications Cooperative Association has reported that many of its members, which tend to be small rural telephone companies, want to get into the cable business but have reported problems with local franchising authorities—particularly unreasonably short build-out periods or requirements to build outside the carrier's own service territory.[16]

The solution, we believe, is to establish a franchise process that does not require such counterproductive build out requirements.

Problem 3: Extraneous Obligations

The third major problem with the current video franchise process is the imposition of extraneous obligations that exceed 1 percent of revenues.

Congress has already indicated its intent to limit payments for franchises by establishing in Title VI of the Communications Act that the 5 percent statutory franchise fee is a ceiling for payments "of any kind."[17] Yet, franchise authorities often seek payments that far exceed the 5 percent fee by imposing requirements such as the assumption of all Public, Education, and Government (PEG) costs incurred by the incumbent cable operator over the entire span of its service, the installation of institutional networks (I-Nets), the requirement to bury aerial plant, the assumption of applications and acceptance fees, etc.[18] These extraneous requirements increase costs and discourage the investment in next-generation broadband capability, thereby delaying the second evolution of broadband technology. The solution, we believe, is to prohibit the imposition of extraneous cost beyond 1 percent of gross revenues.

APPENDIX

Broadband Internet Access Connectivity Principles

TIA has long supported the rights of *broadband Internet access service* consumers to connect to and utilize their choice of legal Internet content, applications and devices, while also recognizing the needs of service providers in a competitive market to manage the security and functionality of their networks. TIA reaffirms its pro-consumer principles, as outlined below, while continuing to observe that currently no significant evidence exists of these principles being abused in the marketplace. As such, it is not now necessary for the Federal Communications Commission to promulgate detailed rules in this area. Rather, the FCC should address any such problems on a case-by-case basis in the event they arise.

1. A competitive broadband Internet access market offers consumers choices with respect to "connectivity"—that is, the ability to access any lawful Internet content, and use any device, application, or service over the public Internet—so long as they do not harm the network. In particular:

1.1 Consumers should receive meaningful information regarding their broadband Internet access service plans.

1.2 Broadband Internet access consumers should have access to their choice of legal Internet content within the bandwidth limits and quality of service of their service plan.

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[15] *See* FCC MB Docket No. 05–311, *Comments of Verizon on Video Franchising,* Feb. 13, 2006, at 40.

[16] *See* FCC MB Docket No. 05–311, *Comments of the National Telecommunications Cooperative Association,* Feb. 13, 2006, at 4, 5.

[17] *See* U.S.C. Sec. 542(g)(1).

[18] *See* FCC MB Docket No. 05–311, *Comments of Verizon on Video Franchising,* Feb. 13, 2006, at 57–75.

1.3 Broadband Internet access consumers should be able to run applications of their choice, within the bandwidth limits and quality of service of their service plans, as long as they do not harm the provider's network.

1.4 Consumers should be permitted to attach any devices they choose to their broadband Internet access connection, so long as they operate within the bandwidth limits and quality of service of their service plans, and do not harm the provider's network or enable theft of services.

2. A competitive broadband Internet access market also gives facilities-based broadband Internet access providers competitive incentives to undertake risky, new investments, while precluding anticompetitive behavior against unaffiliated businesses. In particular:

2.1 Broadband Internet access service providers should remain free to engage in pro-competitive network management techniques to alleviate congestion, ameliorate capacity constraints, and enable new services, consistent with the technical characteristics and requirements of the particular broadband platform.

2.2 Broadband Internet access service providers should remain free to offer additional services to supplement broadband Internet access, including speed tiers, quality of service tiers, security and spam services, network management services, as well as to enter into commercially negotiated agreements with unaffiliated parties for the provision of such additional services.

2.3 Such network management tools would enable operators to continue to optimize network efficiency, enable new services, and create incentives for continued build-out to meet increasing capacity demands.

2.4 Broadband service providers should also remain free to innovate in the deployment of managed services, such as packaged video programming, which utilize the same networks but are distinct from public Internet access services.

TIA believes that the FCC has jurisdiction to vigilantly monitor the broadband Internet access service market and expeditiously review any complaint of anticompetitive activity. However, as no significant evidence of a problem exists at this time, it is not now necessary for the FCC to promulgate detailed rules in this area. Rather, the FCC should address any such problems on a case-by-case basis in the event they arise.

The CHAIRMAN. Thank you very much, Mr. McCurdy.

Our next witness is Robert LeGrande, the Deputy Chief Technology Officer for the Office of the Chief Technology Officer, in the District of Columbia, here in Washington.

Mr. LEGRANDE. That's a mouthful. I took it out of my speech just because of that.

[Laughter.]

STATEMENT OF ROBERT LEGRANDE,
DEPUTY CHIEF TECHNOLOGY OFFICER,
DISTRICT OF COLUMBIA GOVERNMENT

Mr. LEGRANDE. Good morning, Mr. Chairman.

The CHAIRMAN. Pull that mike up a little, will you, please?

Mr. LEGRANDE. Good morning, Mr. Chairman, members of the Committee. Again, my name is Robert LeGrande, and I'm the Deputy Chief Technology Officer with the District of Columbia Government and the National Capital Region's Interoperability Program Manager. Additionally, I'm the founder and Chairperson of the National Coalition for Public Safety. Today, I will comment on your Communications, Consumer's Choice, and Broadband Deployment Act of 2006—specifically, Section 151, Interoperable Emergency Communications.

First, I would like to take a moment and thank this committee, your staff, and the Congress for the continued efforts to address our national public safety communication needs. This Act further

demonstrates this committee's commitment to public safety, and we appreciate the opportunity to speak in support of the legislation.

The 700 megahertz spectrum-clearing legislation process was very painful for all of us, but well worth it. We can now leverage that accomplishment to deploy interoperable public safety solutions across the Nation. The questions before us today are: When and how? My immediate answers to these questions are: now and strategically.

As most of you know, we have many areas in the Nation that lack interoperable voice communications. Catastrophic events such as 9/11, Hurricanes Isabel and Katrina, and future national threats require us to expeditiously provide funding to address public safety's critical communications needs.

While we have many needs, we must all agree on one eventual public safety communications outcome: seamless, interoperable, redundant national network of networks that transmit voice, video, and data. We must also agree that there is an impending multifaceted data communications problem. The vast majority of our current public safety mobile data solutions rely on commercial networks that are shared with the public. In a major event, these networks will likely fail, due to the excessive public and private communication demands, leaving our first responders without mission-critical data. Many jurisdictions throughout the country are attempting to address this problem by deploying noninteroperable private networks using disparate frequencies and differing technologies. If this trend continues, we'll be here 5 years from now trying to solve a data interoperability crisis.

Section 151(d)(1) and Section 151(d)(4), stated below, are essential to preventing this trend, because they establish funding criteria for standardized, commercially-available IP-based technologies being deployed in the 700 megahertz spectrum.

The National Capital Region's Interoperability Program is in its second year of a 5-year plan to deploy a seamlessly interoperable wireless broadband network of networks throughout its 19-member jurisdictions.

I'd like to draw your attention to attachment 1 in your packet.

Our plan leverages the recently cleared 700 megahertz public safety wideband spectrum. The program has already established a successful prototype in use daily by Federal, regional, and local first responders across the District of Columbia. The National Capital Region Interoperability Program recently partnered with Silicon Valley, San Diego, and Phoenix to create a national network of networks for wireless broadband communications. That's also a diagram in your attachment—attached in your book. All regions have agreed to deploy the same technologies in the same frequencies at the same time.

Recent UASI grant cuts severely threaten our region's ability to deploy these proven national wireless broadband solutions. It is our collective hope that this Act will initiate full funding of the four regional programs no later than the end of the calendar year 2006. This investment will provide a model that can be leveraged across the Nation.

In summary, it is our strong belief that a percentage of the dollars should go toward public safety voice communications problems

in high-risk areas. Further, a percentage should go toward investing in solutions that will solve data interoperability communications needs. These investments would patch critical voice communications holes, while investing in a scalable platform that will provide integrated voice, video, and data. The funds for these solutions should be available and disbursed without delay.

In attendance with me today—and I'll ask them to stand—are Chief Demetrios Vlassopoulos, of the District of Columbia Fire Department, and Private Scott Robinson, of the U.S. Park Police. Both are here in support of our national program and are users of the District's citywide public-safety wireless broadband pilot network. This network is used daily to provide mobile video surveillance, high-resolution images, and access to applications, such as CapWIN and WebEOC.

We need your help to continue our efforts to meet our first responders' communication needs, and we thank you for this time, and are happy to answer any of your questions.

[The prepared statement of Mr. LeGrande follows:]

PREPARED STATEMENT OF ROBERT LEGRANDE, DEPUTY CHIEF TECHNOLOGY OFFICER, DISTRICT OF COLUMBIA GOVERNMENT

Good afternoon, Mr. Chairman and members of the Committee. My name is Robert LeGrande. I am a Deputy Chief Technology Officer in the Office of the Chief Technology Officer (OCTO), the central information technology and telecommunications agency of the District of Columbia government. I am responsible for the wireless communications infrastructure for the District government and the National Capital Region's Interoperability Communications Program. Additionally, I am the Founder and Chairperson of the National Spectrum Coalition for Public Safety.

As the leader of the District of Columbia's wireless public safety voice and data communications programs, I have partnered with officials and field personnel of the District's Metropolitan Police and Fire & Emergency Management Service Departments to upgrade our public safety voice network and install public safety wireless broadband network. During this process, I gained a deep appreciation of the demands our first responders face every day, and the urgency of their communications needs. Today, I will comment on the Communications, Consumer's Choice, and Broadband Deployment Act of 2006, specifically section 151; Interoperable Emergency Communications.

First, I would like to take a moment and thank this Committee, your staff and the Congress, for their continued efforts to address our national public safety communications needs. The 700 MHz spectrum-clearing legislation process was painful for all of us, but worth it. We can now leverage that accomplishment and deploy interoperable solutions across the Nation.

The questions before us today are when and how. My immediate answers to these questions are *now* and *strategically.* As most of you know, we have many areas in the Nation that lack interoperable communications. Catastrophic events such as 9/11, Hurricanes Isabel and Katrina, and future national threats require us to expeditiously provide funding to address public safety's critical communications needs.

While we have many needs, we must agree on one eventual public safety communications outcome; *seamlessly interoperable, redundant, national network of networks that transmits video, data, and voice.*

We must also agree that there is a national public safety voice communications crisis, as well as an impending data communications crisis. I'll spend a few minutes describing these major problems and then the remaining time on a recommended solution.

First, the voice communications crisis, please reference the Voice Interoperability Matrix diagram (Attachment I). I will spare you the full description of this diagram, and state that the multiple colors represent the various frequencies used by first responders in The National Capital Region (NCR). The cost to implement the voice interoperability illustrated in this diagram for the District of Columbia was $40 million. Due to disparate frequencies and limitations in legacy voice communications systems, there are approximately 25 of these diagrams in the NCR. The good news

is that first responders in the NCR have interoperable voice communications; the bad news is that this is not the case for many jurisdictions in the country.

Second, the impending data communications crisis is multi-faceted. The vast majority of our current public safety mobile data solutions rely on commercial networks that are shared with the public. In a major event, these networks will likely fail, and our first responders will be without mission critical data. Many jurisdictions throughout the country are attempting to address this problem by deploying non-interoperable, private networks using disparate frequencies and differing technologies. If this trend continues, we will "cube" ourselves for data communications, before we have even resolved the voice communications crisis.

Different approaches can be taken to address our public safety voice and data communications problems. It is important to invest in repairing/upgrading voice communications systems in high-risk areas, while also investing in a new public safety communications platform that solves the impending data interoperability crisis, and has the capacity to later provide a Voice Over IP (VoIP) solution that addresses our long-term voice interoperability communications need.

The NCR is in its second year of a five year plan to deploy a seamlessly interoperable network of networks throughout our 19 jurisdictions. Please reference the NCR Interoperability Program Cornerstone Chart (Attachment II) and the Regional Wireless Broadband Network Deployment Map (Attachment III). Our plan leverages the recently cleared 700 MHz public safety wideband data spectrum and all members of the NCR have agreed to deploy in the same frequencies using the same standardized, commercially available technology at the same time. This Urban Area Security Initiative (UASI) funded program will be competitively bid and select a spectrally efficient technology that provides seamless interoperable mobile data communications while maintaining jurisdictional control. VoIP technology will also be tested and later deployed on this infrastructure.

Recently, the National Capital Region partnered with the Silicon Valley, San Diego, and Phoenix regions. All plan to deploy the same technology, in the same frequencies, at the same time. Please reference the Public Safety National Broadband Network of Networks diagram (Attachment IV).

Unfortunately, recent UASI funding cuts severely threaten our region's ability to deploy our national broadband network of networks solution. It is our collective hope that the Communications, Consumer's Choice, and Broadband Deployment Act of 2006 will fully fund the deployment of the four regional programs (National Capital Region, Silicon Valley, San Diego, and Phoenix) and that these funds are available to start the deployment process no later than the end of calendar year 2006.

In summary, it is our strong belief that a percentage of the dollars should go towards solving the voice communication issues in high-risk areas, a percentage should go towards investing in solutions that will solve our long-term voice and data interoperable communications needs, and that these funds should be available and dispersed without delay.

In attendance with me today is Chief Demetrios Vlassopoulos of the District of Columbia Fire Department, Chief Pam Datcher of the U.S. Park Police, and Captain Hassan Aden of the City of Alexandria Police Department. Each is here in support of our national program and are users of the District's city-wide public safety wireless broadband network. With the Chairperson's permission, I would like to provide you with a two-minute video demonstration of our network.

[Video Demo.]

This is a real network . . . used daily by our Federal, regional and local first responders, We need your help to continue our efforts to meet all our first responder's communications needs. Thank you for your time and we are happy to answer any of your questions.

Attachment I

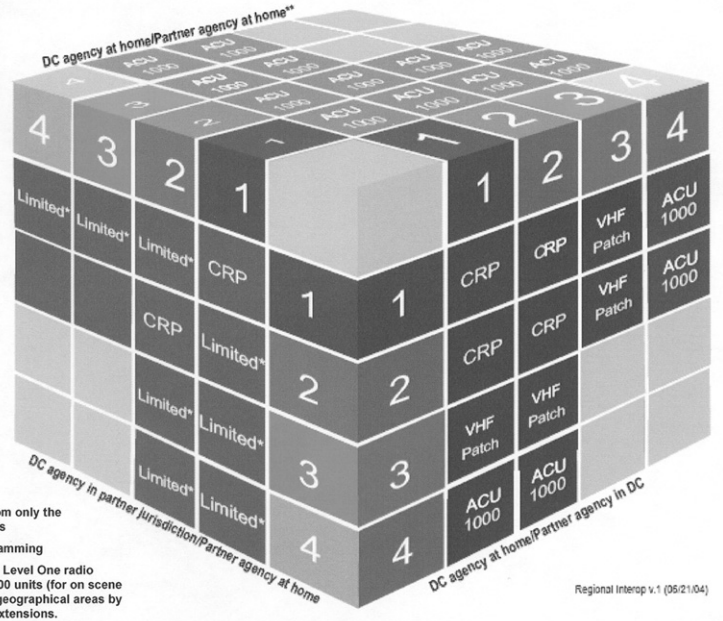
Regional Public Safety Wireless Communications Interoperability

Group 1 (800 MHz Moto)
- Metro Airport Authority
- Fairfax County PD
- Fairfax County FD
- Alexandria PD
- Alexandria FD
- Arlington PD
- Montgomery County PD
- Montgomery County FD
- DC FD

Group 2 (460 MHz Moto)
- DC PD
- WMATA

Group 3 (Federal VHF)
- ATF
- US Fed. Protective Svcs
- US Capitol Police
- FBI
- US Park Police
- US Secret Service
- US Marshalls Service

Group 4 (Other)
- Prince Geo. County PD
- Prince Geo. County FD
- MD State Police
- VA State Police



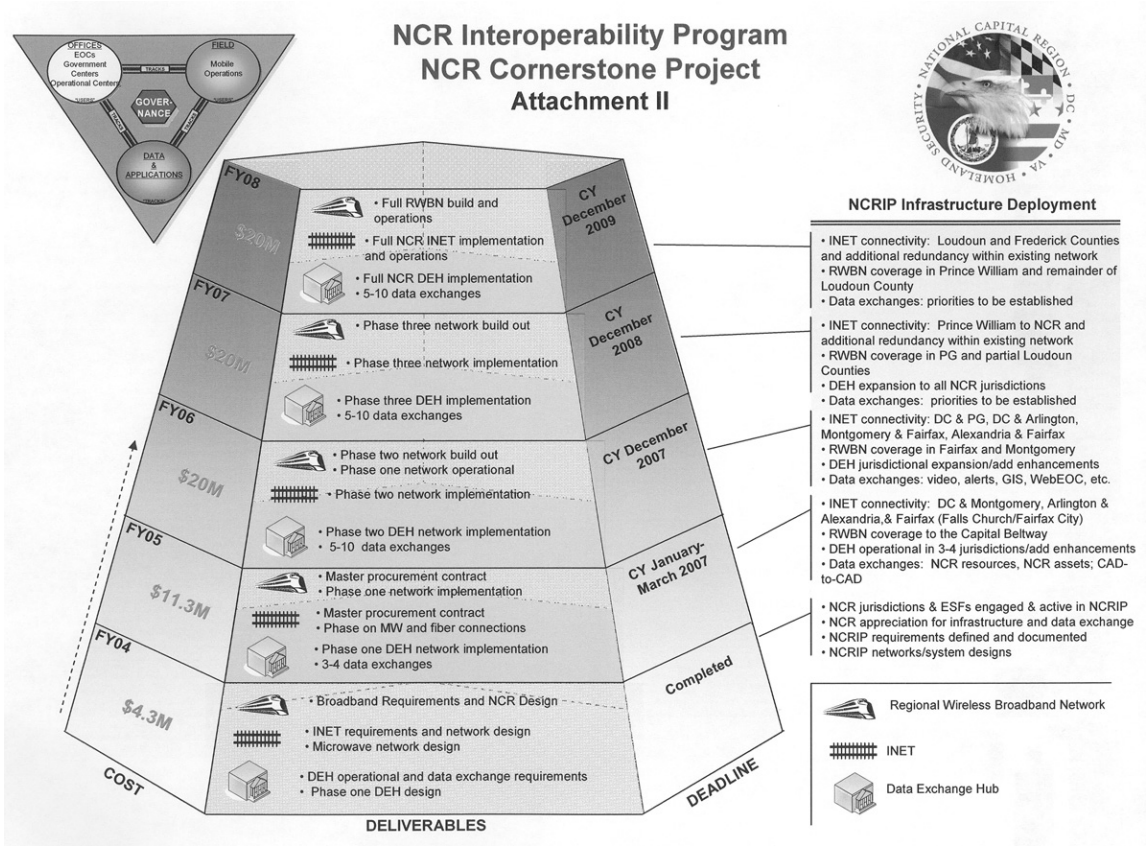
Note:

- Provides interoperability from only the DC Public Safety perspectives

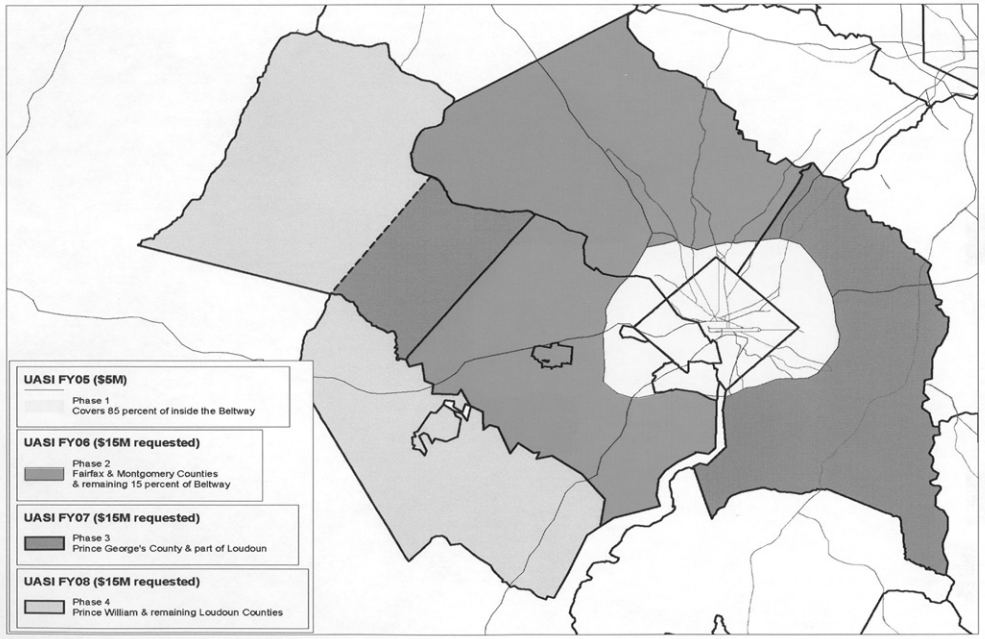
- CRP: Common Radio Programming

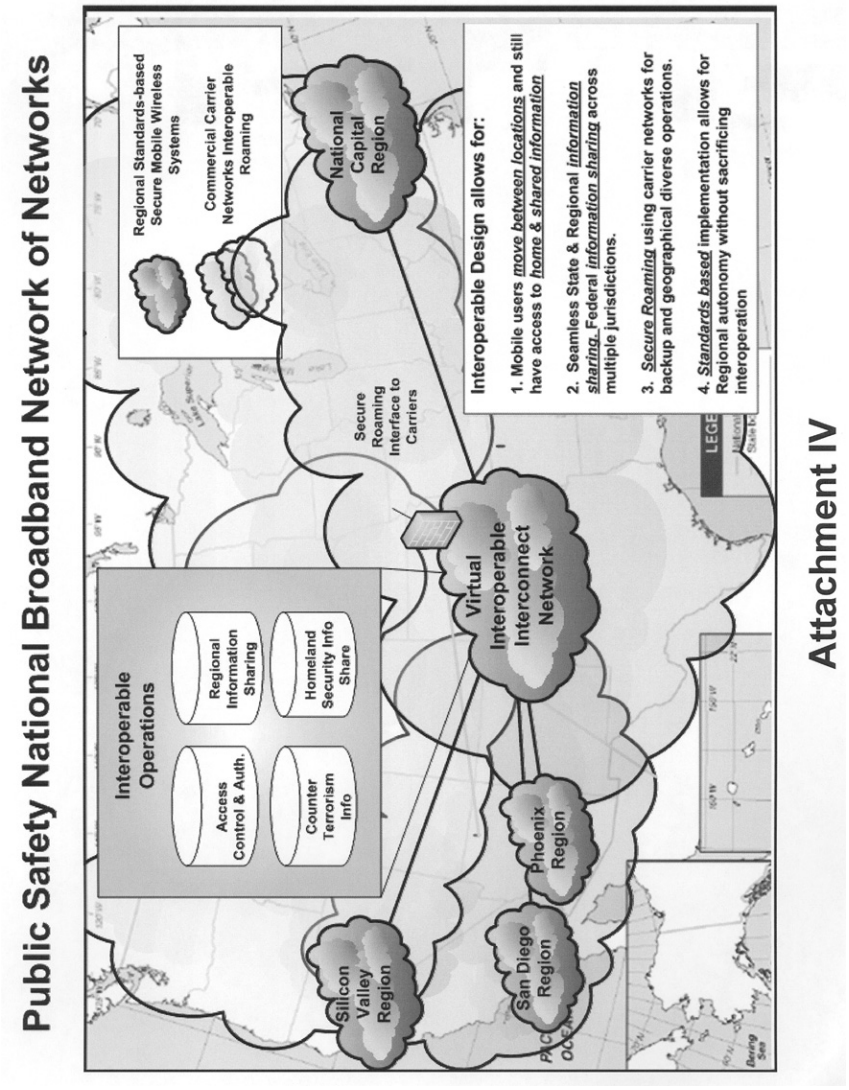
*** Interoperability provided by Level One radio distributions, mobile ACU 1000 units (for on scene interoperability), or in some geographical areas by DC radio network coverage extensions.**

**** Some areas may have radio network coverage that enables Common Radio Programming interoperability**


NCR Interoperability Program
NCR Cornerstone Project
Attachment II
OFFICES
EOCs
Government Centers
Operational Centers
FIELD
Mobile Operations
GOVERNANCE
DATA & APPLICATIONS
FY08
$20M
• Full RWBN build and operations
• Full NCR INET implementation and operations
• Full NCR DEH implementation
• 5-10 data exchanges
CY December 2009
FY07
$20M
• Phase three network build out
• Phase three network implementation
• Phase three DEH implementation
• 5-10 data exchanges
CY December 2008
FY06
$20M
• Phase two network build out
• Phase one network operational
• Phase two network implementation
• Phase two DEH network implementation
• 5-10 data exchanges
CY December 2007
FY05
$11.3M
• Master procurement contract
• Phase one network implementation
• Master procurement contract
• Phase on MW and fiber connections
• Phase one DEH network implementation
• 3-4 data exchanges
CY January-March 2007
FY04
$4.3M
• Broadband Requirements and NCR Design
• INET requirements and network design
• Microwave network design
• DEH operational and data exchange requirements
• Phase one DEH design
Completed
COST
DEADLINE
DELIVERABLES
NCRIP Infrastructure Deployment
• INET connectivity: Loudoun and Frederick Counties and additional redundancy within existing network
• RWBN coverage in Prince William and remainder of Loudoun County
• Data exchanges: priorities to be established
• INET connectivity: Prince William to NCR and additional redundancy within existing network
• RWBN coverage in PG and partial Loudoun Counties
• DEH expansion to all NCR jurisdictions
• Data exchanges: priorities to be established
• INET connectivity: DC & PG, DC & Arlington, Montgomery & Fairfax, Alexandria & Fairfax
• RWBN coverage in Fairfax and Montgomery
• DEH jurisdictional expansion/add enhancements
• Data exchanges: video, alerts, GIS, WebEOC, etc.
• INET connectivity: DC & Montgomery, Arlington & Alexandria,& Fairfax (Falls Church/Fairfax City)
• RWBN coverage to the Capital Beltway
• DEH operational in 3-4 jurisdictions/add enhancements
• Data exchanges: NCR resources, NCR assets; CAD-to-CAD
• NCR jurisdictions & ESFs engaged & active in NCRIP
• NCR appreciation for infrastructure and data exchange
• NCRIP requirements defined and documented
• NCRIP networks/system designs
Regional Wireless Broadband Network
INET
Data Exchange Hub

Regional Wireless Broadband Network Deployment MAP FY05 to FY08 Attachment III





The CHAIRMAN. Thank you very much, Mr. LeGrande.

Our next witness is Dan Glickman, Chairman and Chief Executive Officer of the Motion Picture Association of America.

STATEMENT OF HON. DAN GLICKMAN, CHAIRMAN/CEO, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. GLICKMAN. Thank you, Mr. Chairman, Senator Inouye, and Members of the Committee. On behalf of the member companies of the MPAA, I thank you for the opportunity to talk about S. 2686, which we support.

Protecting intellectual property will become a recurring and increasingly important theme for our economy in the decades to come. Piracy is a dagger in the heart of all the industries that rely on intellectual property protection, and we believe that your bill will help us in our battle against piracy, particularly as it relates to the broadcast flag provisions.

The broadcast flag is targeted and narrowly focused on a single problem: the indiscriminate redistribution of digital broadcast television content over the Internet. The broadcast flag rule was adopted by the FCC some years back, and it was, by no means, perfect. Not everyone who participated in the process got everything they hoped for, and there was probably no one, including people in the motion picture industry, that wouldn't change something, if given the chance. But, in the end, the rule that was approved by the FCC reflected an open and thorough process that took into account the concerns expressed by all who participated, and the result was a compromise that was fair and workable.

As you are aware, a court of appeals struck down the broadcast flag rule that the FCC promulgated, on jurisdiction grounds, not on substantive grounds. And that is why we so much appreciate your including this language in this bill.

The provision, which we support, is not perfect, and no one is likely to be entirely satisfied. But, on the whole, the Committee has done a commendable job of crafting a compromise provision that is fair and workable, and we hope that the bill, and this provision, will ultimately be enacted into law.

There are three reasons to include this broadcast flag provision:

First, it will protect the quality of three over-the-air broadcasts in the digital age. Cable and satellite systems already have systems in place to protect content so that it cannot be indiscriminately distributed over the Internet. If broadcast television is not similarly protected, content providers will choose to send their high-value content to where it can be best protected, and that would particularly affect, adversely, areas not currently served by cable and satellite: broadcast television.

Second, by including this provision, the Committee brings certainty to the consumer electronics marketplace. The marketplace has already anticipated that the broadcast flag will be required, and many manufacturers of digital television devices are now producing equipment in compliance with the FCC broadcast flag regulations.

Third, the provision promotes an important free market principle: by protecting intellectual property protection, you promote job creation. According to a new study conducted by a respected market research firm, our industry loses approximately $6.1 billion a year to piracy. Without this broadcast flag provision, those numbers could grow exponentially once we make the full transition to digital television.

So, Senator Stevens and members of the Committee, we thank you for hosting this hearing. We support the bill and the broadcast flag provisions. And I look forward to answering your questions.

[The prepared statement of Mr. Glickman follows:]

PREPARED STATEMENT OF HON. DAN GLICKMAN, CHAIRMAN/CEO,
MOTION PICTURE ASSOCIATION OF AMERICA

Chairman Stevens, Co-Chairman Inouye, members of the Committee:

On behalf of the member companies of the Motion Picture Association of America, I thank you for the opportunity to talk to you about S. 2686, the Communications, Consumer's Choice, and Broadband Deployment Act of 2006.

Chairman Stevens, this hearing comes at a time not only critical to our industry, but also at a critical time for this Nation.

Protecting intellectual property will become a recurring and increasingly important theme for our economy in the decades to come. This Nation will prosper or it will fail, in large part, based on how we protect our Nation's greatest assets . . . the skill, ingenuity, and creativity of our people.

This is why the MPAA strongly supports including a broadcast flag provision in S. 2686. The broadcast flag rule adopted by the FCC was by no means perfect. No one who participated in the FCC process got everything they hoped for, and there is probably no one, including the motion picture industry, that wouldn't change something if given the chance.

But in the end the FCC rule reflected an open and thorough process that took into account the concerns expressed by all who participated, and the result was a compromise that was fair and workable. The same can be said of the latest provision included in S. 2686. It is not perfect, and no one is likely to be satisfied entirely. The motion picture industry certainly has its own concerns with some of its provisions. But on the whole the Committee has done a commendable job of crafting a compromise provision that is fair and workable. We appreciate your hard work in including this provision in S. 2686, and we hope that it will pass the Senate and eventually be enacted into law.

This provision works to protect video content by giving the Federal Communications Commission (FCC) authority to implement the broadcast flag regulations which it adopted over two years ago, and that were to become effective last July.

There are three reasons to include this broadcast flag provision.

First, it will protect the quality of free over-the-air broadcasts in the digital age. Cable and satellite systems already have systems in place to protect content so that it can not be indiscriminately distributed over the Internet. If broadcast television is not similarly protected, content providers will choose to send their high-value content to where it can best be protected. By including the broadcast flag, this Committee takes a stand to protect free over-the-air television for consumers.

Second, by including this provision, the Committee brings certainty to the consumer electronics marketplace. The marketplace has already anticipated that the broadcast flag will be required, and many manufacturers of digital television devices are now producing equipment in compliance with the FCC broadcast flag regulations. Reinstatement of the FCC rule will provide uniformity and certainty for consumers who rely on digital over-the-air broadcasts.

Third, the provision promotes an important free market principle: By protecting intellectual property you promote job creation.

The American film industry, like all of the creative industries, combines capital and talent to produce intellectual property. It is not easy to create a movie. It requires lots of money, lots of skilled workers, and lots of hard work. In fact, four out of ten movies don't make back their investment. So the movie industry is fraught with risk.

Despite these hurdles, the American film industry is the most successful in the world. It is one of our most important exports. It is one of our best job creators.

But according to a new study conducted by a respected market research firm, our industry loses approximately $6.1 billion a year. Without this broadcast flag provision, those numbers could grow exponentially once we make the full transition to digital television.

The broadcast flag rule is targeted and narrowly focused on a single problem, the indiscriminate redistribution of digital broadcast television content over the Internet. As long as one is not trying to redistribute flagged content over the Internet, a typical consumer will not know the broadcast flag exists.

I want to emphasize that the broadcast flag has been the subject of intense scrutiny by technology and content communities, as well as other interested parties, in open forums consuming literally thousands of man-hours of discussion. There is broad consensus that this is an issue that needs to be addressed. There is also broad consensus on the nature of the solution considered. I believe the discussion draft legislation released last week is fully consistent with that consensus and should be swiftly enacted.

Let me add one cautionary note. While we strongly support legislation that will implement the broadcast flag, we cannot support legislation that will do that at the expense of the anti-circumvention provisions of the DMCA. Legislation similar to that offered by the House of Representatives in the form of H.R. 1201, would, as a practical matter, repeal Section 1201 of the DMCA, and do much more harm than good.

Chairman Stevens, Co-Chairman Inouye, members of the Committee, I appreciate this opportunity to discuss this matter of great concern to our industry and I look forward to answering any questions you may have regarding what I have just discussed.

The CHAIRMAN. Thank you very much.

The last witness of this panel is John Rose, the President of OPASTCO, here in Washington.

Mr. Rose?

STATEMENT OF JOHN ROSE, PRESIDENT, ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES (OPASTCO); ON BEHALF OF THE COALITION TO KEEP AMERICA CONNECTED

Mr. ROSE. Good morning. I'm John Rose, President of OPASTCO. Today, I'm here testifying on behalf of the Coalition to Keep America Connected, a coalition of rural communications providers, consumers, and small businesses. We appreciate both the opportunity to testify and the leadership this committee, and Chairman Stevens, has shown on these important issues.

The Coalition to Keep America Connected is organized by ITTA, NTCA, OPASTCO, and WTA, all representing telephone companies. Collectively, our memberships include more than 700 small- and mid-sized companies and cooperatives that serve millions of consumers that reside throughout more than 40 percent of the land mass of the United States. We serve rural communities.

S. 2686 contains many positive aspects for rural America. I will comment today on the portions dealing with the Universal Service Fund.

First of all, I want to thank you, Mr. Chairman and others on the Committee, for the strong leadership and support for the Universal Service Fund that is reflected in this legislation. The staff discussion draft contains many improvements on that effort. There are areas that give us some concern, though.

The bill provides the FCC with the flexibility to assess contributions from broadband service providers. The long-term sustainability and stability of the Universal Service Fund necessitates that broadband service providers should contribute to the Fund. Current market data continues to demonstrate significant growth in subscribership to broadband services. In light of this growth, permitting broadband service to be assessed in a combination of ways ensures a sustainable contribution base for the long-term.

Regardless of the methodology the FCC establishes, it's important for all broadband providers to contribute to the Fund. We include ourselves in that. Rural providers already contribute on the revenues they receive on their DSL service.

We applaud the language in Section 715 of the discussion draft stipulating that IP-enabled voice traffic should not be excluded from intercarrier compensation. The Coalition has long advocated the simple concept that regulatory arbitrage should not prevent

carriers from being fairly compensated for the use of their networks.

Thank you for including the language that prohibits the limitation of Universal Service support to a single connection or a primary line. Also, the bill clarifies that intrastate services may be assessed for USF contributions. As bundled local and long-distance services become more common, the problem of distinguishing between intra- and interstate services has become increasingly difficult. This provision eliminates the unnecessary confusion generated by the current requirement to assess only interstate service.

We're also very grateful for the exemption of the Universal Service Fund from the Antideficiency Act, an issue that we believe needs to be resolved by the end of this calendar year. The Coalition appreciates the leadership shown on this issue by many Members of this Committee.

On another positive note, the legislation addresses the issue of phantom traffic and proposes language that would help alleviate this growing problem. "Phantom traffic" refers to communications traffic that cannot be properly tracked or billed for. This translates into billions of minutes of communications traffic that are being terminated on the networks of other carriers without compensation. It's essential that all service providers receive reasonable and fair compensation for the use of their networks.

We have three areas of concerns that are not included in the introduced legislation or discussion draft:

First, we would like to see the inclusion of a provision that requires support to be based on the carrier's actual cost. Currently, new eligible carriers in rural telephone company service areas receive support based on the incumbent's cost. The incumbents must not only follow more regulations than other carriers, they must also serve the least lucrative and the most rural consumers.

Second, the legislation should be recalibrated to the current method used to calculate universal growth factor.

The third would be the so-called "parent trap." In many instances, current rules serve as a significant impediment to the kind of network investment this bill is designed to encourage. By modifying these rules, consumers living in rural areas would be able to enjoy the benefits of a broadband-capable network.

Rural areas need the tools to compete. Broadband is one of those essential tools. Our country needs rural areas to be productive in order for this country to be productive and compete on the world market. We believe your bill moves it in that direction.

The Coalition applauds the legislation's move toward a sustainable Universal Service Fund which would make our rural areas competitive, and we pledge to continue working with this Committee on the vitality of this important issue.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Rose follows:]

PREPARED STATEMENT OF JOHN ROSE, PRESIDENT, ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES (OPASTCO); ON BEHALF OF THE COALITION TO KEEP AMERICA CONNECTED

Good Morning. I am John Rose, President of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). Today, I am testifying on behalf of the Coalition to Keep America Connected, a coalition of

rural communications providers, consumers and small businesses. We appreciate both the opportunity to testify and the leadership this Committee has shown on these important issues.

The Coalition to Keep America Connected is organized by the Independent Telephone and Telecommunications Alliance (ITTA), the National Telecommunications Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the Western Telecommunications Alliance (WTA). Collectively, our memberships include more than 700 small and mid-size companies and cooperatives that serve millions of consumers that reside throughout more than 40 percent of the landmass of the United States.

S. 2686, the "Communications, Consumer's Choice, and Broadband Deployment Act of 2006," contains many positive aspects for rural America. I will comment today on the new draft of this legislation and specifically the portions dealing with the Universal Service Fund (USF).

First of all, I want to thank you, Mr. Chairman, and others on this Committee for the strong leadership and support for the Universal Service Fund that is reflected in this legislation. The goal of Universal Service policy is to ensure that every American, regardless of location, has affordable, high-quality access to a variety of modern telecommunications and information services. Rural incumbent local exchange carriers are the embodiment of the Universal Service concept, having built the infrastructure that provides ubiquitous, high-quality local telecommunications service to some of the country's most remote and difficult to serve areas. The provision of a robust infrastructure in these areas would never have been possible were it not for the Nation's long-established policy of Universal Service and the Federal Universal Service Fund. This is important not only to those living in rural areas, but also to those in urban areas who wish to communicate with individuals and businesses in less populated communities.

As introduced, S. 2686 seeks to update America's telecommunications laws to meet the current and ever evolving communications market. In our view, the Staff Discussion Draft released on June 9th contains improvements on that effort, and, in some areas, gives us concern.

The Coalition is pleased that the bill provides the Federal Communications Commission (FCC) with the flexibility to base Universal Service contributions on several different factors, including revenues, working phone numbers, other identifier protocols, connections, and network capacity. This type of flexibility is necessary in a continually evolving communications marketplace.

The bill provides the FCC with the flexibility to assess contributions from broadband service providers. The long-term sustainability and stability of the USF necessitates that broadband service providers should contribute to the Fund. Current market data continues to demonstrate significant growth in subscribership to broadband services. For example, the FCC recently reported that for the twelve month period ending June 30, 2005, the number of broadband service connections increased by 32 percent, from 32.5 million to 42.9 million. In light of this growth, permitting broadband service to be assessed in a combination of ways, based on revenues and/or capacity ensures a sustainable contribution base for the long-term as consumers continue to migrate to broadband platforms. In turn, this enables consumers in rural and high-cost areas to continue to have affordable access to high-quality telecommunications and information services that are comparable to those available to urban and suburban residents, as Section 254 of the Telecommunications Act requires. Regardless of the methodology the FCC establishes, it is important for broadband providers to contribute to the Fund. We include ourselves in that; rural providers fully plan to contribute in an equitable manner as well.

We applaud the language in Section 715 of the discussion draft stipulating that IP-enabled voice traffic shall not be exempted from intercarrier compensation. The Coalition has long advocated the simple concept that regulatory arbitrage should not prevent carriers from being fairly compensated for the use of their networks.

Thank you for including language that prohibits the limitation of USF support to a single connection or primary line. Limiting support in this manner would be devastating to the small businesses that generate a large percentage of the jobs in rural areas.

Also, the bill clarifies that intrastate revenue may be assessed for USF contributions. As bundled services become more common, the problem of distinguishing between intra- and interstate revenues has become increasingly difficult. This provision eliminates the unnecessary confusion generated by the current requirement to assess only interstate revenue.

We are also very grateful for the exemption of the USF from the Antideficiency Act, an issue that we believe needs to be resolved by the end of this calendar year.

The Coalition appreciates the leadership shown on this issue by many Members of this Committee.

The Coalition is also pleased with the inclusion of the new provisions in this version of the bill that would apply the geographic toll rate averaging and integration requirements of the 1996 Act to any services that can be used as a substitute for traditional long-distance toll services. The geographic averaging of toll rates has long been a cornerstone of telecommunications policy in the United States. It is critical to rural subscribers, who typically have to make a greater number of long-distance calls than their urban counterparts due to smaller local calling scopes. For rural subscribers, calls to schools, doctors, and government agencies can often times be toll calls. By extending the geographic rate averaging and integration requirements to successor services, it will help to ensure that consumers in rural and insular areas continue to have access to affordable long distance rates as communications networks and services evolve. We applaud you for extending the rate averaging concept to the IP world.

Another positive provision in the new draft clarifies that portions of study areas may qualify for support from the Broadband for Unserved Areas Account. This will be helpful in enabling rural telecommunications companies to come closer to achieving full broadband coverage throughout their areas. Rural telecommunications companies are committed to offering broadband services to their communities, and have done a tremendous job thus far in deploying it where it is economically feasible. For example, OPASTCO estimates that its members are presently capable of offering broadband to nearly 90 percent of their customers. However, there are portions of some rural study areas that are so prohibitively expensive to serve, that ubiquitous broadband deployment throughout the study area is unachievable absent high-cost support. By making targeted support for broadband deployment available to rural telecommunications companies who have, thus far, been unable to achieve full coverage, it will help to bring our country closer to the goal of affordable broadband availability for all Americans, no matter where they live.

The Coalition also supports having the Universal Service Administrative Company (USAC) serve as the administrator of the Broadband for Unserved Areas Account, subject to FCC oversight. It is efficient and logical to have the current administrator of all the other Universal Service programs administer this new account. Furthermore, rural carriers appreciate the consistency of being able to interact with the same administrator for all Universal Service programs on a long-term basis.

However, with regard to the new Broadband for Unserved Areas Account, we question the collection of these new monies under Section 254(d) of the Act. We are also concerned that the Fund covers the customer premises equipment (CPE) for satellite service. Residential CPE is generally not covered in the other programs, and this provision risks focusing a disproportionately large segment of the Unserved Areas Account on this element.

We are highly supportive of the language that requires the FCC, if it modifies the distribution rules for the high-cost support, to adopt transition mechanisms designed to alleviate any harmful effects on existing Eligible Telecommunications Carriers (ETCs) and their customers. As you may know, the Federal-State Joint Board on Universal Service is in the midst of a proceeding that is considering changes to the high-cost support distribution mechanism for rural telecommunications companies. If the distribution mechanism that is ultimately adopted in that proceeding reduces the high-cost support that rural carriers receive, it is critical that there is not a flash-cut to the new system. Unlike the largest local exchange carriers, rural telecommunications companies have limited resources, and rely heavily on Universal Service support as a source of cost recovery. As a result, they will need ample time to adjust to any negative impacts of a new distribution system in order to prevent undue short-term hardships, and to enable them to continue providing their customers with high-quality service.

On another positive note, the legislation addresses the issue of phantom traffic and proposes language that would help alleviate this growing problem. Phantom traffic refers to communications traffic that cannot be properly tracked and billed for. It is a growing phenomenon that, by Verizon's own estimate, accounts for 20 percent of all traffic on its network. This translates into billions of minutes of communications traffic that are being terminated on the networks of other carriers for free. This is problematic because it places increased pressure on consumers—who are ultimately paying for this unidentified traffic through higher rates or increased Universal Service fees. It is essential that all service providers receive reasonable and fair compensation for the use of their networks.

The Coalition is particularly happy to see new language in the latest version of the bill that would require a provider that transports, or transits traffic between communications service providers, to forward without alteration the call signaling

information it receives from another carrier. This is very important to rural carriers because much of the network traffic they receive comes to them through a transiting carrier. Rural carriers must rely upon the transiting carrier to receive the necessary call-identifying information to properly bill for the call. We are also pleased that the legislation would require the FCC to establish rules and enforcement provisions for traffic identification, including penalties, fines and sanctions for rule breakers. By fixing the problem of phantom traffic, Congress will help alleviate pressures on end-user rates and the USF.

We have concerns about the Group Plan Discount provision that is included in the new draft. We believe it is vague and overly broad by allowing an unspecified number of "additional numbers" to be eligible for the discount. It is positive that the discount is limited to residential customers only.

We have three areas of concern that are not included in the introduced legislation or discussion draft. First, we would like to see the inclusion of a provision that would require support to be based on a carrier's actual costs. Currently, competitive ETCs receive support based on the incumbent's costs. Incumbents must not only follow more regulations than other carriers, they also serve the least lucrative consumers. This often results in many ETCs receiving unwarranted windfalls of support, which increases costs to consumers nationwide with no corresponding benefit. Second, the legislation should recalibrate the current method used to calculate the USF growth factor to account for access line loss. The current method fails to recognize that local exchange carriers are losing customers to other services, and, in many rural areas, out-migration. The current mechanism used to calculate the inflationary adjustment penalizes carriers due to customer loss even as we continue our carrier of last resort obligations.

The third area that we would like to see addressed in the legislation is the so-called "parent trap." There is a need to reconfigure how Universal Service support is calculated and distributed to rural areas in order to align the current disconnect between the rural characteristics of purchased properties with the ridged regulatory classification of the acquired properties. In many instances, current rules serve as a significant impediment to the kind of network investment this bill is designed to encourage. By modifying these rules, consumers living in rural areas would be able to enjoy the benefits of a broadband capable network, because carriers would be inclined to purchase and invest in rural areas that need and deserve rehabilitation.

As stated earlier, the Coalition applauds this legislation's move towards a sustainable Universal Service Fund, and we pledge to continue working with this Committee on this vitally important issue.

At this point I would like to step away from the Coalition to Keep America Connected perspective on USF and comment on other parts of the bill on behalf of OPASTCO. OPASTCO supports the inclusion of the Section 335 Shared Facilities portion of the bill. This will help rural carriers control costs of bundled, innovative new services, and thus assist furthering the deployment of broadband to rural areas. Similarly, subtitle A of Title IV will help small providers obtain content demanded by consumers on an equitable basis, encouraging the bundling of video and broadband services. OPASTCO is also pleased with the inclusion of the Section 602 language. This so-called "white space" spectrum can be utilized on an unlicensed basis to provide wireless broadband to consumers.

Once again, thank you for listening and working with us on these very important issues.

The CHAIRMAN. Thank you very much.

We'll now go through a period of questions from Members of the Committee. I do hope you'll all keep in mind that we do have a second panel.

The Co-Chairman is recognized.

Senator INOUYE. I thank you very much.

Mr. Scott, listening to the testimony of this panel, one is bound to get the impression that there is no clear definition of "net neutrality." What is your definition?

Mr. SCOTT. My definition is very simple. It's nondiscrimination on the Internet.

Senator INOUYE. Should this be legislated?

Mr. SCOTT. I believe it should. I believe it is the cornerstone of what gave us the Internet through Title II. And I believe that, now

that Title II no longer applies to broadband, it is incumbent upon us to transfer over nondiscrimination into the Internet space to guarantee that we continue to have the benefits that we've enjoyed heretofore.

Senator INOUYE. Do you believe the Internet is successful today because of legislation?

Mr. SCOTT. Yes, sir, I do.

Senator INOUYE. What would the impact be with no legislation?

Mr. SCOTT. I think the impact of no legislation is a structural change in the Internet, which would, for better or worse—I believe, for worse—change the way the Internet works, change the user experience of the Internet, change the relationship between the competitive free market for content applications, and the noncompetitive market for broadband connectivity.

Senator INOUYE. I thank you very much.

Mr. Rose, what are your thoughts on out-building?

Mr. ROSE. Thoughts on what, sir?

Senator INOUYE. Out-building. Oh, no, no, I'm—I should be asking Mr. McCurdy. I'm sorry.

Mr. MCCURDY. Senator, I'm sorry, I didn't—you asked my thoughts on buildout?

Senator INOUYE. Yes.

Mr. MCCURDY. We believe that the legislation today, with the changes in the franchise process, incentivizes greater competition throughout the country, and that buildout will occur, that there will be an economic basis for it. This is a way to improve competition, rather than having single providers. And, as I think all the witnesses have testified, the opportunities for consumers to have access to greater broadband capability is more than just use of the Internet, it really provides opportunities for other kinds of services to be provided, and the ability for consumers to network, from a business standpoint, from a personal standpoint. So, I think the way the bill is structured, that it really does provide incentives.

I would disagree with my panelist, Mr. Scott, when it comes to legislating the Internet. The Internet was not legislated before. The 1996 Telecom Act had almost no provisions with regard to the Internet. It was really on telecom. The Internet has been tremendously successful because of a non- or a light-regulatory model emphasized by the Federal Communications Commission and the Congress. And we believe that's the best approach. And that's the approach that says, "If you can't define what 'net neutrality' is, and you can't have two stakeholders that really agree on the definition, and you can't point to a tangible problem, then why regulate it, why be proactive and take that step?"

Senator INOUYE. Dr. Rutledge, is there a middle ground? And I'm saying this because there are strong groups saying no to net neutrality, and other groups saying yes. Is there such a thing as a middle ground?

Dr. RUTLEDGE. Well, you know, I think there is, and I think we are in the middle ground already. As Mr. McCurdy says, there have not been regulations before. These are new regulations that are being proposed. The entrepreneurial behavior is about change. There are existing procedures at the FCC and in antitrust law to

deal with anticompetitive issues. So, I think the issue of access is very important, and that we have laws in place to deal with that.

I think the issue of trying to stop changes or control pricing through legislation is a remedy for disaster. It will end up in a litigation mess like some parts of the 1996 Telecom Act did.

So, guaranteeing access, nondiscriminatory access, yes, but not controls over ability to price, which would deter investments.

Senator INOUYE. I notice that my time is up, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The next Senator is Senator Burns.

Senator BURNS. Thank you, Mr. Chairman.

I really meant it when I said that nobody really has got a definition for "net neutrality." And we will struggle to define that, Senator Inouye, before it's all over.

But I'm interested in the case of video franchising. Have we taken the right approach on this? What exists in the bill today?

Mr. McCurdy?

Mr. MCCURDY. Senator Burns, we really believe that the Title III provisions on streamlining this franchise process are the right step. You know, we've looked at this in-depth, and we find that the delays in issuing franchises really impedes deployment of broadband capability. And we've seen it in several States. A number of States are now trying to revise their provisions, but we believe a uniform Federal provision is the right approach.

Senator BURNS. Dr. Rutledge?

Dr. RUTLEDGE. Again, I'm sorry, sir. The question?

Senator BURNS. Do you think that our approach on video franchising is where we should be in this piece of legislation?

Dr. RUTLEDGE. Well, you know, I really do. And I do, partly because, in the last 5 years the U.S. share of world production of communication equipment has gone from 40 percent to below 20 percent. Last July, I believe it was, when Senator Ensign released a draft of his bill, telecom equipment companies' market values increased by $22 billion in the first 48 hours. Corning was up 15 percent, after they had closed five out of their six U.S. plants. So, I think, the approach of making it easy for people to make investments in video quickly is a very positive one for the capital stock and for productivity growth.

Senator BURNS. Mr. Scott?

Mr. SCOTT. I believe that the framework for franchising authority is workable. I think it's less important where the authority is located than what that authority delivers to the consumer. And I think the biggest issue here that's unresolved is, how are we going to bring video competition out into rural areas? I grew up in the panhandle of Texas, and I don't mean in the great metropolis of Amarillo, I mean out in the country, where you've got yourself a town if you've got a stoplight. And it took us a long time to get cable TV. And I fear that we'll never get video competition out in those areas unless we make a public policy that reasonably guides the marketplace to incentivize buildout in those areas.

Senator BURNS. Do you have competition in video programming now, or video in that small town in the panhandle of Texas?

Mr. SCOTT. Well, I mean, you can get cable television if you're in town. You can get satellite if you're out of town. But over the

years, satellite has proven, year after year, to be unable to discipline the prices of video. And satellite does not bring a high-speed broadband connection with it, like another wireline competitor would.

Senator BURNS. Do you have access to DSL?

Mr. SCOTT. In some cases. It depends——

Senator BURNS. And what——

Mr. SCOTT.—on where you are.

Senator BURNS. Even in your city?

Mr. SCOTT. It depends on how far away from the wire center you are.

Senator BURNS. But it's there?

Mr. SCOTT. It is there.

Senator BURNS. Thank you, Mr. Chairman.

The CHAIRMAN. Senator DeMint?

STATEMENT OF HON. JIM DEMINT,
U.S. SENATOR FROM SOUTH CAROLINA

Senator DEMINT. Thank you, Mr. Chairman. And I appreciate all the testimony today.

Just one note. Mr. LeGrande, you mentioned—and I appreciate that you mentioned—the importance of interoperable communication, rural areas, particularly when there is a disaster, be it manmade or otherwise. And, actually, this Committee had acted on that last year. Senator Ben Nelson, and I, introduced the Warren Act, which this whole Committee passed unanimously. Unfortunately, one Member of the Committee continues to hold it up; so, as hurricane season starts again, we're still sitting on our hands with something that could do a lot of what you had said. So, I appreciate you bringing that to our attention again.

Mr. Chairman, let me just jump to net neutrality. There seems to be a lot of discussion about what's the real definition of "net neutrality." I know exactly what it is, because I'm an old retail guy. And what this is, is the government telling retailers how to run their business.

Now, if there was just one retailer in town, I think we should all be concerned. We obviously have to look out for consumers. But when it comes to the Internet now, there are many retailers, and there are going to be many more in just a relatively short period of time. We've got high-speed phone lines, we've got cable, we've got satellite, and I think you're going to see, in just a relatively few number of years, every community, even distant rural communities, are going to have community-wide WiFi networks with high-speed broadband services, which are already being developed all around the country.

So, it's really commercial suicide for any network retailer to limit something that their customers want. And so, for us to be sitting here concerned that somehow we're going to block something, that one of these retailers is going to block something their consumers want, it just, frankly, won't happen.

In fact, to use this term "discrimination," we want retailers to discriminate. If you've ever seen how the showcase of free enterprise works on the retailing side of our economy, I mean, producers of products and services fight to get their products displayed in

stores, and they make better deals and better products, and they develop market demand for their product, so the retailers are forced to have them. And that's what's happening in this marketplace today. So, we actually want some discrimination to force better products and better prices.

And, again, if you think any of these retailers are going to limit something their customers already want, it just isn't going to happen. We need to stop worrying about telling retailers what products to stock on their shelves and how many facings to give them. We don't need to do that, because the market is developed to the point where it's going to take off if we just let it.

But let me just ask one question to Dr. Rutledge and Mr. McCurdy, because I think you seem to have a grasp on what's really going on here.

Mr. Scott is arguing that if we let the broadband market develop without imposing retailing regulation mandates, that if this discrimination begins, that there'll be no way to stop it, that it'll just get out of hand. Mr. McCurdy, we'll just start with you—what are your thoughts on that? And then, Dr. Rutledge, I'd appreciate your point of view, too.

Mr. MCCURDY. Senator DeMint, people often have noble intent, but I think there are unintended consequences by some of the actions. And regulation often results in that. In the 1996 bill, there were the unbundling requirements, and we saw disincentives really imposed on the deployment of broadband capability.

As I stated in my testimony, I believe the FCC has full authority to investigate any abuses, discriminatory practices or such, that would really block the use of the Internet. And they should have authority to not only investigate, but to adjudicate some of those actions.

And also, if you recall in the House bill, there was an amendment that provided that even though the FCC has authority, it in no way takes away the antitrust authority within the U.S. law. So, there's ample ability to police, and to adjudicate any discrimination that would occur—wrongful discrimination, not the kind of retail discrimination that I think you were alluding to.

And I'd just like to make one last point. I think Senator Burns, has raised that. Senator Dorgan, when he made his intro, talked about incentivizing innovation and providing for competition. I'm here representing the technology industry. Europe and Asia have greater deployment and use of broadband than we do, and this is an opportunity to unleash the ability of major providers to go to that second generation, that next generation of capability, whether it's fiber-to-the-premises, network-to-the-curb; VDSL, which is very high-speed DSL; cable interfaces, new systems there; WiFi, WiMAX, broadband over powerlines. There was an article in the paper yesterday about satellite providers now reaching new agreements to provide Internet capability. This technology is ready to explode, it's ready to take off. And I think you have the ability, this year, to really incentivize it and move it forward.

Senator DEMINT. Dr. Rutledge?

Dr. RUTLEDGE. I think we need to be careful not to try and create regulations for a problem that doesn't exist. There's plenty of remedies between the FCC and antitrust law to deal with anticompeti-

tive behavior. And that's sufficient to deal with the problem. If we do regulate it, there may not be a problem, because there may not be investment in high-speed telecom.

What we call "broadband" is really a misnomer. Broadband is not a "thing." "Broadband" just means that, of all technologies, you're using the one faster than the other guy. You know, once upon a time, the imperial highways in China were broadband, because they were the fastest transportation in the world. They're not any more. Once upon a time, the railroads were the fastest. In the rest of the world, they are using fiber optics. I've had video conferences from Beijing to several thousand people in the U.S., with no delay and perfect signal, because every band on my phone is lit up in every city I go to in China. That's the battle. The battle is a competitive one. And we need to make sure we don't stop change before it happens.

Senator DEMINT. Mr. Chairman, I'll yield back, but just one last point. I think once we interject this idea of discrimination onto the Internet, which is something—really, in retailing, it's a good idea and ultimately benefits the consumer—once we interject that at all, we're going to create another litigation playground for the trial lawyers, and I'm afraid we're going to really hurt something that's beginning to move in a very fast way in the right direction.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Vitter?

Senator VITTER. I have nothing at this time, Mr. Chairman, thank you.

The CHAIRMAN. Senator Dorgan?

Senator DORGAN. Mr. Chairman, thank you.

I think my colleague Senator DeMint has given the most robust support for discrimination that I've heard here in the Senate for some while. I think it was in this room, as a matter of fact, where we saw people on all sides doing their best impression of potted plants, while the Federal Government was doing nothing with respect to the stealing of about $10 billion-plus with respect to wholesale electricity rates in California, and we were told, "Don't do anything, nothing's happening, this is the free market system." We now understand it was a massive criminal enterprise, and Congress would have been well advised to stand up for the interest of the consumers on the West Coast.

But, Mr. Scott, who created the Internet?

Mr. SCOTT. It was a combination of the Defense Department and some university researchers.

Senator DORGAN. So, it was government-created?

Mr. SCOTT. Yes, sir.

Senator DORGAN. Uh-huh. Let me ask you, until last summer, when the Supreme Court affirmed an FCC ruling that broadband was an information service—prior to that time, broadband was considered a telecommunications service, and, therefore, subject to the common-carrier rules and nondiscrimination provisions of the common-carrier rules, is that accurate?

Mr. SCOTT. That's right. DSL and broadband services were considered Title II services.

Senator DORGAN. So, the unbelievable robust growth of the Internet occurred while the nondiscrimination rules existed. Is that correct?

Mr. SCOTT. That's right. And even those cable modems that were not technically subject to Title II common-carrier regulations defacto adhered to those regulations because of the uncertainty of how that nondiscrimination principle would ultimately be applied.

Senator DORGAN. And we are told that, in the absence of those nondiscrimination rules that have always existed, or been adhered to, that antitrust laws replace it. My view of antitrust laws is, they make glaciers look like they're speeding.

Mr. SCOTT. That's right. And——

Senator DORGAN. Antitrust-law enforcement, in this town, is almost completely, thoroughly, totally nonexistent.

Let me ask Dr. Rutledge a question. A CEO of a telecom company recently—actually, last November, said—this was *Business Week*—he said, quote, "They don't have any fiber out there. They don't have any wires, they don't have anything, and they use my lines for free, and that's bull. For a Google, or a Yahoo!, or a Vonage, or anybody to expect us to use these pipes for free is nuts."

I think, Dr. Rutledge, you and I don't disagree about where this would head. I think you indicated, when you testified, that access is very important. You don't want people to discriminate with respect to the ability of—the people in this country to access the Internet. Would that not be true?

Dr. RUTLEDGE. I didn't hear anything in that quote that suggested that no one would have access. I heard——

Senator DORGAN. Well, the quote was——

Dr. RUTLEDGE.—I heard in the quote that there would be differential pricing based on the intensity of use by different customers, just as you have today if you send a letter by Federal Express, or Express Mail, or any other way. If you regulate against pricing freedom, you are shifting the cost of building the infrastructure, if it gets built——

Senator DORGAN. You didn't hear anything in——

Dr. RUTLEDGE.—from the intensive users to the small users of the Internet, because you're forcing average pricing on the market. No, I didn't.

Senator DORGAN. You heard nothing in this quote that would describe a concern about access?

Mr. Scott, did you hear something in this quote—or let me perhaps read another quote. "Google is enjoying a free lunch that should, by any rational account, be the lunch of facilities providers." Do you read into that quote, maybe, a suggestion that those who are controlling access to providers would like to charge, for access, a bit more?

Mr. SCOTT. I do. I hear, in that quote, an intent to change the structure of the Internet. And I think the key point is that even though I would love to see numerous competitive service providers in the marketplace. I'd love to see BPL take off. I'd love to see fiber to the home all over the country. I'd love to see wireless ubiquitous access, but the fact of the matter is that cable, modem, and DSL service control 98 percent of the broadband market. And, actually, over the last year, according to the FCC's data, that market share

actually increased. The market share of all the other technologies combined is less than 2 percent. That's not a competitive marketplace. And there are incentives for service providers in a duopoly market to discriminate against content providers to fatten their pockets.

Senator DORGAN. Let me just say, in North Dakota, for example, 49 percent of North Dakotans have one provider, no competition. I want competition. I want there to be innovation. I believe all that. I, however, am concerned about how mangled the description of what the open architecture of the Internet proposal has become. This notion of retaining an open architecture that has led to the innovation and the growth of the Internet, one of the great innovations of our time, or perhaps any time, has come as a result, in my judgment, of nondiscrimination.

I believe, Mr. Scott, you said that replete in the Chairman's bill—and the bill that's the revision now—are nondiscrimination provisions in a range of areas. I support all of those. I think they are the right thing to do, and I believe the same is true with respect to the restoration of nondiscrimination provisions with respect to the Internet, because we have very big organizations, behemoth organizations that are going to fight over this issue, and I want to make sure that the Internet, 2 years, 5 years, and 10 years from now, is an Internet with open architecture, accessible to anybody. I want—no, I—look, I think it's good that telecom companies are deciding to produce video and to provide competition. I think all of that is good, because, ultimately, that's going to be good for the consumer. But it will also be good for the consumer if we have an Internet a couple of years from now, or 10 years from now, that has an open architecture for the ordinary folks around this country who want to get on it and move on it without impediment. And so, that's the purpose of our legislation that Senator Snowe and I have introduced.

Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you.

Senator DORGAN. Let me thank the rest of this panel. I didn't ask them questions, but—we're getting a lot of really good information, Mr. Chairman. I think you've selected some good panelists.

The CHAIRMAN. Senator Pryor?

Senator PRYOR. Thank you, Mr. Chairman.

Secretary Glickman, I want to thank you for being here today, and also want to echo what you said about the importance of piracy. It is something that is very critical to the U.S. economy, and I'm glad you're vigilant on it, and I'd love to help you work on that, on this legislation and others.

But let me, if I may, start with Mr. LeGrande on—and I have a question about the strategic technology reserve, which is in the Chairman's bill. Do you like the approach that is taken on the strategic technology reserve?

Mr. LEGRANDE. I think that, as I mentioned in my testimony, it is important that we look to the future, that we look to getting on a new platform. I think that our existing voice communications platforms don't scale. They won't, right now, scale to include high-speed data, in video. So, consequently, we really need to look to a new platform so diversification to move us to that is important,

but, at the same time, we still know that there are voice communication systems in various areas—that need support, so we really need to look at doing that.

Senator PRYOR. OK. I'm really glad that the Chairman added the strategic technology reserve in there. I think it's something that the Congress needs to weigh in on. I might have a little different approach, if I can just alert the Committee to this. And that is, I actually like the FEMA approach under James Lee Witt, where he went out and negotiated a number of—I think what they call "set-aside contracts," where they negotiated the contracts, but they didn't execute them until they needed them. And certainly, I like what the Chairman's trying to do. I certainly agree with his goals, that we need to have the communications ability there when we need it. But, given the fact that technology changes so rapidly, given the fact that, say, for example, in the cellular industry, they have mobile units that they can move into areas after hurricanes, after terrorist events, et cetera, to get their cell phone networks up and running. I just think we need to be smart about how we approach this, so I just wanted to alert the Committee to that.

Also, if I may, Dr. Rutledge—let me ask you—the House bill just passed last week. Are you happy with what you see in the House bill?

Dr. RUTLEDGE. I think, by and large, the House bill does a pretty good job of encouraging capital spending, yes.

Senator PRYOR. And, Mr. Scott, on net neutrality—I know that's an issue that's near and dear to your heart—if the Senate bill stays as is, and there are no changes to the net neutrality provisions, what do you think the consequences are of that?

Mr. SCOTT. Well, as I noted in my testimony, I think we'll see a structural change in the Internet.

Senator PRYOR. So, you feel like we don't have the balance in the bill right now that you want to see.

Mr. SCOTT. Yes, that's fair.

Senator PRYOR. And, Mr. McCurdy, as I understand it, you disagree with that. You think there is the balance there, and you think net neutrality, as written in the bill, is workable.

Mr. MCCURDY. Yes, Senator Pryor. As a matter of fact, this morning, early, I was at the canteen just down the hall, and one of my former House colleagues, now a Democratic Senator, came by, and he said, "You're testifying today?"

And I said, "Yes."

And he said, "Are you going to testify on that net neutrality?"

And I said, "Yes."

And he says, "Well, when you figure out what it is, let me know."

And that's part of the problem we have. You know, with all due respect—and my good friend and former classmate Byron Dorgan talked about, you know, the government invented the Internet. And it's true, ARPANET was a joint project. But that's a different platform, and that platform has been changed dramatically over the years. This is not the Internet of that generation. This is a worldwide connectivity that blows the imagination. You look at the map of what the Internet looks like, and it's literally billions of connections and small nets.

We're really talking about differences in platform. This new platform that's being described is beyond our imagination, even now, with the capabilities it's going to provide to, I think, most all Americans. And we want to see it deployed. You know, I'm here because we believe in competition. We want the competition. We want the competition across technologies, but we want it incentivized. We want it in rural Arkansas just as much as I want it in rural Oklahoma. And the way you do that is not by the European approach of subsidizing a single provider and then regulating it. We adopted a different approach in this country, and that is to have a market approach where people do subscribe to services, but the difference is that, in this net neutrality debate, it's the unaffiliated application providers who want the carriers to offer them, for free, all the up-speed, the new bandwidth, the tremendous new speeds and additional capabilities that they're investing billions of dollars to deploy. So, to me, that's a fairly simple argument, moving forward, that this bill, I think, is really taking the right approach, and it has some balance. Will it be perfect? That's why you have committees, why you have conferences, and why we'll probably revisit this issue in the future. It's also why you have to keep, I think, effective oversight of what the FCC's doing.

Senator PRYOR. Thank you.

Mr. Chairman and Members of the Committee, my impression—I know that net neutrality is a very controversial piece of this, and my impression, after talking with I don't know how many dozens of people about net neutrality, there are a set of issues that, really, I think, can be agreed upon. I think that there is some general agreement on a lot of issues, a few issues there's no agreement on, and people just see the world differently. But, certainly, I'd like to work with my colleagues to find the common ground we can, and get as much as we can agreed to and work it into the bill, if that makes sense.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. I, too, think there's an area—and I've discussed it with some Members of the Committee—where we ought to talk about the FCC having the right to deal with net neutrality issues that affect consumers and let the basic providers, the large providers, hire the attorneys to battle out their concepts of what is there. But the protection for consumers, I think, we could handle in net neutrality. When it comes to interfering with the marketplace, in terms of the major expenditures in capital, I think we should stay away.

Senator PRYOR. I'll be glad to work with you on that. Thank you.

The CHAIRMAN. Senator Lautenberg?

Senator LAUTENBERG. Thanks, Mr. Chairman. And thanks, in particular, for giving us a little more time to look at the bill, to enter into the debate that we see here today.

I think the latest draft of the legislation does have good language that will grow community broadband efforts. And, as you know, I introduced the Community Broadband Act with Senator McCain, and I thank Mr. McCurdy for mentioning it. I think we're making some progress. We've got an agreement with Senator Ensign, and Senator McCain, and myself. And I think that it's going to help us

clarify whether or not the community has a role to play when offering these services.

As it has been said here, broadband, a 21st-century utility, improves communication and education, but many Americans are just not able to get broadband service because they live in small towns. Now, coming from the most densely populated State in the country—people don't think of us as having small towns, but we have more than our fair share of communities, about 560, and a lot of them are very small. I still catch up on the names, and I've lived there all my life. But the companies are just not, at this point in time, making it available, or people just can't afford it. So communities across the country have responded by stepping in to create their own municipal networks. And we've got to protect their right to do so.

So, I thought the first draft of this communications bill put too many obstacles and hurdles in the way of community broadband development.

Now, based on the agreement that we worked out last week, I think that the new title on community broadband is a major improvement. The bill requires that, before a town acts on its own to provide broadband, it must give notice to the public about the kind of project it has planned, and it also must give private industry an opportunity to offer proposals to undertake the same project. But the town will have a voice, ultimately, to decide how to proceed. And the bill encourages public-private partnerships like those we're seeing in Philadelphia and San Francisco, and smaller cities like Summit, New Jersey.

Now, on the issue of allowing telephone companies to enter the TV market, often called "franchise reform," I appreciate the Chairman's efforts to address the concerns of local government and consumers, but I still think there's room for improvement. And we all want to increase competition in the television market, because it would result in expanded services and lower prices for consumers; but we've got to ensure, when a company enters a new area, it's going to serve all of the customers in that jurisdiction, not just the ones who are most affluent or easiest to reach. New Jersey is an example of this. My home State is close to enacting legislation to create a statewide franchise. The New Jersey bill requires new companies that want to provide TV service in our State to reach customers in the 60 densest cities in the State, beginning in 3 years.

So, this is a sweeping piece of legislation that we're looking at here. And, obviously, there are going to be provisions on which we agree, and others on which we disagree. And I think we've struck the right policy balance on community broadband. And, hopefully, in the next week, and with the help of today's witnesses, Mr. Chairman, who provided some very interesting observations on where we ought to go, we'll continue to work on this bill.

Now, Dr. Rutledge, you talked about the focus on capital. And I heard your views on how structure ought to be developed, and have people paid based on productivity. And I come out of the business world and ran a pretty good-sized computer services company. What has been the capital investment, would you say, by the cable industry, by the telcos, in the last, perhaps, 10 years?

Dr. RUTLEDGE. I'd have to go dig in my file drawer to find a good answer for you, Senator, but the total capital spending peaked in 2001 at about $150 billion a year. It fell, until 2005, to a round number of $50 billion a year——

Senator LAUTENBERG. Well——

Dr. RUTLEDGE.—and is going back up in this direction.

Senator LAUTENBERG. Yes.

Dr. RUTLEDGE. Cumulative investment would be in the—make up a number—$200 billion-ish zone——

Senator LAUTENBERG. Well, it——

Dr. RUTLEDGE.—the cost of building out $200 to $400 billion from here.

Senator LAUTENBERG. Yes. But it doesn't sound like we're investment-starved, in my view. The cable industry says that they've already put $100 billion, in the last decade, to improve and upgrade their services. And certainly the competitive factor that looms over all parties is going to induce capital investment. I don't see us as capital-starved.

And, in terms of net neutrality, Mr. Chairman, I think what we have to do is revise the description, because net neutrality means you're not at war anymore, and that things are going to be peaceful from that point on. And I think it gets confused, in terms of what we're talking about when it's net neutrality. Does it say "Just tell what kind of services are available and what kind of pricing that might include?" I think the problem with net neutrality, is that the term describes something that people don't understand. Are we in agreement on that? I think the words to define it make it more complicated than the situation really is; enough said.

Thanks very much, Mr. Chairman. Thank all of you at the witness table.

The CHAIRMAN. Thank you very much.

I believe the next person is Senator Boxer.

STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM CALIFORNIA

Senator BOXER. Thanks very much, Mr. Chairman. And thank you for moving your bill—on changing your bill in ways that are helpful—very helpful. For example, I think that the broadcast flag provision now is something that I'm happy with; and, for my State of California, I thank you for that. The Wireless Innovation Act, that allows unlicensed devices to use the unused spectrum, is very important. So, those are parts of the bill I strongly support, but I still have some questions on other parts.

I also wanted to welcome the panel. Two of my colleagues that I enjoyed working with so much are here.

I wanted to take this whole issue on about what's pro-business, what's not, and to say that, on the net neutrality issue, there's no such thing as a pro-business position, because business is split. Depends on the business. We had a whole hearing where we had businesses in front of us who want us to protect net neutrality. And some of those are Amazon, Yahoo!, EarthLink, Microsoft, Google—there's a whole site, *SaveTheInternet.com,* that lists many, many small businesses. So, there isn't any, you know, pro-business position here. I think we've got to get past that. And the whole point

that, you know, regulation always hurts retailers, as my good friend Senator DeMint says, is—you could have these same people here from the business community on the opposite side being for regulation. Depends on the issue. So, this is something we've got to step back from, I think. We've got to do the right thing for the majority of the American people.

So, I want to get to the issue of net neutrality, and—now, Mr.—Dr. Rutledge said that there has been no regulation of the Internet. Mr. Scott, do you agree with that?

Mr. SCOTT. I mean, we can get out the Communications Act. There has always been regulation of the Internet. It was in Title II from the beginning of the Internet. I'm not quite sure why that argument is still around.

Senator BOXER. OK. And then, I'm just going to go straight with this line of questioning here. When you were asked, Mr. Scott, "How would you define 'net neutrality'?" you put it simply. Everyone is struggling with definitions. You don't seem to have a problem. You said it's nondiscrimination on the Internet. Now, what about that is unclear? Could you now describe what you mean when you say, "nondiscrimination on the Internet"?

Mr. SCOTT. Well, I think, you know, my ideal definition of "net neutrality" is in Section 202 of the Communications Act.

Senator BOXER. And you want to summarize that so people understand it——

Mr. SCOTT. Just——

Senator BOXER.—in simple terms?

Mr. SCOTT.—reasonable, and nondiscriminatory conditions of service on the Internet.

Senator BOXER. OK.

Mr. SCOTT. Now——

Senator BOXER. And yet, do you understand why people are struggling with trying to define what does this mean? Do you——

Mr. SCOTT. I——

Senator BOXER.—do you understand why they're having a problem?

Mr. SCOTT. I think the struggle is not over the definition of "nondiscrimination." I think everyone understands that quite clearly, clear enough to embrace it when it applies to their own business interests, such as in the program access rules, which, by the way, back in the 1992 Cable Act, drew the same kind of criticisms about regulating an industry in a thicket of regulation and a litigation playground. These things never happened. Program access rules have worked quite well. And, in fact, we're beefing them up in the latest draft of this bill, and that's a position we support. I think the struggle over net neutrality is not the definition of "Internet freedom," it is how to apply it to navigate the politics of the issue.

Senator BOXER. I think I agree with you. Do you—you advocate for a buildout requirement. I mean, all the testimony is, "Leave us alone. Let us charge whatever we want. Don't have net neutrality language, and you'll see the great things that will flow from that." Listen, I heard about that in California from Enron, and I know what happened, "Leave us alone, prices will go down," and we're $11 billion poorer. And, thank God, some crooks are in jail. But I really want you to tell us why you advocate for a buildout require-

ment in addition to a redlining provision that prohibits discrimination.

Mr. SCOTT. Well, I think the only real way to guarantee that competition and the benefits of competition come to all American communities, including rural areas, is to intentionally craft public policy that guides the market in that direction, because, if we don't, what we're going to have is a patchwork, where the most lucrative markets, those local franchising areas, whether they're municipalities or counties, will get competitive service, and those that aren't lucrative will not. I mean, we saw this problem 75 years ago with the telephone, and we addressed it. We decided that this was a technology that every American household deserved. I would say we need to bring competition into every American community. I think there's a way we can couple buildout requirements on the franchise with a Universal Service policy expanded to broadband to make that a reality.

Senator BOXER. Mr. Glickman, I just want to ask you this, because as you—I know that we're happy with the way this all turned out, in terms of the broadcast flag, but I just want to give you a chance to put on the record here—some people say that, given the current state of technology, it isn't possible to engage in mass piracy of over-the-air shows. So, how do you respond to those who say broadcast flag is a solution in search of a problem?

Mr. GLICKMAN. Well, first of all, you have to realize that cable and satellite systems already have systems in place to protect content, so that they cannot be indiscriminately distributed over the Internet. But free, over-the-air broadcasts——

Senator BOXER. Speak into the mike.

Mr. GLICKMAN. I'm sorry—free over-the-air broadcast does not have that. So, roughly about 15 percent of the people in this country, largely in underserved areas, face the fact that their content can't be protected. So, unless you provide a parity here, unless you provide the same kind of protection for free, over-the-air broadcast that you do for cable and satellite, it's likely that that content will move to cable and satellite, which means an awful lot of people who don't have the systems could lose their freedom to see all sorts of shows in this country.

And the fact of the matter is, is that, with the advent of digital television, you will have all sorts of opportunities to take that and spread it all over the world and not be compensated for it. So, it not only provides an opportunity for piracy—rampant piracy—but it also means—that other systems, other than over-the-air broadcasting, will be preferred in the protection, and that means content providers will go where the preference is, because that's where the content will be protected. So, it is a big problem.

Senator BOXER. Well, I thank you, because I worry about the House language, and I think this is an important debate.

Mr. Chairman, do I have time for one last question? Do I have any time remaining? It's hard for me to see your clock. Well, I've lost it.

Do you agree, Mr. McCurdy, with the four network neutrality principles set forth by the FCC?

Mr. MCCURDY. Yes. The FCC has adopted policies that are consistent with what the Telecommunications Industry Association

outlined as principles for Internet usage. And we think those should be extended to include pro-competitive network management techniques to alleviate congestion, ameliorate capacity constraints, enable new services.

I would say to my good friend, I happen to live in a jurisdiction in Virginia. I have satellite for my television, I have cable for my Internet, and telephone through one of the major providers. What was interesting, when the telephone provider announced that it was going to deploy fiber to the home in our neighborhood, my Internet bill dropped $20 a month without any notice. It just dropped. You know, now I have choices, and we want those choices to be available to other people.

And our concern is that by regulation you're going to limit those choices and the incentives to make the investments. And these are huge investments, and government can't mandate these investments, because it's not government money. And so, we want this competition to really enable this further deployment.

Senator BOXER. Well, I'm encouraged that you support the FCC's principles. I just don't know why you wouldn't want them to have the authority to address the problem.

Thank you, Mr.——

Mr. MCCURDY. I believe they have the authority to address the problem, and that's why we're encouraging this committee to authorize——

Senator BOXER. No, they don't.

The CHAIRMAN. Thank you very much.

Senator Allen?

STATEMENT OF HON. GEORGE ALLEN,
U.S. SENATOR FROM VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman, for holding this hearing. And thank you for your leadership in pushing forward on this Consumer's Choice, and Broadband Deployment Act of 2006. I have a statement I'd like to put into the record.

[The prepared statement of Senator Allen follows:]

PREPARED STATEMENT OF HON. GEORGE ALLEN, U.S. SENATOR FROM VIRGINIA

Mr. Chairman, I would like to thank you for calling today's hearing to discuss your Consumer's Choice, and Broadband Deployment Act of 2006. All of us here recognize the need for telecommunications reform, and we would all like to see a bill pass this year for a variety of reasons. Thoughtful telecommunications reform legislation will greatly benefit consumers by increasing competition, and, therefore, consumer choices for communications services such as video, voice and broadband.

The primary motivation for this bill is the Internet. As I have stated many times, I believe that the Internet is the greatest invention since the Gutenberg Press. The Internet and broadband revolution is opening up a whole new world of opportunity for consumers and businesses. Internet applications are bringing new competition to old markets, which means more innovation, lower prices, and higher quality of service for customers. For example, in the voice space, voice-over-IP technology is providing consumers with an alternative to traditional phone service. Entrepreneurs are merely a website away from offering phone services. Virtually every consumer with broadband Internet access can now choose between several telephone service providers.

Unfortunately, these technological advancements enabled by the Internet have outpaced many of the laws and economic regulations governing the communications industry. I applaud Senator Stevens for his efforts to update many of these regulations including a provision to streamline regulations that pertain to another exciting Internet application—IPTV. Phone companies are beginning to offer this exciting

new video service around the country, including a few places in Virginia. Government should get out of the way as much as possible and allow this competition to flourish.

A guiding principle I have followed throughout my time in public service, is that the Internet, and all of the opportunities it brings, should be as accessible as possible to all Americans. Unfortunately today, many people from rural areas to big cities either do not have access to broadband Internet service or simply cannot afford it. As a result, the U.S. is lagging behind much of the world in broadband penetration (16th). To encourage the deployment of affordable broadband services, I introduced, along with Senator Kerry, and a bipartisan group of Senators (Sununu, Boxer, Dorgan), the Wireless Innovation Act of 2006 (WINN Act).

The goal of WINN Act is to unleash the power of advanced technological innovation to facilitate the development of wireless broadband Internet services. Specifically, our legislation allocates certain areas within the broadcast spectrum that are otherwise unassigned and unused (known as white spaces) for wireless broadband and other innovative services. I thank the Chairman, for including the WINN Act in his communications reform bill. Mr. Chairman, I thank you again for holding this hearing and I thank all of the witnesses for being here. I look forward to hearing their ideas and suggestions. I also look forward to working with you on further improvements as we work to move this bill through the Committee and the Senate.

Senator ALLEN. This measure, it's so important that we get this passed, for so many reasons. Listening to Congressman McCurdy wisely choosing to move into Virginia——

[Laughter.]

Senator ALLEN.—but, regardless of all that, this is exactly what we want to see. With the greater deployment of broadband, with increased competition, you get more consumer choices and services, whether it's voice, video, or broadband; and, with more competition, you get better quality, and you can get lower prices. And that's why it's so essential that we find a consensus on this net neutrality issue, because there are so many other beneficial aspects of this measure.

Now, the Internet—we're all talking about getting more deployment of the Internet. In particular, it may be in inner cities, where people don't have access to it as much as, say, a suburban area. Or, also, in places such as Virginia and other States, small towns and rural areas don't have access to broadband. They may have access for video, for satellites, but they don't necessarily have broadband access, which, therefore, limits their ability for telemedicine, for education, for commerce, and for access to information.

One of the measures you, Mr. Chairman, have been very helpful to me on was a measure that I introduced, which was the Internet Tax Nondiscrimination Act, which the President signed into law in 2004, and it's a moratorium preventing access taxes on the Internet. On average, it would be an 18-percent tax. The last thing, in my view, we need are these avaricious State and local tax commissars imposing an 18-percent tax on Internet access.

I'd like to ask Dr. Rutledge, What effect do you think taxing Internet access would have on broadband deployment and penetration? My view is, this moratorium, or this prohibition on State, Federal, or local taxing of Internet access, ought to be permanent. What impact, if it were permanent, would that have on broadband deployment and penetration if that were added to this bill?

Dr. RUTLEDGE. Adding a tax to Internet distribution would reduce capital spending and shrink access to the Internet, it would reduce the return on capital of assets invested in the sector, by some 20 percentage points, if that tax were deployed. Building-out

the infrastructure needed in the next 10 years or so, is going to cost somewhere between two- and four-hundred billion dollars. Every time a company in this sector announces new capital-spending plans, their stock price falls, so they're being told by the market not to do it. And they're being told by the market to move their capital someplace that has lower tax rates and where they can get paid.

Senator ALLEN. Well, do you see, in rural areas, where my friend from Montana, our colleague Senator Burns will say, and I say it, as well, is, there's a lot of dirt between light bulbs——

Dr. RUTLEDGE. Yes.

Senator ALLEN.—out in the country, and if you have a small market, to get that rate-of-return—there's a reason there's less cable out in the country: there are fewer customers. If you add an 18-percent tax to it, one would logically conclude that fewer people could afford it, thereby exacerbating the economic digital divide, insofar as access to broadband. Would you agree with that?

Dr. RUTLEDGE. Absolutely. I think adding taxes will make it more difficult to bring high-speed Internet into rural areas.

Senator ALLEN. The other measure that I thank the Chairman for including, is a measure that I introduced, along with Senators Sununu, Boxer, Dorgan, and Kerry, and that's the Wireless Innovation Act. This is to use the unused, unassigned, so-called "white spaces" for unlicensed use, for more robust and efficient use of that particular spectrum, which I believe will lead to rapid innovation and result in numerous benefits. You'll actually get some competition using this spectrum. It's not like WiFi that shoots out for maybe a few hundred yards; it'll shoot out miles and miles, and also not be impeded by buildings, or trees, or structures. And I think there are numerous benefits to consumers, whether you're in the city or whether you're in the country, or whether you're in a suburban area, and make wireless broadband more affordable.

Mr. Scott, I know you touched on it in your opening statement. Could you elaborate, for the benefit of the Committee and the American people, on some of the benefits American consumers will see if this legislation, this Wireless Innovation Act, becomes law?

Mr. SCOTT. I'd be happy to. And I want to thank you, Senator, for your leadership on the issue. It is one of the best ideas that I've heard in a while.

I think you're going to get two things when you open up the empty broadcast spectrum that are going to solve the most important impediments to our broadband deployment, and those are the high cost of delivering service in rural areas and the high prices that keep low-income households from buying broadband access. Opening up the empty broadcast spectrum lowers the cost of infrastructure deployment for wireless broadband by a significant factor—by some estimates, an order of magnitude. Now, that order of magnitude of cost savings will be passed along to the consumer, and, by some estimates, will produce a broadband connection down below $10 a month. Now, that's a price point that most American families can afford, and I think that's the moment when we see our broadband engine begin to churn up a bit, and we begin to tick up some places above those 15 other nations that are currently ahead

of us in broadband. I think this is an important measure to take us down that path.

Senator ALLEN. Thank you, Mr. Scott.

Dr. Rutledge actually is nodding his head in agreement, so it's to see——

Mr. SCOTT. Yes.

Senator ALLEN.—I assume you're both in agreement on this one subject.

Dr. RUTLEDGE. Absolutely.

Mr. SCOTT. All right.

Dr. RUTLEDGE. Consensus.

[Laughter.]

Senator ALLEN. Good. Let me ask Mr. LeGrande a question.

The CHAIRMAN. Senator, this will have to be your last question.

Senator ALLEN. Mr. LeGrande, on the CapWIN, are you familiar with CapWIN?

Mr. LEGRANDE. Yes, sir.

Senator ALLEN. Because one thing we saw, Mr. Chairman, when the Pentagon was hit, was all sorts of fire and rescue personnel coming into the Pentagon, but not communicating, between Arlington, Fairfax, Alexandria, Maryland, and D.C. That has worked out very well in an operable way, even for the Texas Guard, when Hurricane Rita came in. Would you briefly summarize for us how that's working in the Capital Region, and if you also see that as replicable for interoperability elsewhere in the country?

Mr. LEGRANDE. OK. It's a core component of what we're moving toward in the National Capital Region. CapWIN was developed several years ago, and it does provide data access and actual direct communications between folks using their laptops or other wireless devices. It's a great platform that we certainly plan on leveraging within the National Capital Region. It's a virtual application or a virtual network. We have plans to ride it on our hardwire network, which is a fiber optic network that these gentlemen spoke of as so important, earlier, but also ride on our wireless broadband network. So, together with CapWIN, our infrastructure that we're putting in place, and hopefully through our partners in California and other places, we'll be able to leverage the CapWIN experience throughout the country. So, it's a very important application, and we're glad we have it.

Senator ALLEN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Smith?

STATEMENT OF HON. GORDON H. SMITH,
U.S. SENATOR FROM OREGON

Senator SMITH. Thank you, Mr. Chairman.

I think many of us are trying to find the right balance here, because we recognize how critical this legislation is to the future competitiveness of our country.

I believe, Mr. Scott, you were in my office recently, and you represented to me that the amount of money that would come through assuring net neutrality is very small in comparison to the enormous additional business opportunity that is out there, and that

this would not be an impediment to deployment. Is that your position?

Mr. SCOTT. Yes, sir, that's fair. I think that there's a little more to it than that, which is that the sources of revenue that will drive the buildout of these next-generation networks will come from end-user costs and producer costs, which can go up and down at the will of the network operator at any time. They can raise the cost on those producers of content that interconnect with the Internet, and they can raise the cost on consumers to buy next-generation services. That's how cable built out their network, and that's how all of the nations that are currently ahead of us in broadband, but yet retain network neutrality, have built out their networks.

Senator SMITH. So, on the one side of the equation, we're talking peanuts, in terms of regulation to assure net neutrality; on the other side there are very real dollars.

Mr. SCOTT. These economics are a matter of speculation, and I would——

Senator SMITH. Can you give us an idea what—you know, what are we talking about—$20 billion here, $200 billion there?

Mr. SCOTT. You know, I've read several studies, and one of them has the numbers on one side, and the other one has the numbers on the other side. And I think, you know, for me, the primary way that I think about the Internet is, where has the innovation been? Where have the dollars been spent over the last 10 years as we've seen the Internet take off? And I want to make sure that those businesses that have become so successful stay here in the United States and don't retreat to Asian markets or to European markets because they find a more favorable climate to innovate in those areas.

Senator SMITH. Mr. Rutledge, as you see a few billion here, in terms of regulation, or a trillion over there, you see the equation reversed. Is that correct?

Dr. RUTLEDGE. What I see is that these innovative companies are leaving, and have left. The U.S. has lost more than half of its global market share in telecommunications equipment, largely to China.

Senator SMITH. But is Mr. Scott right, that these other countries have assured net neutrality, and yet the business has still gone over there?

Dr. RUTLEDGE. There are many different regulatory structures in the different countries. Largely, it's a question of taxes and costs and incentives to move. If you went to Chengdu, in western China, you'd see all the names you know up on the wall who are there with R&D facilities, doing optical physics right now. But I think the issue here isn't whether you get one or the other; it's whether you get both or neither. Because there won't be any high-end Internet services if there is no way to get them to people. And if there's no spending on infrastructure, there won't be any way to get people the services, at the end of the day.

It's not surprising to me that the companies that have built up huge market caps in the Internet in the recent years would like to keep things the way they are, because those market caps have turned them into a conservative force. I don't know where the next innovation's going to come from, but I'll bet you it does not come

from those five companies we would all say. It's going to come from somebody we don't know yet. But it won't happen unless there's capital spending and the infrastructure in place.

Senator SMITH. In your testimony, Mr. Rutledge, you say that there is no regulation of the Internet. I believe that's what I have in front of me. And yet, Mr. Scott says there has always been regulation of the Internet. Who's right?

Dr. RUTLEDGE. Well, we're both wrong, probably. DSL was regulated. Capital spending in America in telecommunications area, including cable, declined by two-thirds over the 5 years up to the decision to deregulate high-speed Internet, and has increased since then, but not back to where it started the story. Before that, high-speed Internet was largely cable modems, which were not as regulated.

Senator SMITH. Well, it just seems to me that—and I said this in a hearing, the last one we had on this issue—that there is just so much enormous good in this broader bill that it would be a tragedy for our Nation if net neutrality is the basis upon which it is entirely taken down. And that's a very real possibility, the way I see things shaping up. Does anybody here have an idea how we can split this baby, how we can preserve this broader good that comes from this legislation, and deal with this net neutrality issue on some middle course?

Mr. MCCURDY. Senator?

Senator SMITH. Yes.

Mr. MCCURDY. If I could, on that, I think the Chairman is trying to do exactly that. I think the Chairman has offered a way for you to move the bill, which is going to provide the greater good; and at the same time, really get a better understanding of what the practices are going to be, understand what net neutrality is. Until we saw recent op-eds, it wasn't even mentioned. It just kind of came out of nowhere.

Senator SMITH. Right.

Mr. MCCURDY. And we're talking about competing business models here. And we're talking about advanced platforms. And I think that's what we want to see move. And I don't think there's disagreement here. It appears to have almost become a partisan issue, and I have yet to really understand what the basis of it is.

So, I think the Chairman is trying to find that. I commend him, I commend the Co-Chairman, Senator Inouye, for trying to work with this committee. It has worked better than I've seen a lot of committees work in the last few years—in trying to reach out and build some consensus.

Now, I—you know——

Senator SMITH. Well, I actually agree with you. I think that's where the Chairman is. And that's where I'm inclined to go. But I think, Mr. Scott, you disagree with that. And I'd love you to elucidate.

Mr. SCOTT. Well, I think there are quite a few things that we find we actually all agree on, things like: no one wants to see blocking and degradation of service on the Internet. A couple of weeks ago, I sat on a panel like this with an executive from Verizon, and he said as much. So, I think we can put that on the table. And I think we can make sure that that never happens.

I think we all agree we want to see Internet freedom, and we want to maximize consumer choice. I think if you look at the 150 pages of this bill, and you see how often nondiscrimination principles are applied in order to protect consumers in noncompetitive markets, there is a lot of room in that principle of nondiscrimination to find a way to both protect consumers, and keep the free market for innovation and content and applications on the Internet.

Senator SMITH. But isn't your concern that——

The CHAIRMAN. Senator, this will have to be your last question.

Senator SMITH. OK—that if we go with the Chairman's bill, and then this does become a problem, that Congress simply won't be in a place to get it through?

Mr. SCOTT. Well, I think if we study the problem, and, in 5 years, we find that, in fact, the Internet has changed for the worse, and we want to go back, all of the network operators who are currently building out their networks will have installed network discrimination routers in their systems, and they'll have to divest and completely change the technologies that are in that infrastructure. And I think Congress would have a hard time undoing that kind of investment.

Senator SMITH. Thank you, Mr. Chairman.

The CHAIRMAN. That may be true, but the provision calls for an annual review by FCC on a continuing basis from day one. And when I hear you talk, Mr. Scott, I think you use the word "net neutrality," really, to mean put common-carrier provisions applying to all communications. Now, we're not going to do that. And I don't think anyone here would agree to put common carrier on all of it. So, we're dealing with communications now, not with the three levels of telecommunication, information service, and communication. It's all communications, because of the vast ability to compete now.

And with regard to the problem of charges, if you take a search engine, people who have them will charge you more if you want your name to come up first. Now, is that net neutrality? I think we'd better be careful what we're talking about.

By the way, the law that you refer to—I mean, the concept of video franchising you referred to, we almost copied the law of Texas. And the first place that was served after that new law went into effect, I'm told, was Keller, Texas, which you and I know is pretty rural. So, I don't have the fear you do of the provisions we have here. We have a watchdog in the FCC, which has got a flag out there, and they're told, annually, to report to us. But, more than that, if they see, they really see something they can define as a violation of net neutrality, to immediately tell us, and we'll tackle it on legislation. Now, I don't think it'll be 5 years. If there is something out there called net neutrality that develops, we'll know it very quickly.

I hope you'll help us get the bill. I think the bill, in itself, represents a major step toward recognizing that communications is communications, and it ought not to be treated differently if it was telecommunications, or information service or communications by any other means. They all ought to be on a level playing field, in terms of incentives to expand and develop. Everything I've read

says we're behind the world on broadband. And I think the reason is the fear that we're not going to pass this bill.

So, let's move on to the next panel. I appreciate you all coming. We all appreciate it, as a matter of fact, not just me.

While we're changing, if we may, keep it down a little bit, let me urge the witnesses to come forward: Ken Fellman, Kyle McSlarrow, Walter McCormick, Christopher Putala, Steve Largent, Phil Jones, and Robert Foosaner. Thanks very much.

Ladies and gentlemen, if we can make this transition quickly, I must report to you that there'll be a vote in the Senate, about 12:15, and we intend to stay here to listen to our witnesses. We do appreciate that you all have waited. This has been a long session, I know. And, again, we'll print all of the statements in the record as you've presented them to us.

And let me call on Kenneth Fellman, the Mayor of Arvada, Colorado.

Mr. Mayor? Pull the mike right up to you, if you will.

STATEMENT OF HON. KENNETH S. FELLMAN, MAYOR, ARVADA, COLORADO

Mayor FELLMAN. Thank you. I don't know whether to say good morning or good afternoon. I guess we're close.

Chairman Stevens, Co-Chairman Inouye, Members of the Committee, I'm Ken Fellman, Mayor of Arvada, Colorado, and I am honored to be here today on behalf of local governments nationwide.

Before I address specifics, the national and local government organizations also want to thank both the majority and the minority staffs for their professionalism, courtesy, and the time spent with us to hear our concerns and work toward resolutions. The revised draft represents a good-faith effort to address many of our concerns. There are matters that we could not resolve, and we agree to disagree, but that is the nature of the legislative process. We look forward to continuing this dialogue as we move toward mark-up.

Just as my friend, Dearborn's Mayor Guido, testified at your last hearing, I want to, again, stress that America's local governments embrace technological innovation and competition in the video marketplace. Our last testimony outlined our well-known and oft-stated principle that video franchising process should remain at the local level.

In our review of the first draft, we raised five specific criticisms. First, we testified that the bill failed to preserve local franchising authority. The proposed timeframes for local action were unrealistic and required a franchising authority to act in 15 business days. The new draft imposes a timeframe of 90 calendar days within which the franchising authority must act. We believe that our original proposal of 90 business days is more reasonable.

Second, we testified that the bill would send all rights-of-way disputes to the FCC, an agency that lacks the resources and the expertise to handle them. The new discussion draft changes that model and replaces the FCC with a court of competent jurisdiction. We appreciate that change.

Third, we testified that, while the intent was to keep local government financially whole, the prior draft resulted in significant revenue loss. The revised draft attempts to address this concern over gross revenue, although the language appears in brackets, and we strongly urge you to retain this language.

Regarding PEG financial support, we still believe this percentage of support should be higher. We note that an additional section was added to provide an alternative of a per-subscriber payment basis. This language is also bracketed, and we strongly urge that it be retained.

Fourth, we testified that the bill would permit video providers to pick and choose the neighborhoods they serve and bypass others completely. While the draft expands the anti-redlining section, this section alone falls short. Local governments should retain the discretion to impose reasonable, competitively neutral, and nondiscriminatory buildout requirements.

Fifth, we testified that it appeared that the original draft would undermine taxing authority of State and local government in areas wholly unrelated to rights-of-way compensation, and we appreciate the corrections that have been made in this draft.

Our other concerns relate to the consumer protection issues and the references to certain accounting principles. We are pleased with Title I's public safety provisions and the changes that we anticipate to Title V regarding municipal broadband.

Senator Stevens and Senator Inouye, we appreciate the progress that has been made so far, and we hope that we can see that the reservations in the brackets are removed. We will continue to work with your staffs on the remaining issues.

Thank you very much.

[The prepared statement of Mr. Fellman follows:]

PREPARED STATEMENT OF HON. KENNETH S. FELLMAN, MAYOR, ARVADA, COLORADO

Introduction

Good morning, Chairman Stevens, Senator Inouye, and members of this Committee. I am Ken Fellman, Mayor of Arvada, Colorado. I am honored to be here today to testify not only on behalf of the National League of Cities (NLC), but also on behalf of local governments across this Nation, as represented by the National Association of Counties (NACo), the United States Conference of Mayors (USCM), the National Conference of Black Mayors, the National Association of Telecommunications Officers and Advisors (NATOA), the Government Finance Officers Association (GFOA), and TeleCommUnity.[1]

Before I address specifics, the national organizations want to thank both the majority and minority staffs for their professionalism, courtesy, and time spent with us to hear our concerns and work toward resolutions. The revised draft represents a good faith effort to address many of our concerns. There are matters that we could not resolve, and agreed to disagree, but that is the nature of the legislative process. We look forward to continuing this dialogue as we move towards markup.

Just as my friend, Dearborn's Mayor Michael A. Guido, testified at your last hearing, I want to again stress that America's local governments embrace technological innovation and competition in the video marketplace. We want and welcome real

[1] NLC, USCM, NCBM and NACo collectively represent the interests of almost every municipal or county government in the United States. NATOA's members include elected officials, as well as telecommunications and cable officers who are on the front lines of communications policy development in cities nationwide. GFOA's members represent the finance officers within communities across the country who assist their elected officials with sound fiscal policy advice. TeleCommUnity is an alliance of local governments and their associations that promote the principles of federalism and comity for local government interests in telecommunications.

competition in a technologically-neutral manner. Local governments—and our residents—support the deployment of new video services in our communities.

Our last testimony outlined our well-known, and oft-stated, principle that the video franchising process should remain at the local level. To do so permits each community, based on its unique community needs and citizen input, to decide for itself—in a fair, equitable and politically accountable manner—the nature of the video service that will be provided to its citizens.

Based on this principle, we put forth our philosophical concerns with this legislation—that video franchising authority would be stripped away from local governments; that Congress should not attempt to speed entry into the marketplace for new video providers through subsidies paid for out of local government budgets to private sector entities for the use of the public rights-of-way; that no citizen should be deprived of video service because of the neighborhood they live in; and that public, governmental, and educational (PEG) access channels and institutional networks are critical links to our communities.

The Specifics

In our review of the first draft, we raised five specific criticisms that we believed needed to be addressed.

First, we testified that while ostensibly preserving local franchising authority, the net effect of the earlier version of the legislation would be to strip authority from local governments, and grant that authority to the Federal Communications Commission (FCC). The proposed timeframes for local action were wholly unrealistic and requiring a franchise authority to act in 15 days—and to approve a franchise in 30 days—would, in many instances, violate State and local law, deprive elected officials of their statutory rights and authority, and leave consumers without a voice in their community.

The new staff discussion draft imposes a timeframe of 90 calendar days within which the franchising authority must act on the video provider's application. While this new deadline will require some jurisdictions to change their processes, it is a more reasonable time for local governments to act than appeared in the first draft. Still, we would prefer that the language be revised to accommodate the public notice and hearing requirements of State and local law. These requirements are the foundation of democracy at the local level, not merely for cable franchising, but for all local laws. We see no need to give preferential treatment to one industry.

Second, we testified the bill would send all rights-of-way disputes to the FCC, an agency that lacks the resources and expertise to handle them. We said the bill would second guess not only the general police powers of the community, but the policies and engineering practices of public works departments nationwide—and put those decisions within a Federal agency with no stake in the outcome other than to speed deployment at any or all cost.

The new discussion draft changes that model and replaces it with a court of competent jurisdiction as the sole recourse for dispute resolution. This works in today's environment, and should work in the future. And we welcome the addition in Section 612 in which new video service providers will have to agree to comply with all regulations regarding the use and occupation of public rights-of-way, including the police powers of local governments. We have some concern, however, that the right-of-way language places too many obligations on local rights-of-way regulators. We believe that, much like 47 U.S.C. § 253, if a right-of-way management requirement is competitively neutral and non-discriminatory, no more is required. As drafted, the bill would preempt local right-of-way regulations that satisfy the requirements of § 253 in certain circumstances.

Third, we testified that while the stated intent of the original draft may have been to keep localities financially whole, the bill would result in a significant revenue loss to local governments. The exclusion of advertising and home shopping revenues from the definition of "gross revenues" would significantly diminish the rent paid for the use of public property. Further, the reduction in the base of gross revenues would undermine local government's ability to provide necessary services through the use of public, educational, and government access facilities, and deprive public safety and governmental use of institutional networks.

The revised draft attempts to address this concern over gross revenue, although we note that there may be some reluctance to accept language we have suggested. The language appears in brackets in the definitions section—Page 69 "(2) Gross Revenue (A)(iii), (iv)."

We strongly urge you to retain this language, which includes both home shopping and advertising revenues.

Regarding PEG financial support, we still believe the percentage of support should be higher. While many communities across the country already impose a one

percent of gross revenue formula for PEG financial support, a number of communities have entered into freely negotiated franchise agreements with video providers that provide for additional support. This draft would strip those communities of the support that their video providers agreed to give to support these vital local resources.

We also recommended that in addition to the language providing one percent of gross revenues for PEG support, that an additional section be added to provide an alternative of a "per-subscriber" payment basis. We note that this language has been included (Page 63, line 16), but it too is bracketed, and may be subject to further consideration. We strongly urge that this language be retained as well. We are also troubled by the exclusion of one-time or lump-sum PEG support payments from the "per subscriber" formula. This arbitrarily punishes communities which did not have the foresight years ago in anticipating what Congress would do now.

Fourth, we testified that while at first glance the bill appeared to prohibit redlining, it would permit video providers to pick and choose the neighborhoods they would like to serve and bypass others completely. This would not enhance the position of this country in the standing of broadband deployment, but will certainly widen the gap between those who have access to competitive, affordable services and those who do not. Rather than ensure that everyone is served and served equitably, the legislation would continue the downward spiral that the unregulated market has created thus far.

While the new staff discussion draft expands the definition of what groups are covered by the anti-redlining section, this section alone falls far short of the measures we believe will be necessary to enhance broadband deployment, and ensure competitive services are offered to all segments of our communities. Local governments should retain the discretion to impose reasonable, competitively neutral and nondiscriminatory buildout requirements.

The new language does put in place dual, non-duplicative complaint-initiated enforcement mechanisms, State commission enforcement, or State attorney general enforcement. While some guidance is given to the state, absent the discretion on the part of local governments to require buildout, we are not convinced this will be sufficient to actually address our redlining concerns.

Fifth, we testified that it appeared that the original draft would undermine the taxing authority of State and local governments in areas wholly unrelated to rights-of-way compensation.

The new draft addresses this concern on page 65, line 7, "(d) Other Taxes, Fees, and Assessments Not Affected.—Except as otherwise provided in this section, nothing in this section shall be construed to modify, impair, supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation." We appreciate your resolving this issue in this manner.

Other Interests and Concerns

Having addressed the five main points from our earlier testimony, we would like to call the Committee's attention to other matters in the discussion draft.

Consumer Issues

Section 632, as proposed to be amended by this discussion draft, would have the FCC, after consultation with a variety of groups, promulgate regulations with respect to customer service and consumer protection. Local communities would not be able to create different standards tailored to meet local needs. Existing standards would be preempted if inconsistent with the new FCC standards. The new draft would allow local governments to enforce the Federal standards, with the video service provider having the opportunity to appeal to the FCC. The ability to tailor local standards to meet local needs has served consumers well, and this local authority should not be preempted.

GAAP

We expressed concern to the Committee staff about utilizing Generally Accepted Accounting Principles (GAAP) as a standard for the Annual Review of PEG financial support. GAAP are "principles" and, as such, are guidelines. It is not a clear set of black and white rules. The accounting treatment of many issues involving the definition of gross revenue can be subject to interpretation, as well as materiality standards.

Utilizing GAAP will present the following issues:

- The categories of revenues will not be clearly and consistently defined because GAAP can issue new standards and guidelines. GAAP can change based on new accounting standards by industry, and/or new interpretations of old standards

by industry, resulting in variations in the calculation of gross revenues from year to year.

- Recognition of revenue under GAAP can hinge on contract language making gross revenues subject to the manipulation of the Franchisee.
- GAAP is utilized within the accounting industry as a guideline and is subject to interpretation. Thus, the Franchisor and Franchisee may have differing opinions of what revenues to include in franchise and PEG fee calculations.
- Issues such as advertising commissions, launch fees, distribution fees, and cooperative advertising may be accounted for as "contra-expenses" in accordance with GAAP, even when the "third party" is an affiliated entity. This allows manipulation of the recognition of gross revenues by the Franchisee, and this presentation of revenues is advantageous only to the video service providers.
- There is more than one method to record revenues in accordance with GAAP. The video service provider could choose the version that lowers fees, resulting in debate as to the proper treatment and interpretation.

Municipal Provisioning

We believe the new language recently agreed to by Committee Members is a marked improvement, and we are grateful to Senators McCain and Lautenberg for their leadership in ensuring that communities can explore broadband options.

Having noted a number of concerns, we would like to point out some acceptable parts of the revised draft.

We appreciate the staff's rescission of the "video source" definition to accommodate IPTV and interactive, on-demand services.

We want to note that the Committee staff accepted our recommendation in assuring that PEG channels be available to all subscribers in a franchise area by requiring they be in a basic tier of service.

We like Title I of the draft, particularly the section on interoperability and SAFECOM. The interoperability section of Title I appropriately allocates available funds, and utilizes the expertise of the Department of Homeland Security's SAFECOM program.

Conclusion

We value the deliberative process, such as today's hearing, to be sure that we are making informed decisions. The franchising process should be designed to promote fairness for consumers and promote a level playing field for all providers, and this draft makes significant progress towards ensuring this is the case.

Collectively, we represent the interests of almost every municipal and county government in the United States. We strongly endorse promoting competition that will permit new video providers to come into our communities on a level playing field, while preserving local franchising authority that has proved to be so valuable to our cities and counties around the country. We note that there were many areas of initial concern within the bill that have been addressed. We look forward to continuing our work in assessing the legislation and its impact, and believe that the Committee should continue its excellent work, and ensure a strong record in support of any decision to change existing law.

Thank you. I look forward to answering any questions you may have.

The CHAIRMAN. Thank you, Mayor.

Our next witness, Kyle McSlarrow, who is the Chief Executive Officer of the National Cable & Telecommunications Association.

STATEMENT OF KYLE MCSLARROW, PRESIDENT/CEO, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Mr. MCSLARROW. Mr. Chairman, thank you. And thank you, Mr. Co-Chairman. And a special thanks, also, to your staffs, who have worked so hard to get us to this point.

I was prepared just to talk a little bit about some of the changes in the latest draft, but, like a moth to the flame, I can't resist talking a little bit about net neutrality, based on the last panel.

There were two issues that were raised. One was whether or not the Internet has ever been regulated. The answer is, no, unequivocally. There is an issue as to whether or not the Bells, with DSL

technology, the on-ramp to the Internet, were regulated. And that is true. But cable modem service—and cable, remember, is the largest broadband provider in America—has never been regulated. There was one court case, I think out in the Ninth Circuit, that suggested otherwise, but we have always operated in an unregulated environment. And that is important, because the proponents of net neutrality would like to paint a picture that something changed recently that we need to now correct. But, in fact, at least for cable and our broadband service, it hasn't been regulated. We invested the $100 billion because of the 1996 Communications Act, which largely deregulated our industry. We put fiber into the ground. We put out cable modem service. That spurred competition from the Bells. And we now have robust competition, which is exactly the policy result that you want.

The second issue is this issue of discrimination. Mr. Chairman, I think you hit it head-on. You can't—if you cross the line into regulation in this space, and you say you're doing so on the basis of discrimination, there is no principled reason why you have to stop with network providers. You can go to Microsoft's operating system or any web-based software. You can go to Google's search engine. You can go to Amazon, or eBay or any of the other, quote/unquote, "discriminatory" practices that they engage in. Now, I'm not suggesting you do so, but I am suggesting that people should think twice before going down this road.

On the new draft, I have to say, it's a little bit of a mixed bag for us. At the outset, I think, for us, we're where we were at the last hearing on the bill, which is, we think this is a fair product, it's a very balanced approach. We'll continue to work with you. I'll just point out two things. One, the voice competition piece of the bill, we believe, has been significantly improved, and we appreciate you listening to the concerns that we expressed at the least hearing and in our testimony. We think it's vital that, if we're going to look at the competitive space, in terms of who the households have as providers, both for video and for voice, that we get that entire competitive space right. So, we think this draft goes a long way toward making the video and voice competition part of the market; a good one.

The second place where I think we've gone a step backward is in the program access language. Congress, I guess, in 1992, established a policy that, because of the then-fledgling satellite industry, they wanted to ensure that the satellite industry had access to programming that was then largely owned by the cable operators. And so, that was the policy that is in current law today. And I have to say, it worked magnificently well. The second and third largest multichannel video providers in America are DIRECTV and EchoStar, two satellite companies. Number 1 is Comcast. So, it worked. And in that timeframe, the percentage of cable programming owned by cable operators dropped from above 50 percent to about 20 percent in the same timeframe. So, you had more competition, and you have less of an ownership interest, in terms of the cable industry.

So, while I think the government has already intruded in this space, and I can offer my own views about whether or not that made sense, the truth is, in terms of what the policy goal was, it

has largely been accomplished. What this does is, it starts discriminating between satellite and cable operators, in terms of whether or not you can offer exclusive programming. So, on the one hand, DIRECTV, which has the NFL Sunday Ticket, which no one else can get access to, is free to have that kind of exclusive arrangement, but cable operators, who are offering other types of sports programming, are prohibited from doing that.

And, again, Mr. Chairman, as I said at the last hearing, I think the program access requirements are a search of a problem that doesn't exist, and I would urge you to delete the entire provision.

And, with that, I'll stop. I'll be happy to answer questions. Thank you.

[The prepared statement of Mr. McSlarrow follows:]

PREPARED STATEMENT OF KYLE MCSLARROW, PRESIDENT/CEO, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Chairman Stevens, Co-Chairman Inouye, and members of the Committee, thank you for the opportunity to appear today to comment on the June 9 staff draft revisions to S. 2686.

In my testimony last month, I explained that NCTA found much to commend in the introduced bill, including the elimination of outmoded economic regulation of cable services, and movement in the direction of a level playing field in video as well as voice competition. In addition, we strongly supported the very thoughtful approaches to difficult issues like net neutrality and the digital transition in the introduced bill, and are pleased to see those approaches preserved in the June 9 staff draft. My May 18 statement also included a detailed discussion of the provisions in the bill and where those provisions have not changed, I respectfully incorporate them there.

Today, therefore, I would like to focus my testimony on the staff draft's proposed changes to the introduced bill.

In a number of these areas, the staff draft suggests changes that we believe improve the bill.

Voice Competition

We believe the staff draft significantly improves the provisions on voice competition. We agree with the staff draft's proposal to limit the rights, duties, and obligations of carriers under sections 251 and 252 of the Communications Act to *facilities-based* VoIP providers, which have made a commitment to deploying their own networks and infrastructure. A non-facilities-based provider should not have the right to order facilities-based entities, on whose networks it rides, to interconnect at a particular place or manner.

We are also pleased that the staff draft addresses rural telephone carriers' recent refusals to exchange VoIP traffic with telecommunications carriers, even though they have existing interconnection agreements with those carriers. Rural carriers' resistance on this point is depriving rural consumers of competitive voice services.

Universal Service

As I have testified before, the cable industry supports the principles underlying the Universal Service regime. We agree that Universal Service reform is needed, but urged you to reform the disbursements side of the Universal Service Fund (USF) as well as contributions to the USF. Thus, we are pleased that the staff draft offers a number of helpful improvements on the disbursement side. For instance, it adds competitive-neutrality as a Universal Service principle and appropriately proposes to substitute more technology- and provider-neutral eligibility requirements in lieu of the ILEC-centric obligations in the introduced bill. In particular, the draft would require a competitor to offer service throughout its service area rather than the ILEC's. It would also not condition a competitor's Universal Service eligibility on a commitment to offer local usage plans comparable to those offered by ILECs, or to provide equal access to long distance carriers. Competitors should not have to mimic ILEC service offerings, or network architecture, or geographic coverage to qualify for Universal Service support.

Second, the staff draft would eliminate the requirement that all Universal Service Fund recipients deploy broadband. While broadband deployment is a goal strongly shared by the cable industry, incorporating it into Universal Service eligibility

would have appeared to validate—even if indirectly—using funds for broadband deployment. Cable companies are understandably very reluctant to contribute revenues from their own broadband services to subsidize their competitors, either directly or even by supplying them with fungible resources.

Finally, we are pleased to see that the draft extends the fiscal oversight proposed in S. 2686 for the "E-Rate" programs to the rural and high-cost programs as well.

Level Playing Field for Cable Operators and Video Service Providers

The bill's opt-in opportunities for existing operators are essentially unchanged from the introduced bill. As I explained last month, these opportunities remain too limited. While the introduced bill is a fair start, we again urge you to ensure the availability of opt-in for every existing cable provider beginning on the date of enactment.

Role of Local Governments; Prohibition on Discrimination

The staff draft would give the State public utility commissions the responsibility for enforcing the prohibition on the denial of video service to potential subscribers on the basis of race or religion, in addition to income. While an improvement from the introduced bill, under which only the FCC had enforcement authority, we continue to believe that local governments are best suited to investigate and determine instances of discriminatory conduct.

Other Issues Related to Franchising and Regulation

The staff draft does not address many of the franchise- and regulatory-related issues I described in my May 18 testimony on S. 2686, and in some cases even adds provisions that create additional concerns. We look forward to continuing to work with you and your staff on these issues.

First, the draft still lacks a definition of franchise area. Such a definition is essential to ensure meaningful compliance with the antidiscrimination requirement. Second, the draft revises the new definitions of "video service" and "video service provider," but it may preserve a loophole for AT&T's IPTV service by defining video service as the "one-way transmission" of video, carrying forward the language from the current definition of cable service that AT&T and the Connecticut DPUC relied on to exclude IPTV from that definition. These definitions must be carefully constructed to bring all providers of functionally equivalent video services within the same franchising and regulatory scheme, regardless of the delivery technology they use.

Third, the draft would put upward pressure on cable rates by increasing government fees on video services. The draft would authorize PEG and institutional network (INET) support payments in excess of the 1 percent of gross revenue proposed in the introduced bill, if the incumbent cable operator was contributing more than that in a franchise area, while eliminating the proposed offset for INET operating costs incurred by an incumbent cable operator that opts in or otherwise becomes subject to the new scheme. It would also broaden the definition of gross revenues—the base for calculating franchise fees—to include home shopping and advertising revenues. Finally, the staff draft lacks any requirement for cost-based permitting and rights-of-way management fees.

Program Access

We are disappointed that the expansion of program access law remains in the staff draft, and that it has, on one hand, been further broadened. In this regard, the staff draft would bar "permanent foreclosure strategies" and "terms or conditions that have the effect, in their application, of discriminating against an MVPD based on its technology, delivery method, or capacity constraints." Both of these vague and undefined concepts will lead, inevitably, to disputes and litigation over business practices that are lawful today; even under the program access law. On the other hand, the staff draft narrows the program access provisions of the bill to permit exclusive arrangements between DBS and non-vertically integrated national sports programming services. As we have previously said, we would urge you to drop this entire provision. As currently drafted, the provisions solve no existing problem in the marketplace, and are likely to add confusion and unfairness.

Conclusion

Thank you, again, for this opportunity to testify. We appreciate your openness to our perspective and our suggestions, and look forward to continuing to work together to craft a framework that promotes innovation and consumer choice.

The CHAIRMAN. Thank you very much.
Our next witness is Walter McCormick.

STATEMENT OF WALTER B. MCCORMICK, JR., PRESIDENT/CEO, UNITED STATES TELECOM ASSOCIATION (USTELECOM)

Mr. MCCORMICK. Mr. Chairman, thank you very much. Co-Chairman Inouye, members of the Committee, thank you for the opportunity to testify today.

On behalf of our 1,200 member companies, we want to commend you for recognizing the importance of updating our telecom laws, to provide consumers with a new choice in video, and to stabilize and secure Universal Service for the future. And it would be our hope that this debate on net neutrality not slow down action on either of these important objectives, providing increased video choice and securing Universal Service for the future.

Mr. Chairman, we've been honored to participate in this process. We commend you for the outreach and inclusiveness that has characterized your deliberations.

As you have noted, Mr. Chairman, the world has changed since the passage of the 1996 Act. Today, you can make a telephone call on a landline phone, on a wireless phone, on a cable phone, on an Internet phone. You can obtain high-speed Internet access from your telephone company, your cable company, your wireless company, your satellite company. In coffee shops, in airports, on college campuses, and in many municipalities, you can access the Internet via WiFi hotspots. Electric utilities are beginning to invest in delivering broadband over powerline. Others are entering the market using unlicensed spectrum. And the government is about to put new spectrum out for bid.

As a result of this world of choice, consumers are benefiting. The prices for broadband access are falling, and broadband penetration is increasing, particularly among middle-income Americans and minorities. Earlier in this hearing, there were comments made that this investment, this explosive growth in the Internet, was occurring under regulation. The facts tell a different story. It has been since there has been unbundling relief, it has been since there has been deregulation, that broadband Internet investment and access has skyrocketed. So, today in this country, just over the course of the last 2 years, we have seen the number of broadband providers nearly triple, and, in the last 5 years, we have seen them grow by almost tenfold. In major metropolitan areas—in States like California, we see up to 23 providers in cities like San Francisco, and Los Angeles, and San Diego; 75 percent of Americans have access to up to four high-speed Internet providers. So, what we're seeing, Mr. Chairman, is, we're seeing explosive growth, and we're seeing a marketplace that's working.

This bill is aimed as expanding choice for video, to give consumers an expanded ability to get the services they want from the companies they choose. And, in doing so, it preserves an appropriate role for government. First, it protects the revenues, the franchise authorities currently received from franchise fees. It protects PEG channels and iNETs. Second, it protects and secures Universal Service for the future by expanding the contribution base, by treating all competitors fairly, and by exempting USF from the Antideficiency Act. And by assuring both intrastate and interstate services are assessed, this bill advances important reforms.

With regard to access to sports programming, Mr. Chairman, we do support the provision that's in your bill. We think it is an important competitive provision.

And finally, Mr. Chairman, this bill does take a measured and reasoned approach to net neutrality. It is a compromise position. It is a reasoned position to instruct the FCC to report annually about impacts on the free flow of information. There is, as everyone has noted, no problem today. The Chairman of the FCC says that he has the sufficient authority to address any problem that might arise. The approach of this bill, to monitor and then to act, should be the approach of the Committee.

Finally, Mr. Chairman, we're pleased that you're moving. The House of Representatives acted, just this week, on its own measure to give consumers new TV choice. We look forward to working with you, and the members of the Committee, to see S. 2686 proceed expeditiously through the Senate.

[The prepared statement of Mr. McCormick follows:]

PREPARED STATEMENT OF WALTER B. MCCORMICK, JR., PRESIDENT/CEO, UNITED STATES TELECOM ASSOCIATION (USTELECOM)

Introduction

Mr. Chairman, Co-Chairman Inouye, Members of the Committee: Thank you for this opportunity to appear before you today. I am Walter McCormick, President and CEO of the USTelecom Association. On behalf of our more than 1,200 member companies, I thank you for the work that this Committee has put into updating the Nation's communications laws to expand consumer choice, encourage robust broadband investment, and stabilize the future of Universal Service.

Last week the U.S. House of Representatives delivered an historic vote . . . an overwhelmingly bipartisan vote to deliver the many benefits of video choice to American consumers . . . to continue down a path of vigorous investment in the Nation's broadband future . . . and to ensure a broader funding base for Universal Service. These principles are embraced and advanced as well by . . . S. 2686, the "Communications, Consumers' Choice and Broadband Deployment Act of 2006." So I thank you for your leadership, and for this opportunity to appear before you today to talk about the broadband future . . . video choice . . . Universal Service . . . and this important effort to advance these national priorities.

It has been 10 years since this body last revisited the issue of U.S. communications policy. How much has changed. Broadband investment and adoption are surging ahead at an unprecedented rate today. According to the Pew Internet and American Life Project, the number of Americans with broadband at home has risen 40 percent over the past year. This rapid adoption is being driven by intensely competitive prices, with some introductory rates now below $15 a month. Consumer choices—across a variety of platforms and services—continue to expand seemingly every day. This legislation—and the growing momentum for delivering reform this year in both the House and the Senate—represents an historic opportunity to continue that progress for consumers, and for our Nation's information economy.

USTelecom's membership ranges from the smallest rural telecom companies in the United States to some of the largest investors in America's broadband infrastructure today. We are united in our commitment to a modern communications policy, in which all companies are encouraged to invest and compete head-to-head in the marketplace . . . with consumers determining the market winners based on who provides the most innovative, attractive packages of voice, video and Internet services to meet their needs.

We believe this market-based model—rather than a government-managed regulatory model—is best capable of encouraging significant investment in next-generation broadband infrastructure . . . in encouraging the arrival of new innovations . . . and the availability and numerous benefits of diverse market choices for consumers.

Video Choice

The companies I represent are particularly eager to bring new consumer choices to the video marketplace. No one in this room—or across America, I'd gather—needs

a lecture in the many benefits that would be derived from enhanced consumer choice in the video marketplace. A recent study by the Phoenix Center indicates that consumers would save as much as $8 billion on their cable bill in the first year alone with TV freedom. In Keller, TX, the local cable company reduced the rates on its most popular bundled service package by nearly 50 percent in response to Verizon's announcement of a voice, video and Internet triple play.

Our companies would like to bring this innovation and competition to communities across the country. Standing in the way, as you know, are outdated regulations that were designed, in a bygone era, to protect consumers from cable monopolies. Unfortunately, today they frequently have the exact opposite effect—protecting cable companies from the market disciplines—on price, on quality of service, on innovation—of vigorous competition.

Removing barriers to our competitive entry into the video marketplace would deliver this much-needed consumer choice. Your legislation takes the right approach . . . maintaining local revenue streams and control over public rights-of-way . . . safeguarding local, education, and government programming . . . and advancing video choice and competition.

Another critical byproduct of this updated policy would be a bright, green light to the marketplace to continue investing in the Nation's broadband infrastructure . . . creating jobs, increasing broadband penetration and fueling a continued revival of our high-tech economy.

Universal Service

Mr. Chairman, I also want to thank you for your long-standing leadership on Universal Service. There is nothing I can tell you about the value of this national commitment, nor the challenges it faces today that you do not already fully understand. Representing a state with one-fifth of the land mass of the continental U.S., and only one-fifth of 1 percent of the Nation's population, you require no lecture on the cost of providing essential services to a dispersed population . . . nor the importance of ensuring the Nation remains connected through affordable, reliable communications. Our member companies, too, know the importance of Universal Service to rural and low-income communities across the country, so we welcome the reforms proposed in this legislation.

This legislation would stabilize Universal Service amid a rapidly evolving technology environment . . . ensuring new technologies contribute alongside established technologies . . . so Universal Service is a shared responsibility and one that receives adequate funding. Universal service reform, too, is a time-sensitive priority that should spur action in this Congress.

Net Neutrality

Mr. Chairman, I also want to thank you for the reasoned, measured approach taken in this legislation to the "net neutrality" debate. This is a very complex technology debate that, I believe, has been unfortunately and inaccurately oversimplified in recent weeks. As I have stated before this Committee many times, the companies I represent have been managing networks in this country for over 100 years. Consumers today have—and will continue to have—the freedom to call or e-mail whomever they choose . . . and to visit any legal website . . . without being blocked, without their service being impaired or degraded. It's the right thing to do in a country that values and cherishes the First Amendment. It's smart business . . .offering the greatest customer satisfaction, and driving demand for broadband.

And, the FCC has demonstrated both the will and the capacity to safeguard Internet freedom. We are well aware that Congress and the FCC are watching our companies closely.

The measured approach of the watchful eye that your legislation proposes is reasonable and pragmatic. The notion that Congress should rush to regulate the Internet—in anticipation of a problem that may never manifest—is dangerous. This extreme position would not preserve the free and open Internet we enjoy today, it would most certainly stifle its future development and growth. And, to hold the consumer benefits of video choice hostage to this extraneous debate over Internet regulation, makes no sense.

Mr. Chairman, we applaud your giving the marketplace the opportunity to continue demonstrating its capacity to be a responsible, innovative driver of the Internet's evolution; before resorting to regulation and government-managed competition. This bill delivers to consumers long overdue video choice and stability for Universal Service. It ensures, vigilance and accountability on the issue of Internet freedom. But it wisely continues the hands-off policy that has driven unprecedented Internet investment, innovation, and economic growth.

Mr. Chairman, it is time to update the Nation's communications laws . . . to stabilize Universal Service . . . and to share with American consumers the many benefits of video choice . . . not next year or the year after that, but right now—this year—in this Congress.

If we streamline the video franchising process, the net result will be accelerated broadband deployment, more competition for voice, video, and Internet services, and lower prices for consumers. I look forward to continuing to work closely with you, Mr. Chairman, with this committee, and with leaders on both sides of the aisle who are eager to bring the many benefits of video choice and Universal Service to consumers and to the Nation's economy. Thank you again for the invitation to be here today . . . and for your leadership in driving these vital issues to resolution this year. I would be happy to answer any questions you may have.

The CHAIRMAN. Thank you very much.

Our next witness is Chris Putala. Am I saying that right?

Mr. PUTALA. You are, sir.

The CHAIRMAN. Putala—thank you—Vice President for Public Policy of EarthLink, in Washington, D.C.

STATEMENT OF CHRISTOPHER PUTALA, EXECUTIVE VICE PRESIDENT, PUBLIC POLICY, EARTHLINK, INC.

Mr. PUTALA. Thank you, Mr. Chairman, Co-Chairman Inouye, and members of the Committee. As the Chairman stated, my name is Chris Putala. I'm Executive Vice President for Public Policy at EarthLink.

EarthLink is the Nation's largest independent Internet service provider. We are a publicly-traded company headquartered in Atlanta. We are proud to provide Internet access, and services to more than 5.4 million consumers throughout the country.

Thank you for the opportunity to testify today. I ask that my full statement be made a part of the record, and I will summarize.

Today, we will hear one common argument from this panel. In short, where the other team has market power, this Committee should enforce against discrimination. Bell companies argue that cable has too much power, and not enough competition in television services; and so, they seek nondiscriminatory program access rules. Cable argues that Bells have too much power, and not enough competition over telephone networks; and so, they ask this Committee to require nondiscriminatory interconnection rules for VoIP. And, by the way, EarthLink agrees. The independent wireless company, Sprint Nextel, argues that the Bells have too much power and not enough competition in the high-capacity pipes that connect cell towers to the network; and so, they ask this Committee to reduce special access charges to prevent discrimination from the Bell companies. Again, EarthLink agrees.

I respectfully suggest that this same nondiscrimination principle guide the Committee as it continues to consider the important issue of network neutrality. The fundamental points are the same that the Bells make about television, that cable makes about telephone. In the face of market power, there is a need for protections against discrimination—in this case, nondiscriminatory equal access to the Internet. The rules that have governed the Internet from the start required equal and open access over the last mile, precisely because consumers lacked robust choices. And, under these rules, under the same rules, different speeds and different bandwidth offerings have always been permitted, and they should continue to be so, in our view. The legislation offered by Senators

Snowe, Dorgan, and others offer both key ingredients, nondiscriminatory equal access, and the ability to offer consumers a variety of different speed options.

The Snowe-Dorgan legislation protects consumer freedoms in another important respect, by ending the anticompetitive practice of requiring customers to buy regular voice phone service when they buy broadband service. Why should a customer, who wants to use VoIP, or their wireless phone instead of traditional phone service, be required to spend 25 to 50 bucks every month for this phone service she doesn't want, in order to get broadband? We urge all members of the Committee to support this standalone broadband provision.

EarthLink also urges all members to support the modified municipal broadband language included in the new staff draft. We are pleased that this legislation takes an important step to encourage a new broadband facility by eliminating current and future prohibitions on local broadband initiatives. EarthLink is proud to be leading the effort to un-wire America's cities with WiFi technology, delivering the Internet wirelessly and affordably. EarthLink has already partnered with Philadelphia, Anaheim, San Francisco, and New Orleans to build, own, and manage, at our cost, a wireless network to provide these new broadband services. EarthLink's WiFi networks will also practice what we preach, we will offer fair, reasonable, and nondiscriminatory wholesale rates to others who seek to bring customers to these new networks.

The interconnection policies in the staff draft are not as well crafted as those originally in S. 2686, in our view. The interconnection rights included in the original legislation better follow the successful lesson offered by the early days of wireless to ensure that all providers will be able to exchange VoIP traffic. Ten years ago, wireless faced the same situation Internet voice traffic does today. Wireless networks had relatively few customers; and so, little negotiating power with the Bells when it comes to the terms and conditions of connecting to the Bells' customers. Fortunately, this Committee took significant steps in 1993 and 1996 to require nondiscriminatory interconnection rights in the face of such disproportionate market power. The original draft of S. 2686 better incorporated this core lesson from wireless, and nondiscriminatory interconnection rights should be granted to all VoIP providers, not just facilities-based providers.

To close with one last comment, EarthLink recognizes the importance of Universal Service, and stands ready, as a VoIP provider, to continue to contribute to the Federal Universal Service mechanisms. We respectfully ask, however, that whatever mechanisms you authorize the FCC to adopt be competitively neutral, and not require us to engage in complex legal exercises to determine whether a particular dollar of customer revenue is subject to, or outside of, Universal Service assessment.

Thank you very much for the opportunity to testify. I look forward to your questions.

[The prepared statement of Mr. Putala follows:]

PREPARED STATEMENT OF CHRISTOPHER PUTALA, EXECUTIVE VICE PRESIDENT, PUBLIC POLICY, EARTHLINK, INC.

Mr. Chairman, Senator Inouye, members of the Committee, thank you for inviting me to speak to you as you consider S. 2686, and how best to update our communications laws in light of change in technologies and marketplace conditions, to preserve the competition, innovation, and freedom that characterize the Internet, and to ensure that all Americans—including low-income Americans and those in the most rural parts of our country—receive the benefits of the broadband revolution.

For ten years, EarthLink has been on the cutting edge of delivering the Internet to American consumers and business, first through dial-up, then broadband, and now VoIP, wireless voice and municipal wireless Internet services. Over the past ten years, we've seen the Internet grow from the specialized province of a few tech-savvy early adopters to an integral part of American work and family life. And we've seen—and helped—millions of Americans move toward broadband services and capabilities that were not possible with dial-up services.

Our approach has been to deliver our customers the services they want: Our motto is "we revolve around you." And we've been successful. Over the past three years, EarthLink has won numerous awards for customer satisfaction in both broadband and dial-up services. We now deliver to our customers a full-range of broadband services and applications, including Internet access, Voice-over-IP, and wireless services. We offer our customers a wide range of enhanced offerings, including pop-up, spam and spyware blockers, anti-virus protection, and parental controls. We are excited to work with the Cities of New Orleans, Philadelphia, San Francisco and Anaheim—and we hope many more—to deploy a new WiFi network providing the residents of those cities an alternative to the cable—telephone company high-speed wireline access duopoly.

At the outset, I'd like to commend the Committee, and particularly its staff, for all the hard work you have put in so far. S. 2686 takes some key steps towards an appropriate regulatory framework for broadband communications. In particular, we commend the provisions making clear that local governments may seek creative solutions to bring broadband—or more broadband—to their communities, and the bill's recognition that VoIP providers—like wireless carriers and CLECs—need to be able to interconnect and exchange traffic with traditional telephone networks. But there are also areas where the draft could be improved, particularly with respect to what has come to be known as net neutrality. We are also concerned that the current draft cuts back on the interconnection, numbering, and number portability rights for VoIP providers, and that the bill does not yet contain a stand-alone broadband requirement, as proposed by Senators Snowe, Dorgan and Inouye. These are all elements that are critical to delivering the "consumers' choice" promise of the bill's title.

As you consider further how to shape the legislation that has moved forward, I would like to leave you with five key thoughts:

1. A local facilities-based access duopoly does not provide sufficient choice to drive innovation, and preserve consumer freedom to use the services and applications of their choosing. The bill's municipal broadband provisions, therefore, appropriately ensure that consumers have as much choice as is possible, without fear of taxpayer funding or financing.

2. Remember that the Internet (like the market) has become a dominant economic force, because it lets a thousand economic flowers bloom, and does not let the network operators (or any other centralized authority) determine which flowers take root. Net neutrality protections are therefore critical to maintaining consumer choice and innovation.

3. Protect consumer freedom by requiring that broadband be available on a standalone basis.

4. Promote competition by ensuring that all VoIP providers can obtain numbers, utilize number portability, and interconnect and exchange traffic with the legacy telephone network. In that context, while providers should be entitled to and pay fair interprovider compensation, recognize that the current intercarrier compensation system on the legacy telephone network is hopelessly fractured, and thus both empower and require the FCC to reform that system quickly.

5. In ensuring that all communications service providers contribute to Universal Service, ensure that any mechanism is competitively neutral.

I. Municipal Broadband Is Critical To Broadband Deployment and Consumer Choice

A. Facilities-Based Duopoly Is not Sufficient to Protect Consumers and Drive Innovation

This Committee has long recognized that while duopoly is better than monopoly, a duopoly by itself does not necessarily serve consumers well, nor lead to maximum innovation. The history of wireless services, for example, cautions strongly against relying on a facilities-based duopoly to deliver strong competitive choices and marketplace innovation to consumers. From 1984 until the first broadband PCS services began to be offered in 1995, wireless services were a legally-sanctioned duopoly. Not surprisingly, prices rose until 1993, when Congress voted to authorize new wireless entry through spectrum auctions—of which Chairman Stevens was an early and leading champion.[1] Duopoly created wireless services that were priced for only a few, relegating wireless to a niche market.

On the other hand, since the third and fourth (and more) wireless competitors entered the market in 1995–96, competition in the wireless market has exploded. As stated above, wireless subscribers have soared from only 20 million in 1994 to nearly 200 million as of June 2005. In 1993, wireless service averaged 58 cents per minute,[2] but by the end of 2004 was averaging 9 cents per minute—a nearly 85 percent drop.[3]

The same market performance can be expected in broadband as well. If there are only two facilities-based broadband providers, competition will stagnate, and consumers will not reap the full benefits of the broadband revolution. Broadband today is characterized by a cable-telco duopoly, with cable modem service and ILEC-provided DSL together accounting for 95 percent of all residential and small business broadband connections nationwide.[4]

However, if a stable duopoly is not permitted to develop, the market will keep competitive pressure on all providers and force the two dominant facilities-based providers, cable and ILEC DSL telephone companies, along with all other market participants, to continue to innovate to the benefit of consumers. Unfortunately, the FCC's decisions have moved to shore up, rather than challenge, the existing access duopoly. In its *Wireline Broadband Order,* for example, the FCC allowed incumbent telcos to stop providing last-mile broadband transmission as wholesalers. As a result, in mid-May, for example, AT&T notified its wholesale broadband customers that it had stopped accepting new orders for wholesale DSL two weeks earlier, as of May 1, 2006. The minority draft legislation notably—and properly—would reverse that change, and treat these services with market power as telecommunications services. As another example of a regulatory action that buttresses duopoly, the FCC's curtailed CLEC access to unbundled loops in Omaha, Nebraska—including loops used for competitive DSL service—because of *cable voice* competition, effectively raising the price for a CLEC to use UNE copper loops combined with its own electronics to deliver alternative broadband services in competition with the cable company and incumbent telco.

Moreover, the nationwide stability of that duopoly also keeps growing as the telcos and cable companies each, respectively, merge, with the proposed AT&T/BellSouth; potentially reaching half the homes in the country. This will no doubt put pressure on both Verizon and the cable companies to strive for similar scale. Time Warner and Comcast are already dividing up Adelphia between them.

Shoring up the existing duopoly has real consequences. For one thing, it makes net neutrality a more significant issue. As analyst Blair Levin wrote earlier this year, the net neutrality debate is fundamentally about the market power of the current broadband telco/cable duopoly. It is much easier to have an Internet "gatekeeper" when there are only two gates. I'll return to net neutrality later.

In addition, we should remember the lessons of both 9/11 and New Orleans. Having more communications networks—rather than just a duopoly—means we have more ways to keep communications up and running in a crisis. In particular, on both 9/11, and in New Orleans, and the Gulf Coast after Hurricanes Katrina and

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[1] See *http://wireless.fcc.gov/statements/Sugrue__slides3.ppt.*

[2] *Id.*

[3] *Implementation of Section 6002(b) of the Omnibus Budget Reconcilliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services,* Tenth Report, 20 FCC Rcd 15908, 15966 (¶ 158) (2005).

[4] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, High-Speed Services for Internet Access: Status as of June 30, 2005, at Table 6 (April 2006), available at *http://www.fcc.gov/Daily__Releases/Daily__Business/2006/db0407/DOC-264744A1.pdf.*

Rita, the Internet proved to be an important means for keeping communications flowing, both among first responders and among victims and their families.

B. Municipal Broadband—Antidote to Duopoly

As S. 2686 recognizes, the best way to address problems with duopoly is to expand the number of unaffiliated alternatives—just as Congress did with wireless in requiring that new spectrum be distributed for broadband PCS. At EarthLink, we are actively exploring alternatives to telco and cable. We are not limiting our efforts to municipal broadband. For example, we are an investor in a broadband-over-powerline project with Current Communications.

EarthLink's municipal deployments illustrate the promise of municipal broadband. We are very proud to assist the City of New Orleans rebuild its infrastructure as it recovers from the devastation of Hurricane Katrina. Underscoring the public safety advantages of having a third broadband network, our wireless network will give New Orleans' city officials and first responders another way to keep communications networks operating in the event of another, unthinkable tragedy.

Our path-breaking New Orleans and Philadelphia deployments shows how much can be accomplished with no risk to taxpayers:

- EarthLink will build, own, and manage the wireless network, at no cost to the cities, while providing the cities a revenue share to fund its operation. And, EarthLink has guaranteed network upgrades on an ongoing basis. This is not a case of "taxpayer funded" competition, and will not lead to taxpayer funded bailouts. Nor is it funded by tax-free bonds. EarthLink is bearing the risk of constructing this network.
- This network will serve all the citizens of New Orleans and Philadelphia by providing a competitive alternative to current broadband and dial-up Internet services—at retail rates at, or below, the common price of premium dial-up Internet access.
- The initial service offering will be a symmetric One Megabit per second (1 Mbps) service, which is about fifty times as fast as a dial-up connection. It's nearly as fast as a typical DSL line for downloads, and is actually faster than most of today's broadband services when uploading data. Once we have the initial service deployed, we expect to offer higher-tiered services up to several times that fast, and we will upgrade the network over time so that ever higher speeds are enabled as new technology becomes available.
- EarthLink supports Open Access to third-party Internet service retailers and "net neutrality." So, the project will provide opportunities for many local companies to resell broadband access service that they purchase at competitive wholesale rates. As the third broadband entrant in this market, we embrace competition as a way to make the use of our network more attractive. And the same is true for "net neutrality." We view this as the best way to serve the consumer and embrace innovation and competition.
- In Philadelphia, EarthLink's partnership with Wireless Philadelphia will help bridge the Digital Divide, subsidizing affordable high speed Internet access to low-income households in overlooked neighborhoods.

These deployments will catapult New Orleans and Philadelphia into a worldwide leadership position in technology, and will enable officials to meet the needs of their residents as well as enhance the visitor, tourism, and business climate of those great cities. But, EarthLink is already taking this story on the road! In Anaheim, San Francisco, and Milpitas, California, EarthLink has been selected as the municipalities' private-sector partner. And EarthLink has (or soon will) propose that we unwire other municipalities—at our cost—across America, including:

Honolulu, Hawaii;
Houston, Texas;
Boston, Massachusetts;
Long Beach and Orange County, California;
Milwaukee, Wisconsin;
Arlington, Virginia; and
Minneapolis, Minnesota.

We also believe, however, that the EarthLink approach of partnering private sector expertise and capital with municipalities can also be harnessed to expand broadband options in small cities and rural areas across America. EarthLink is developing a "Network Alliance" program with just this goal in mind.

Local entrepreneurs know best the local consumer and business needs for broadband access and services. EarthLink's Network Alliance program will aid these local businesses in partnerships providing:

- EarthLink's technical expertise in network design, deployment, and specifications;
- EarthLink's volume pricing for equipment and services—so even the smallest companies will get the best prices; and
- EarthLink's ordering, billing and other back-office services—so these local businesses can put full focus on building out networks and signing on customers.

Our New Orleans and Philadelphia projects are great examples of what local governments and the private sector can accomplish together, as the bill envisions. And so thier record is clear, Philadelphia and other cities across the country solicit competitive bids for their projects. EarthLink has participated in other competitive bids around the country—with a recent successful example being San Francisco.

S. 2686 takes the most necessary step with respect to municipal broadband, and that is to preempt State and local laws that prohibit, or have the effect of prohibiting locality-driven broadband. It also appropriately requires municipalities that provide broadband act nondiscriminatorily when applying its ordinances and rules, particularly those involving rights-of-way, permitting, performance bonding, and reporting.

We also believe that many of the changes made in the June 9 staff draft improve this section of the bill, and we commend the staff for making these changes. First, the June 9 draft eliminates a provision that would have required a public provider to grant a requesting non-governmental entity the right to place similar facilities in the same conduit, trenches, and locations, subject to a public safety exception. While well-intentioned, this requirement would have been difficult to implement. For example, antenna locations can have limited capacity, depending on load and other engineering factors, as well as the need to space facilities to prevent them from interfering with one another. As originally drafted, the bill would have made it difficult to execute construction schedules.

Second, the June 9 draft more appropriately makes clear that the municipal broadband provisions of this law do not preempt generally applicable telecommunications laws, rather than making the application of all generally applicable laws a condition precedent to providing service. One suggestion we offer here is that the June 9 draft states that this bill does not displace telecommunications laws that are generally applicable to public providers. Given the nondiscrimination goals, as well as the goal of enabling public providers to offer broadband service, what should be preserved is the application of telecommunications laws that apply to all providers, not just public providers.[5]

Third, the June 9 staff draft appropriately encourages public-private partnerships, without creating difficult line-drawing issues that the original bill created with respect to what constitutes a public-private partnership. The original bill could have been interpreted to include the mere lease of tower sites or other rights-of-way does not create a public-private partnership, and then imposed various competitive bidding requirements. The provisions of the staff draft are better, particularly given the fact that States and local governments have their own competitive bidding requirements.

Fourth, the staff draft appropriately deletes the mandated "right-of-first-refusal" for local projects that are not competitively bid public-private partnerships, along with what could have been unduly costly and burdensome neutral evaluation requirements. This will particularly help small localities that might lack the resources to carry out all the previous requirements.

Finally, we note that the general public safety exemption (new subsection 706(g) of the Telecommunications Act of 1996) in the original bill, while again well-intentioned, raised questions as to what rules apply to network deployments that are dual use, i.e., with a portion for public safety and a portion for the general public. Experience has shown that, particularly in smaller towns and rural areas, it is important to aggregate communications demand, and to make common use of facilities where possible. Having two sets of requirements, one for public safety and one for other uses, limits the ability to obtain the economies of scale and scope that will make these deployments affordable in smaller and rural communities, and which otherwise promote important public interest objectives such as public safety. The June 9 staff draft appropriately eliminated that provision.

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[5] Accordingly, in proposed Section 706(d)(2), on page 116, line 9, of the June 9, 2006 Staff Draft, the words "such public" should be deleted.

II. Net Neutrality—Keeping the Internet Working Through Freedom and Innovation

It is undisputable that the reason the Internet has been a transformative engine for economic growth and innovation is that the Internet is an open communications platform. As Vint Cerf, the father of the Internet, previously told this Committee, the open Internet allowed companies like EarthLink, Google, Yahoo!, eBay, and Amazon to grow from an entrepreneur's dream to successful Internet businesses. Small companies and entrepreneurs can use the Internet to prove the worth of their ideas without having to convince a bureaucrat at a cable or telephone company of their economic merit—or having to pay a "success" fee to those network duopolists. The Internet drives growth because—like the market as a whole—it allows a thousand flowers to bloom without central planning or management.

At EarthLink, we lived this history. If the telephone companies had had their way, our pioneering dial-up Internet access business would have been shut down by imposing per-minute access charges. Instead, because the FCC did not allow the telephone companies to become Internet toll collectors, millions of Americans were able to gain familiarity with the Internet, building the critical customer awareness and interest in the Internet that enabled broadband products to be successful when launched. Moreover, because the consumer connected to the Internet with an ordinary telephone call, the telephone companies were not permitted to try to favor some Internet services over others.

Going back to our days battling AOL in the Internet services marketplace, EarthLink has long recognized that consumers are not best served by exclusive-access Internet networks. We believe that consumers are best served by an Open Access model—where network owners offer fair, reasonable, and nondiscriminatory wholesale rates to others who seek to bring customers to that network. And we don't just pay lip service to this model—as a network operator, we live up to the vision. EarthLink's municipal networks are open networks. Any qualifying ISP will get the same low, wholesale rate, and we welcome them to bring consumers to our network. And, we welcome the competition that ensues—it will ultimately deliver the best service and experience to consumers.

As a network investor and operator, EarthLink rejects the argument by the telephone and cable duopolists that networks must be closed and applications subject to a "success tax" in order to promote network investment. We embrace "net neutrality" because it is both consumer friendly and economically right. We will succeed by adding users and by providing our (and our wholesale customers') users better service, not by throttling web-based innovation and business models. When EarthLink and our local government partners expand the number of facilities-based networks providing Internet access, the marketplace can better police and ensure "net neutrality." This model of competition obviating the need for regulation is exactly what happened with wireless resale requirements, after this committee ended the wireless duopoly through spectrum auctions.

So how can this Committee address net neutrality in the time until there is sufficient competition to eliminate any concerns even without regulation? I offer a few thoughts.

First, recognize, as analyst Blair Levin has commented, that net neutrality is about market power in the local portion of the broadband network, and not about the Internet "cloud" or backbone. Accordingly, as Mr. Levin has put it, the more networks, the less the concern—provided those networks are not affiliated (as some wireless and telco networks are). A gatekeeper can discriminate and exercise market power only when there are a very small number of gates.

Second, discrimination is particularly significant when bandwidth in the last mile is scarce. Put another way, a network can meaningfully discriminate through the last mile best if the last mile can't handle all the bits the consumer wants.

Third, the Committee, and policymakers in general, should be particularly skeptical of network operator claims for a need to discriminate with respect to low-bandwidth (e.g. VoIP and e-mail) or high latency (*e.g.,* streaming video for storage on a TiVo) services and applications.

What this leads to is that, in order to preserve the open, innovative nature of the Internet and consumers' freedom to choose their applications and services until there is sufficient competition—and at least until consumers are so awash in broadband capacity that network neutrality that discrimination cannot be executed—EarthLink supports adoption of some clear rules, building on the FCC's broadband policy principles. In this regard, we believe that the bill recently introduced by Senators Snowe, Dorgan, and Inouye would provide a strong, interim assurance that the Internet will remain a vibrant driver of and tool for innovation.

III. Empower Consumers Through Stand-Alone Broadband

Another provision of the Snowe-Dorgan-Inouye bill that I commend for inclusion in S. 2686 is the provision on stand-alone broadband. As the Committee is well aware, in many instances, consumers who want to purchase DSL service must also purchase voice telephone service. Those types of requirements frustrate consumer choice by precluding consumers from buying DSL service from a BITS provider, while using another provider's VoIP service in lieu of the BITS provider's traditional circuit-switched (or VoIP) voice service.

There is no reason to permit this type of gamesmanship that blocks consumer freedom to choose. Cable companies, by and large, already permit their customers to buy broadband Internet access without buying video services. As conditions of their mega-mergers, the Nation's two largest ILEC BITS providers, Verizon and SBC, have committed—for two years—to offer such stand-alone or "naked" DSL services to 80 percent of their customers. Qwest has said that it will offer stand-alone Internet access services.

This consumer freedom should not be temporary, and should extend beyond the two years pledged by AT&T and Verizon as part of their recent merger approvals. All consumers should be given the freedom to choose the service that best meets their needs, unfettered by tying arrangements designed to protect legacy businesses.

IV. Interconnection and a Rationalized Interprovider Compensation System Are Critical for VoIP and Universal Service

One other set of provisions that are critical to delivering on the bill's promise of consumer choice are its provisions regarding the interconnection rights of VoIP providers, and the attendant Universal Service, and intercarrier compensation obligations of VoIP providers. Today's system doesn't serve competition or Universal Service well, with regulatory uncertainty plaguing all industry participants.

This Committee is well aware how critical interconnection, as well as access to numbers, number portability, and fair interprovider compensation arrangements, are to allowing consumers to have real choice and benefits from VoIP competition. Again, for evidence of why this is necessary we need look no further than our collective experience with wireless. Over the past ten years, we have seen an explosive growth in wireless services. In 1994, there were fewer than 20 million wireless subscribers; today, there are over 200 million—a more than ten-fold increase.

Prior to the 1996 Act, wireless faced extremely unbalanced terms when it exchanged traffic with incumbent local telephone companies. In some cases, wireless carriers paid the incumbent telephone company for every minute of traffic that the wireless carrier received from the incumbent LEC, and it also paid the incumbent LEC for every minute of traffic that originated from a wireless customer but terminated to a telephone number on the traditional public-switched network.[6] These arrangements were hardly surprising. In 1996, wireless carriers were much smaller than the incumbent LECs, and had many fewer subscribers. Few incumbent LEC subscribers would therefore be inconvenienced if they were unable to call out to, or receive calls from, a wireless customer. However, the wireless carriers were dependent upon the incumbent LECs to handle all but the then very small fraction of calls placed between wireless consumers. The incumbent LECs were thereby able to use their market power over interconnection to extract fees from wireless carriers, regardless of whether traffic originated from the incumbent LEC's wireline customer, or from the wireless carrier's customer. From the ILEC's perspective, it was able to insist on "heads I win, tails you lose" compensation for traffic exchange. This allowed the incumbent LECs to raise wireless carriers' costs, thus inflating the prices that wireless carriers had to charge to their customers, and, thereby, limiting wireless carriers' competition with landline services.

The 1996 Act changed all of that. Under the 1996 Act, for all local calls, an incumbent LEC could charge a wireless carrier (or, for that matter, a CLEC) for traffic that the wireless carrier originated, but could no longer charge a wireless carrier

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd. 15499, 16037, 16044 (1996) ("*Local Competition Order*") (CMRS carriers complain "that they are unable to negotiate interconnection arrangements based on mutual or reciprocal compensation because of incumbent LEC bargaining power;" "the problem of achieving mutual compensation is further compounded because incumbent LECs not only charge rates that bear no relationship to their costs, but also refuse to compensate CMRS providers for termination of landline-originated calls;" "incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls;" "we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks.")

for traffic that originated from an incumbent LEC's own customer.[7] Moreover, under the 1996 Act, the wireless carrier is entitled to compensation for all local traffic that originates on the ILEC's network and terminates on the wireless carrier's network: the rate the ILEC pays the wireless carrier mirrors the rate that it charges the wireless carrier. Furthermore, the FCC ruled that reciprocal compensation rules, and not intrastate and interstate access charges, would apply to all CMRS traffic that originated or terminated within a "Major Trading Area," a large region used for PCS licensing that was much larger than traditional ILEC local calling areas.

There were two significant results from these changes with respect to wireless intercarrier compensation. First, incumbent local telephone companies could no longer use traffic exchange fees to increase a wireless carrier's costs, and thus prevent a wireless carrier from offering prices that would compete with the incumbent local telephone company's core services. By making these charges cost-based and symmetrical, all carriers were required to compete. Second, because the traffic exchange fees that wireless carriers paid were no longer strictly tied to ILEC traditional wireline local calling areas, wireless carriers were able to offer regionwide and national calling plans. This led directly to the emergence of today's popular wireless one-rate bucket pricing plans.

We urge that S. 2686 fully incorporate the core teachings of the wireless experience and applies those lessons to broadband and VoIP. Like pre-1996 wireless carriers, VoIP providers will be very small relative to the incumbent LECs, and will have a much greater need both to receive calls from, and terminate calls to the ILEC's customers than the ILEC will need to do with respect to the VoIP provider's customers. This asymmetric market power is exactly what led to the asymmetric charges between incumbent LECs and wireless carriers prior to 1996. Should the large incumbent telephone companies be able to impose those unbalanced, asymmetric charges far above cost-based levels, the incumbents will be able to squeeze VoIP out of competition for mainstream consumers, and relegate VoIP to a niche—much as wireless occupied only a niche prior to 1996.

Accordingly, S. 2686 should, as the original draft did, give all VoIP providers, not just "facilities-based" VoIP providers the rights to obtain telephone numbers, to port numbers, and to interconnect with the local telephone network. If "facilities-based" is defined too narrowly, a provider such as EarthLink, which purchases wholesale DSL from both CLECs and ILECs to offer its services, could be denied interconnection, telephone numbers and number portability simply because it doesn't physically own, or provision, its last-mile transmission facilities. Provisioning the "last-mile" shouldn't be the test for interconnection, number portability, or access to numbers, so long as the VoIP provider is operationally present—itself or through an agent—in the area in which it wants to exchange traffic with the legacy telephone network. In our view, the changes made by the June 9 staff draft, head in the wrong direction.

Second, EarthLink recognizes the critical importance of Universal Service, and stands ready, as a VoIP provider, to contribute to the Federal Universal Service mechanisms. As an ISP, CLEC, and VoIP provider, EarthLink today pays both directly and indirectly to support Universal Service. The Committee is properly considering how that Universal Service payment mechanism can be improved and broadened.

We embrace our duty to support Universal Service: Universal Service ties our country together, and brings economic and educational opportunity to all corners of our country. As the staff draft correctly recognizes, a cornerstone of any mechanism must be that whatever mechanisms it authorizes the FCC to adopt are competitively neutral, and do not require us to engage in complex legal exercises to determine whether a particular dollar of customer revenue is subject to, or outside of, Universal Service assessment. Today's mechanisms are flawed in both respects. We also urge that if the bill is going to permit states to assess Universal Service fees, as the staff draft does, that those fees not extend more broadly than to the services covered by the Federal mechanism, and that there be some limits on the magnitude of those State fees.

Third, while we do not object to the idea, as the staff draft contemplates, that providers should pay each other fair interprovider compensation, we are concerned that neither S. 2686, nor the staff draft empower or direct the FCC to make sure the interprovider compensation system is fair, rational, and economically sustainable as a precondition of those obligations. The current intercarrier compensation system on the public-switched network is universally recognized to be Byzantine, economically

[7] Technically, the 1996 Act's reciprocal compensation rules apply to all traffic that is not interstate or intrastate exchange access, information access or exchange services for such access. *See* 47 CFR 51.701.

irrational, and broken. Today's system imposes different charges for the same use of the network depending of whether a call is "local," interstate "long distance," or intrastate "long distance," whether it is a wireline call or a wireless call, and whether it is an information service or a telecommunications service. Unless S. 2686 addresses this issue head-on, it will leave a gaping hole that will ultimately defeat all of the bill's goals, including consumer choice, broadband deployment, and the preservation of Universal Service. Accordingly, the Committee should adopt the provisions of the minority staff draft that both give the FCC the authority to address interprovider compensation issues, and require the FCC to take action to reform the current system within 180 days.

Before I close, I leave you with a note of caution on a topic not addressed by the S. 2686 or the staff draft—forbearance under Section 10 of the Communication Act. The FCC has taken an extremely expansive view of its forbearance authority, and without necessarily requiring that a competitive marketplace be supplying what regulation was assuring. So, for example, the FCC has consistently cut back on the scope of Section 251(c)'s unbundling requirements, going so far as to forbear from Section 251(c) entirely with respect to unbundled loops in Omaha, Nebraska. The FCC did so because a competitive, wholesale market for loops had developed (in which case forbearance would make sense), but because the cable company—which didn't use unbundled loops—was able to serve residential customers over its cable plant. And perhaps even more troubling, the FCC recently allowed a forbearance petition to be granted by inaction. In other words, the FCC simply let a private party assume the FCC's delegated rulemaking authority by refusing to act. This raises very troubling and serious constitutional issues—most notably whether an administrative agency can, through inaction, allow a private party to rewrite the laws without any affirmative governmental action, let alone action by the Congress and a signature of the President.

On behalf of EarthLink, I thank the Committee for the opportunity to present these views. The staff has done yeoman's work, and presented you with a thoughtful starting point for further legislative efforts. By continuing to promote additional broadband competition, and by preserving the Internet's essential character as a place that fosters economic innovation without duopoly control, the Committee can craft a truly pro-consumer, pro-innovation legislative framework for broadband services.

The CHAIRMAN. Thank you very much.

The next witness is Steve Largent, the President and Chief Executive Officer of CTIA—The Wireless Association, in Washington.

STATEMENT OF HON. STEVE LARGENT, PRESIDENT/CHIEF EXECUTIVE OFFICER, CTIA—THE WIRELESS ASSOCIATION®

Mr. LARGENT. Chairman Stevens and Co-Chairman Inouye, and members of this Committee—thank you for, yet again, another opportunity to testify before the Committee, to offer the wireless industry's views on the Communications, Consumer's Choice, and Broadband Deployment Act of 2006.

Over the course of the last year, I have closely followed the debate and rationale as to why Congress needs to update our national communications laws, which has led us to this point today. The purpose is simple: create a national deregulatory framework, induce competition, spur innovation, and lower customer prices. Ironically, while Congress is working to increase competition and innovation in other telecom sectors, vis-à-vis a national framework, State legislatures and PUCs throughout this country are working hard to impose disparate and conflicting State-by-State regulations on the industry I represent. I have listed just a few of these proposed State regulations in my written testimony.

I guess it would be somewhat understandable if there were only one or two carriers to choose from, or prices had gone up, or consumer complaints were on the rise, or there was a lack of handsets that were offered, or a lack of innovation. But none of those things

I've just mentioned are the case. In point of fact, the opposite is true. Americans have come to rely on, and enjoy, the ability to communicate anyplace, anytime that wireless affords. CTIA and our member companies have been working with this Committee to reinforce the national deregulatory framework Congress created in 1993. I would hope that Members of this Committee would carefully consider and support the merits of such a proposal.

Regarding the issue of net neutrality, the wireless industry has seen no evidence that there is a problem that needs to be resolved, or would be solved, by prescriptive regulations. CTIA believes the Internet has derived its strength by virtue of its freedom from regulation; and, therefore, believes the net neutrality provisions contained in this legislation are the appropriate approach to take.

Finally, as I stated at a hearing a couple of weeks ago, when it comes to USF reform, the promotion of wireless voice and broadband service is a solution, not the problem. Since 1997, of the $22 billion spent on high-cost Universal Service subsidies, $20.9 billion has gone to incumbent LECs, while only $1.1 billion has gone to wireless ETCs. This year, wireless carriers—more accurately, wireless customers—will pay over 2-and-a-half billion dollars into the Universal Service Fund. It is CTIA's belief that if wireless customers are going to chip in, to the tune of 2-and-a-half billion dollars, they deserve a better return on their investment than what they are currently receiving.

In summary, I would ask the Committee to support strengthening the wireless industry's national framework, refrain from imposing anticipatory and prescriptive net neutrality regulations, and take into account that the current Universal Service system does not reflect current market realities. Consumers never benefit from regulations that distort the competitive market. CTIA's USF reform proposals demand accountability and results from all fund recipients.

Again, thank you, Mr. Chairman, for the opportunity to offer some additional views, and I'll be happy to elaborate further on any questions you may have.

[The prepared statement of Mr. Largent follows:]

PREPARED STATEMENT OF HON. STEVE LARGENT, PRESIDENT/CHIEF EXECUTIVE OFFICER, CTIA—THE WIRELESS ASSOCIATION®

Chairman Stevens, Co-Chairman Inouye, and members of the Committee, thank you for the opportunity to appear before you this morning to discuss issues relating to the future of U.S. telecommunications law. As you determine the most appropriate ways to spur competition and innovation in the telecom sectors while simultaneously protecting consumers, I encourage you to take steps to further the positive impact that the wireless industry has had on the U.S. economy, and on the level of competition for voice and data services. The wireless sector is repeatedly touted as the model of an industry that has flourished in a national deregulatory framework, and it is becoming apparent that this Congress is attempting to deliver a similar national framework to other telecom sectors. Ironically, while Congress is working to increase competition and innovation for other sectors via a national framework, regulatory bodies at the State level are attempting to take wireless far back into the 20th century by imposing disparate and burdensome State-by-State restrictions. The innovative national approach applied to the wireless industry in the 1993 Budget Act has proven its incredible value and is one which recognizes that the consumer is the best regulator.

The Consumer is the Best Regulator in a Competitive Market

In 1993, Congress passed *The Omnibus Budget Reconciliation Act of 1993 (OBRA 1993),* which added a new section 332(c) to the Communications Act preempting state rate and entry regulation. Congress recognized that pre-OBRA state regulations actually operated to slow down competition, delay entry, and minimize or prevent carriers from developing new and innovative rate plans. Section 332(c)(3) preempted State and local rate and entry regulation of wireless carriers, but preserved State authority over undefined "other terms and conditions" of commercial mobile radio services. State commissions have asserted this "other terms and conditions" authority as the basis for an increasingly broad range of regulation.

State legislatures and commissions are increasingly introducing and passing an array of conflicting laws and regulations. Just last week, a bill was introduced in the Michigan Senate that requires a mandatory trial period extending well beyond the time the customer receives his first bill that limits early termination fees to $20, and requires the Michigan Public Service Commission to establish service quality standards for wireless service. Simultaneously, the New York Assembly is currently considering a bill that would require its Consumer Protection Board to adopt a different set of new rules and regulations on wireless carriers requiring a different trial period. In addition, the New York Assembly is considering what written materials have to be provided to customers when, as well as at what time within a contract period, carriers can make changes to their rates. Surely, Congress did not intend for Michigan wireless subscribers to have service under one set of rules while New Yorkers have service under a completely different set.

A review of the results of this ground-breaking deregulatory framework have been astounding and altogether unique as compared to other telecom sectors. In 1993, states were preempted from regulating entry. As a result, the wireless industry has gone from two wireless carriers per market to an average of five per market. States were preempted from regulating rates. Competition and market forces have caused the average price per minute to fall about 84 percent. There were 11 million wireless customers in the United States when OBRA was passed, now there are 219 million customers. These customers have the ability to pick among carriers for better service quality, different plans, and unique offerings. The lightly regulated wireless industry has invested $187.8 billion in capital expenditure since the OBRA was passed—not including the billions of dollars spent purchasing spectrum. Where once a limited number of people had an expensive voice only option, consumers now have access to voice, text messages, office systems, e-mail access, mobile television, web access, games, and other entertainment options.

Opponents to the continued, national, light-touch regulation Congress put in place in 1993 claim they are trying to protect wireless consumers. Here is the pivotal question you need to be asking—protect wireless consumers from what? Lower prices? More providers to choose from? More choices among rate plans? Innovative new devices with features like camera phones or that are sleekly designed? Multiple billing options, from rollover minutes to text message billing? Clarity on bills about what the charges are for? Cheaper devices?

Let me be clear, the wireless industry supports consumer protection: protections against confusion about what consumers can expect from their provider and how their service operates; protection from a decline in the variety of services and devices they can choose from; protection from the reduction in their ability to obtain the exact device and service plan they want; and the lack of ability to receive the best services and devices.

State-by-State, wireless specific laws and regulations over issues such as the size of the font of marketing materials, and how long of a trial period consumers have to test their phone undermine the national, deregulatory framework Congress instituted in 1993 and that produced the enormous consumer benefits I outlined earlier. I respectfully ask you again—what is the problem more laws and regulations would solve for the wireless consumer? We often hear that State-by-State laws and regulations are necessary so that wireless consumers have somewhere to go, close to home, to have their concerns addressed. We agree that wireless consumers need recourse to address whatever issues they have. And they do! State attorneys general have and will continue to have authority to prosecute fraudulent business practices—and they exercise their authority.

There are many forums for wireless consumers to address and resolve their concerns at both the State and Federal levels. The FCC's tracking of quarterly complaints shows that wireless complaints have fallen 37 percent over the last year, and now stand at 22 complaints per million wireless customers—that's an incredibly low complaint ratio that continues to improve as carriers expend significant resources to address consumer issues. But what about those wireless consumer concerns. The wireless industry does not turn a deaf ear to them. It is the foundation

of our business model to attract and keep customers. Some industry critics would have you believe that we actually try to annoy our customers and drive them away. Nothing could be further from the truth. Wireless companies take customer service very seriously, spending millions of dollars a year on training personnel and upgrading their call center capabilities.

Wireless carriers are also spending millions of dollars a year on behalf of wireless consumers by opposing excessive and discriminatory taxes imposed by State and local governments. Wireless consumers are bearing the brunt of budget shortfalls as cities and localities view the telecom consumer as the golden goose for revenue enhancement. Ironically, some of the states that are the most aggressive in pushing for regulation on wireless carriers in the name of the consumer, are also the states with the highest rates of taxes and fees on their constituents.

As we enter our third decade, the wireless industry is poised to enter a wireless renaissance, bringing advanced services like wireless Internet, to more than 200 million mobile Americans. We are at a critical juncture in our evolution, and need your leadership to make this renaissance a reality for consumers at prices they can afford. Shoring up the national, deregulatory framework you created in 1993, is the best way to empower consumers and protect their rights and access to innovative, convenient, and affordable wireless devices and services. How to do this? Reaffirm the national framework for wireless carrier practices, and allow the FCC to regulate only in instances necessary for public health and safety, or demonstrated market failure.

Wireless Perspective on Regulating the Internet

Recently, a concept called "net neutrality" has generated intense debate within the context of broader reforms of our telecommunications laws. The issues are complex and confusing. It appears the only thing everyone agrees on is that no one can agree on what net neutrality means. The wireless industry has seen zero evidence that there is a problem that needs to be, or would be, solved through the variety of net neutrality legislative proposals currently circulating. The industry agrees with FCC Chairman Martin that the Commission already has the jurisdiction and ability to address any problems in this area, and urges you to carefully consider the unintended, negative consequences that could befall the U.S. wireless consumer if anticipatory regulations are enacted. The Internet, like the wireless industry, has never stopped growing and evolving. There is no reason to restrict the growth or evolution of either, unless, or until, a real marketplace failure is identified.

In particular, the wireless industry is quite concerned that many of the unintended consequences that would flow from some of the net neutrality regulations being considered would have a particularly negative impact on wireless consumers. The industry is also troubled that the proposed net neutrality regulations being contemplated will discourage investment the industry needs to continue building the infrastructure, design the devices and operate the evolving networks needed to make a wireless renaissance a reality, and sustain consumer demand for more advanced mobile services. CTIA believes the Internet has derived its strength, and contributed to the economy, by virtue of its freedom from regulation, and, therefore, believes the net neutrality provisions of the Communications, Consumer's Choice, and Broadband Deployment Act of 2006, which calls for a review of the current system, in lieu of regulation, is the appropriate approach to take.

Universal Service Reform for the Wireless Consumer

Let me turn now to the urgent need for Universal Service reform. Over the last decade, wireless industry contributions to Universal Service have been steadily rising, while Universal Service distributions remain primarily directed to wireline carriers. Wireless carriers and their customers are responsible for about one-third of contributions to Universal Service. The wireless industry's payment into the Federal Universal Service programs will likely exceed $2.5 billion this year. Meanwhile, the vast majority of Universal Service subsidies are directed to our competitors—wireline carriers. Wireless carriers receive only about 13 percent of Universal Service support overall and less than 20 percent of high-cost Universal Service support. Since 1997, of the $22 billion spent on high-cost Universal Service subsidies, $20.9 billion has gone to incumbent LECs, and only $1.1 billion has gone to wireless carriers. This inequity exists even as consumers—the only intended beneficiaries of Universal Service—are demanding more and more wireless services. In fact, there are now more mobile wireless subscribers than wireline switched-access lines.

The wireless industry shares Congress's commitment to the goals of Universal Service and its concerns about growth in the size of the Universal Service Fund. Wireless carriers are committed to the efficient deployment of networks in rural America, and Universal Service can play an important part in making that happen.

Because of our net payer position, the wireless industry has strong incentives to ensure that Universal Service contributions are collected from as wide a base of contributors as possible, while ensuring that both incumbent and competitive eligible telecommunications carriers (ETCs) receive no more support than is necessary to achieve the goals of Universal Service. On the contribution side, CTIA supports adoption of a numbers- or connections-based contribution methodology. On the distribution side, CTIA supports market-driven reforms to curb demand for Universal Service subsidies. The current Universal Service system does not reflect current market realities. It favors incumbent wireline networks and that does not help consumers. Consumers never benefit from regulations that distort the competitive market. In contrast to the current Universal Service mechanisms, CTIA's reform proposals would demand accountability and results from all Fund recipients, and would encourage and reward efficiency. Under CTIA's proposals, both incumbents and competitors would receive less support.

As this Committee works to update our Nation's telecommunications laws, please consider the tremendous positive impact that the wireless industry has had on the ability of consumers to communicate, on the U.S. economy, and on the competitive landscape.

The CHAIRMAN. Thank you.

The next witness is Philip Jones, Commissioner of Washington Utilities and Transportation Commission, the WUTC, of Olympia, Washington.

STATEMENT OF HON. PHILIP JONES, COMMISSIONER, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION (WUTC); ON BEHALF OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS (NARUC)

Mr. JONES. Thank you, Mr. Chairman, and Co-Chairman Inouye.

I am Philip Jones, Commissioner with the Washington Utilities and Transportation Commission, a resident of Seattle, Washington, and a member of the National Association of Regulatory Utility Commissioners, which you know as NARUC. I serve as Chairman of NARUC's Federal Legislative Subcommittee on Telecommunications in our efforts in this bill, and I'm also a member of the Intercarrier Compensation Task Force, Chairman Stevens, which we have visited with you before.

We commend you and your staff on the great efforts you've made in the manager's amendment that was released last Friday night. We've scrambled hard to develop testimony to respond to it. And just let me offer a few comments today, especially after Mr. Largent addressed some of the comments on the role of State PUCs for wireless communication.

NARUC's approach changed quite a bit when we released our white paper in July 2005, what we call "Cooperative Federalism." We undertook a dialogue with the stakeholders in the communications industry to ensure that as the industry changes—wireless, VoIP, triple-play broadband bundles, and also the mega-mergers—that we have a better paradigm at the State level for dealing with regulation.

The first principle is technology, neutrality. We are trying to come up with a regulatory approach that establishes that any regulations that we developed are technology-neutral. The other is the concept, instead of end-to-end point, interstate-intrastate—what is inter and what is intra? What is long distance, what is local?—develop a "functional federalism" approach. In that model, we believe that the States excel in areas like consumer protection, efficiently resolving intercarrier disputes, ensuring public safety, such as E–

911, and assessing the level of competition in local markets, and tailoring national Universal Service to those goals, specific to the State.

This is actually not a new model. For the past several years, wireless carriers have been governed by Section 332—specifically, 332(c) of the Act, which does not—I emphasize "not"—declare wireless to be interstate or intrastate, but, rather, assigns appropriate functions to State and Federal authorities. It assigns spectrum management functions to the FCC, includes a rebuttable presumption of competitiveness for wireless carriers, and allows States to handle—States to handle—consumer protection and other terms and conditions of service. Wireless carriers are also able to avail themselves of State arbitration procedures for interconnection to the wireline phone network, what Mr. Putala, of EarthLink, mentioned. We think this is a model of successful federalism that shouldn't be tampered with.

Three areas I'd like to address: the first is consumer protection. We are pleased to see that the manager's amendment and the Inouye staff draft—neither of those seek to pare back the role of State commissions in consumer protection. We think this is appropriate. Under current law, State commissions handle—hundreds of thousands of complaints every year. And we generally provide individual relief to each complaint, often resolving complaints in a matter of weeks, or even days, as opposed to the FCC complaint process.

We are concerned, and raise the issue today, because the wireless industry, in particular—and my colleague to the right, my good friend, Steve Largent—has launched an aggressive lobbying effort to create a technology-specific preemption standard for their telecommunication services. From our point of view, it makes little sense to eliminate scores of consumer protections at the State level on the basis of that technology. And I should add that States are actively involved in issues like ETC designations, in which the wireless companies receive a good deal of Federal revenue to provide service to high-cost areas, and we deal with the wireless carriers in a positive way, generally.

Interconnection, Section 213 of your manager's amendment, is a good step forward in applying the rights and obligations of interconnection to VoIP providers. We support that provision. Going forward, it is our hope that stakeholders participating in NARUC's ICC—our Intercarrier Compensation Task force—will make a recommendation to the FCC soon, probably in the month of July, about particular ways to rationalize the intercarrier compensation payment structure—not the provisions in your bill, but the payment structure.

On Universal Service, we appreciate the effort to broaden the base. Mr. Chairman, you consistently use the word "communications services." We appreciate that you have broadened the base on USF to all communications services, including broadband. In particular, we appreciate your focus in the manager's amendment on allowing States to assess on either revenues or bandwidth or on working telephone numbers for the State USF programs that do exist. It's important to note that 22 State programs exist today. These States are providing useful functions in service to high-cost

areas, and we would like to ensure, as the process moves forward, that these provisions are protected.

On video franchising, I—NARUC has not taken a formal position on video franchising, and I would just note that several States—South Carolina, New Jersey, California, Indiana and others have acted in the past few months to adopt State legislative approaches to video franchising, and that is something that we would urge the Committee to address in the deliberations ahead. We have noted, with pleasure, in the latest staff draft, that the State PUCs are no longer being asked to referee or arbitrate on definition of gross receipts. However, you have given us some new obligations on redlining and enforcing redlining provisions. These are so new to us, and based on the fact that so many States have so many different approaches, we are caucusing our States on an urgent basis now to see what they think of that provision, and will get back to you and your staff as soon as possible.

Thank you.

[The prepared statement of Mr. Jones follows:]

PREPARED STATEMENT OF HON. PHILIP JONES, COMMISSIONER, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; ON BEHALF OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS (NARUC)

Mr. Chairman, Co-Chairman Inouye, and members of the Committee, thank you for the opportunity to testify today on S. 2686, the Communications, Consumer's Choice, and Broadband Deployment Act of 2006.

I am Philip Jones, Commissioner with the Washington Utilities and Transportation Commission (WUTC) and a member of the National Association of Regulatory Utility Commissioners (NARUC). I serve as Chairman of NARUC's Federal Legislative Subcommittee on Telecommunications and as a member of the Association's Intercarrier Compensation Task Force. NARUC represents State public utility commissions in all 50 states, the District of Columbia, and U.S. territories, with jurisdiction over telecommunications, electricity, natural gas, water and other utilities.

We commend you and your staff, as well as Co-Chairman Inouye, and other Committee Members, for getting us to where we are today. While there is still much to be done, we appreciate your hard work and especially your responsiveness to the specific concerns we have raised along the way.

NARUC's Approach to Federalism

NARUC's analysis of the recently released manager's amendment to S. 2686 and the other bills before this Committee is guided by our "Federalism and Telecom" white paper that we approved in July 2005, after an extensive dialogue among ourselves and with stakeholders, examining every Federal policy position we had taken since the passage of the Telecommunications Act of 1996.

We undertook this dialogue to be sure that, as Congress reexamined the Act, our policy positions reflected the impact of all the new technologies and market developments in recent years, including the emergence of Voice-Over-Internet-Protocol (VoIP), triple-play broadband bundles, mega-mergers, and the tremendous growth of wireless telephony—and all the associated challenges to traditional Federal and State oversight roles. In the end, we came to two important conclusions.

The first was that, with the pace of innovation accelerating, any major bill must strive to be as technology neutral as possible. Whenever technological change and restructuring sweeps through an industry, there is pressure to give new technologies special status under the law because they don't appear to fit the "old" regulations. The problem with this approach is that the new services compete directly with traditional services, and by creating brand new regulatory silos, you distort the market, encouraging regulatory arbitrage instead of true innovation. The better approach, in our view, is to ask how these new technologies change the environment for *all* players, and reexamine the first principles behind the regulations that are on the books for everyone.

The second conclusion was the development of our "functional federalism" concept, which is the idea that if Congress is going to rewrite the Telecommunications Act, it doesn't have to be bound by traditional distinctions of "interstate" and "intra-

state," or figure out a way to isolate the intrastate components of each service. Instead, a Federal framework should look to the core competencies of agencies at each level of government—State, Federal and local—and allow for regulatory functions on the basis of who is properly situated to perform each function most effectively.

In that model, States excel at responsive consumer protection, efficiently resolving intercarrier disputes, ensuring public safety, assessing the level of competition in local markets, and tailoring national Universal Service and other goals to the fact-specific circumstances of each State.

This is not actually a new model. For the past several years, wireless carriers have been governed under Section 332 of the Act, which does *not* declare wireless to be interstate or intrastate, but rather assigns appropriate functions to State and Federal authorities. It assigns spectrum management functions to Federal authorities, includes a rebuttable presumption of competitiveness for wireless carriers, and allows States to handle consumer protection and other terms and conditions of service. Wireless carriers are also able to avail themselves of State arbitration procedures for interconnection to the wireline phone network. Under this model, the wireless industry has already eclipsed the traditional phone business in total number of subscribers and now has over 200 million subscribers and $118 billion in annual revenues—a model of successful federalism at work.

Consumer Protection

Neither the manager's amendment, nor the Inouye draft seeks to pare back the role of State commissions in consumer protection, and we think this is appropriate. Under current law, State commissions handle hundreds of thousands of consumer complaints every year, and generally provide individual relief to each complaint, often resolving complaints in a matter of weeks, or even days, through informal processes. In addition, we are able to address new and novel concerns as they arise, whether they are the result of new fraudulent schemes or unfair terms in boilerplate service contracts.

We are concerned, and raise the issue today because the wireless industry in particular has launched an aggressive lobbying effort to create a technology-specific preemption standard for their telecommunications services. From our point of view, it makes little sense to eliminate scores of consumer protections at the State level solely on the basis of the particular technology used. In the case of wireless, it makes even less sense because the industry has prospered so well under the division of authority that now exists. And while some have argued that wireless is "too interstate" to face telecom-based State consumer protections, our experience is that the carriers have little trouble finding their way to Olympia, or Sacramento, or Anchorage when they are asking for something, such as certification to receive Universal Service dollars or interconnection to the wireline networks.

Most importantly for an industry that is quickly replacing traditional landline phone service in many people's lives, there are legitimate consumer protection issues, often associated with selling service via long boilerplate contracts with terms of a year or more. Now is probably a good time to let those concerns shake out instead of cutting off avenues of relief for consumers.

Interconnection

We appreciate the specific recognition in both the manager's amendment, and the Inouye draft of State commission expertise and effectiveness when it comes to mediating, arbitrating, and enforcing interconnection agreements between carriers. In a networked industry like telecom, fierce competitors will always have to cooperate to operate a seamless network of networks, but there are frequent incentives for one carrier or another to frustrate interconnection for anti-competitive reasons. State commissions are generally recognized as the fastest, most effective forum for resolving interconnection disputes.

It makes particular sense to extend the right of interconnection to VoIP providers, so long as they are willing to undertake the responsibilities of providing a telecommunications service, such as paying appropriate intercarrier compensation, and making equitable contributions to Universal Service. By the same token, we support the provisions in the Inouye staff draft clarifying that deployment of IP infrastructure does not free a provider of the duty to interconnect.

Going forward, it is our hope that the stakeholders participating in NARUC's Intercarrier Compensation Task Force will make a recommendation to the FCC soon about particular ways to rationalize the intercarrier compensation payment structure, and clarify the obligations of all providers in a way that eliminates distortions and incentives for arbitrage.

Universal Service

One of the most important things the new legislation would do is stabilize the contribution base for the Federal Universal Service Fund. Spreading the base broadly to all those services that utilize and benefit from a ubiquitous communications infrastructure is a simple question of fairness, and will reduce the opportunities for regulatory arbitrage that distort the market.

We are also pleased that both the Stevens bill and the Inouye staff draft recognize the importance of State Universal Service programs. Universal service is a jointly shared responsibility between the States and the Federal Government, with 26 State programs distributing over $1.3 billion—nearly 20 percent of the overall national commitment to Universal Service. This joint approach benefits both "net donor" and "net recipient" states because it lessens the burden on an already sizable Federal program and permits another option when Federal disbursement formulas do not adequately serve a particular state or community.

State Universal Service funds face the same structural funding challenges as the Federal program, with many new services that rely on a ubiquitous network (and exchange traffic with the PSTN) failing to contribute equitably to either one. That's why it is good that both manager's amendment and the Inouye staff draft would allow State funds to broaden their contribution bases to include total revenues and Voice-Over-Internet-Protocol (VoIP) services. Ultimately, we'd encourage you to make the assessment authority for both State and Federal programs co-extensive.

Committee Members should also know that the NARUC Intercarrier Compensation Task Force, on which I serve, is close to winding up its work. At a previous hearing before this Committee, my colleague Ray Baum of the Oregon Public Utilities Commission testified that the impact of intercarrier compensation on the revenue streams of carriers is more than $10 billion. I would only caution you that every previous plan to substantially lower access charges, including both the "CALLS" plans and the "MAG" plan, has involved a combination of retail rate changes and increased Universal Service support. So as difficult as it is to address funding and distribution issues with USF today, we need to remember that there are additional implicit subsidies in the system that will turn into additional stresses on the Fund if and when they are made explicit.

Video Franchising

While NARUC does not take a formal position on the video franchising provisions in the manager's amendment and other proposals before the Committee, a number of State legislatures and commissions have acted under current law to reform and streamline their processes. In Texas, Indiana, South Carolina, and Kansas, this has meant the creation of statewide franchises awarded by the State commission or another agency. In Virginia and Arizona, it meant a streamlining of the local franchise process.

As a general matter, we want to encourage vigorous competition in the video market and also recognize the important roles that State and local governments should play in any framework. To that end, we are currently engaged in a dialogue with a number of stakeholders through a Working Group chaired by Commissioner Daryl Bassett of Arkansas, and will soon issue a white paper detailing the particular roles that NARUC's members are playing in this area.

While the manager's amendment no longer delegates a specific role to State commissions for consumer complaints and calculations of gross revenues, it does designate both State commissions and attorneys general to handle income-based redlining complaints. We are surveying the NARUC members to find out which State enabling statutes would allow their commissions to play this role, although at first blush it appears that role would be most feasible in the 12 or so States that have already vested some level of franchising authority in the State commission.

E–911 and Emergency Communications

While it is not addressed in S. 2686, another important component of a technology neutral policy is ensuring that VoIP providers are meeting their duty to provide 911 and E–911 functionality to consumers. States were first to raise this issue back in 2004 when the New York and Minnesota commissions ordered Vonage Holdings to provide emergency dialing services to its customers. While both orders were the subjects of legal challenge, we are pleased to see that in the intervening two years, the FCC has acted to require the same functionality, and Congress is not far behind.

This is also an area where the same State commissions have worked through informal avenues to help VoIP companies gain access to the 911 call center infrastructure, so they could make those capabilities available as early as possible. We are continuing to refine our Federal policy positions under the guidance of a Working Group chaired by Commissioner Connie Hughes of New Jersey.

Conclusion

We look forward to working with Chairman Stevens, Co-Chairman Inouye, and all the members of the Committee as you consider additional refinements and amendments to S. 2686, and move toward consideration by the full Senate and final enactment. Our goal at all times has been to offer ourselves not as traditional advocates with a bottom line to defend, but as resources in each State and partners in seeking the best deal for our mutual constituents.

The CHAIRMAN. Thank you very much, Mr. Jones.

Our last witness, Robert Foosaner—right?

Mr. FOOSANER. Foosaner, sir.

The CHAIRMAN.—Foosaner, Vice President of Government Affairs and Chief Regulatory Officer for Sprint Nextel, of Reston, Virginia.

STATEMENT OF ROBERT S. FOOSANER, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS AND CHIEF REGULATORY OFFICER, SPRINT NEXTEL CORPORATION

Mr. FOOSANER. Chairman Stevens, Co-Chairman Inouye, and members of the Committee, my name is Bob Foosaner, and I'm the Senior Vice President of Government Affairs, as the Chairman has said, at Sprint Nextel. I appreciate being given the opportunity to be part of today's hearing, and I commend you for taking on the complex task of reforming communications law.

Nextel supports the goals of the bill before you today—namely, encouraging competition and focusing on the deployment of broadband nationwide. We believe the bill would be enhanced by addressing the critical need to correct the market failure for special access.

Sprint Nextel is heavily dependent upon the Bell Operating Companies (BOCs) to provide the last-mile connections. In fact, special access lines connect all of our sites to our mobile switching centers and link our network to the network of other carriers. I believe you might be surprised to know that, at 99 percent of our cell sites in BOC territories, we find that BOC is our only choice. Sprint Nextel is not alone in its dependency on the BOC's provision of the last mile. These other companies include ISPs, cable companies, long-distance carriers, other wireless providers, and nearly every major U.S. business. In fact, the Ad Hoc Telecommunications User Committee, an organization of major U.S. businesses, has filed data with the FCC showing that the BOCs, in 2005, remain the sole source of dedicated access at roughly 95 percent of all business premises nationwide, even for the largest corporations.

Sprint Nextel would very much prefer to have the option of obtaining these dedicated circuits from someone other than the parents of our largest competitors, Cingular and Verizon Wireless. Prior to its merger with Sprint, Nextel made a concentrated effort to reduce its dependence on wireless in the most competitive market in the Nation—New York City. And we failed. When Nextel sought bids for special-access services in the New York metropolitan area, competitors bid to serve fewer than 3 percent of our locations.

Others have previously raised this issue with you. AT&T and MCI, prior to their absorption into the Nation's two largest BOCs, had repeatedly demonstrated there's a special-access market failure. In 2004, MCI informed the FCC, quote, "The ILEC's market power over the market for DS1 and DS3 facilities, coupled with the

Commission's decision to largely deregulate the pricing of these facilities, has resulted in prices far in excess of the cost. The result is that special access has become the ILEC's "most profitable line of business," from MCI. For example, just last year, AT&T/SBC earned a rate-of-return of 92 percent on its special-access charges. Bell South earned nearly 98 percent. These returns are not a 1-year aberration. Special-access rates-of-return—namely, their after-tax profits—have grown steadily over 5 years. Indeed, SBC's rate-of-return rose by more than 120 percent from 2001 to 2005, and the rates-of-return increased by more than 167 percent for Bell South and 175 percent for Verizon. Without effective rules or meaningful competition, the BOC's special-access profits are likely to grow at an even faster pace—a future in which special access will become even more critical, and more capacity will be required to support the burgeoning mobile broadband marketplace that this Committee is committed to encouraging.

Congress needs to mandate that the FCC impose the pricing discipline that the marketplace has failed to provide. Let me be clear: failure to do so will thwart mobile broadband deployment and competition that we all seek.

Thank you. I'd appreciate any questions you have to ask.

[The prepared statement of Mr. Foosaner follows:]

PREPARED STATEMENT OF ROBERT S. FOOSANER, SENIOR VICE PRESIDENT, GOVERNMENT AFFAIRS AND CHIEF REGULATORY OFFICER,SPRINT NEXTEL CORPORATION

Good Morning Chairman Stevens, Co-Chairman Inouye, and Members of the Committee. I am Bob Foosaner, Senior Vice President of Government Affairs for Sprint Nextel Corporation. Thank you for the opportunity to appear before you today to discuss S. 2686, the Communications, Consumers' Choice and Broadband Deployment Act of 2006. I appreciate this opportunity, and I commend you for taking on the complex task of reforming our Nation's communications law.

In my view, the goals of the bill before you today—encourage competition, the deployment of broadband nationwide and, most importantly, bringing the benefits of telecommunications advances to all consumers—would be enhanced if your bill addressed the serious market failure for special access services—a market that is a lynchpin to the success of a vibrant, competitive broadband marketplace.

Today, Sprint Nextel, like many of our Nation's businesses (including Internet service providers, cable companies, long distance carriers, competitive local exchange carriers, and other wireless companies), remains heavily dependent on the Bell Operating Companies (BOCs) to provide "last mile" connections known as "special access services." In fact, Sprint Nextel has identified alternative providers of special access services at less than one percent of its cell sites nationwide. In other words, in nearly every case the BOC is the *only* choice for service in their respective service territories. Sprint Nextel needs these dedicated circuits to link together different parts of its own network (for example, from our cell sites to our switches) and to link its network to the networks of other carriers. Sprint Nextel and other businesses' reliance on special access services, moreover, will only increase as we need more and more capacity between our cell sites and our networks to support the transmission of voice, video, and other data over broadband networks.

Sprint Nextel would very much prefer to have the option of obtaining these dedicated circuits from someone other than the BOCs who, after all, are the parents of our largest competitors Cingular and Verizon Wireless. The reality, however, is that even ten years after passage of the Telecommunications Act of 1996, the competitive availability of special access services, such as DS1 and DS3 services, is woefully limited. In the Boston, Massachusetts metropolitan area, for example, Sprint Nextel provides service to its subscribers through a sophisticated wireless network with more than 1,500 cellular radio towers and five mobile switching offices. To move our traffic from the cell site to our switches, and then ultimately to the public switched telephone network, we purchase dedicated DS1 and DS3 circuits that interconnect the towers and switches, and link our Boston customers to Sprint Nextel's national

and international telecommunications network. Ninety-eight percent of Sprint Nextel's expense for the hundreds of dedicated circuits Sprint Nextel uses in the Boston area is paid to Verizon.

Several other critical markets tell the same story. In Portland, Maine, Sprint Nextel has over 100 cell sites, one mobile switching center and approximately 150 special access pipes connecting those network components. *One hundred percent* of those special access circuits are purchased from Verizon. In Miami, there appears to be a little more competition with 88 percent of Sprint Nextel's expense for 2,800 special access pipes, connecting over 1,200 cell sites to four mobile switching centers, paid to BellSouth. In Richmond, Virginia, our network of over 400 cell sites and one mobile switching center is connected by approximately 900 special access connections, with 85 percent of the cost of those connections going to Verizon. The Charleston, South Carolina, network is reliant on Bellsouth for 86 percent of its special access, and in San Francisco, we purchase 98 percent of our special access from AT&T to connect our 2,000-plus cell sites to six mobile switching centers.

To provide just one more example that demonstrates the monopoly market Sprint Nextel and numerous other businesses face for special access services, look to the New York City metropolitan area—an area generally regarded as one of the most competitive areas in the Nation. Prior to its merger with Sprint, Nextel made a concerted effort to reduce its dependence on Verizon special access service, and it failed utterly. When Nextel sought bids for special access services in the New York metropolitan area, competitors bid to serve fewer *than 3 percent of the required locations* in one of the most competitive geographic markets in the Nation. On a nationwide basis, according to an FCC report, wholesale revenues from the sale of special access by the BOCs and other incumbent local exchange carriers to Sprint Nextel and other carriers amounted to $10.5 billion, while the wholesale revenues generated by competing providers amounted to $664 million.[1]

Sprint Nextel is also heavily reliant on the BOCs' special access services to serve *wireline* large business customers with sophisticated telecommunications requirements, especially high-capacity data networks. Although many of these customers are located in and around the center of urban areas, Sprint Nextel nonetheless has had very limited success in securing service from competing providers of dedicated circuits, especially in the wake of the BOC acquisitions of AT&T and MCI last year, the two companies that had been the leading competitive providers of special access service. In Boston, for example, Sprint Nextel currently obtains 90 percent of the special access it needs to reach large business customers through Verizon. In Portland, Maine, and Miami, Florida, Sprint Nextel's special access for wireline service is obtained from the BOC 98 percent and 91 percent of the time, respectively. In Richmond, Charleston, and San Francisco, those numbers for Sprint Nextel's special access services are 81 percent, 86 percent, and 87 percent, respectively. All of these markets are overwhelmingly dominated by the BOC.

Sprint Nextel is not the only company captive to the BOCs' special access market dominance.[2] Other companies—including, notably, AT&T and MCI prior to their absorption into the Nation's two largest BOCs—have demonstrated repeatedly that there is a special access market failure. In 2004, MCI (now Verizon) informed the FCC that "[t]he ILECs' market power over the market for DS1 and DS3 facilities, coupled with the Commission's decision largely to deregulate the pricing of those facilities, has resulted in prices that are far in excess of cost. The result is that special access has become the ILECs' most profitable line of business,"[3] Pre-BOC merger AT&T similarly argued for correction of the special access market failure by promoting the very action that many of us have asked be included in your bill. That is, AT&T recognized the need for "reimposing an annual productivity offset (X-Factor) . . . [to] ensure that ratepayers share in the benefits of special access produc-

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[1] See the Federal Communications Commission, 2004 Telecommunications Industry Revenues, released March 2006, at Table 5.

[2] Other carriers appear to have been similarly unsuccessful in obtaining competitively provided dedicated circuits. (*See* AT&T Reply Comments, RM–10593 at 12–16 (Jan. 23, 2003); Ad Hoc Telecommunications Users Committee Reply Comments, WC Docket No. 05–65, Attachment A, ETI Report at pp. 16–22 (May 10, 2005).) In addition, Ad Hoc's analysis shows that intermodal technologies do not offer competitive alternatives to high- speed special access services. Declaration of Susan M. Gately, attached to Ad Hoc Telecommunications Users Committee Reply Comments, at ¶¶ 19–25. In fact, it appears to be undisputed that competitive alternatives are available only at a "tiny percentage" of commercial buildings. AT&T Reply at p. 13 (stating that the BOCs do not dispute the conclusion that competitive alternatives are available only in a small number of buildings).

[3] MCI Comments, WC Docket 04–313, at p. 156 (Oct. 4, 2004).

tivity gains, as the Commission originally intended."[4] Finally, the Ad Hoc Telecommunications Users Committee, an organization of major U.S. businesses, also has filed data with the FCC showing that the BOCs, in 2005, remained the sole source of dedicated access at roughly 98 percent of all business premises nationwide, even for the largest corporate users.[5]

Will competition develop and correct this market failure? Unfortunately, that is not likely. As the FCC itself has noted, the competitive deployment of stand-alone DS1 circuits connecting two points—for just one carrier's traffic—is rarely if ever an economic possibility.[6] Competitive carriers simply cannot establish a business case to lay a DS1 circuit out to a Sprint Nextel cell site, given the high- fixed, sunk costs incurred to construct that circuit. Prior to its merger with SBC, AT&T echoed this predicament, stating that it and other special access purchasers "generally have no alternative suppliers for the bread and butter DS-level services."[7] Thus, for carriers like Sprint Nextel that rely heavily on those circuits, the prospects for obtaining service from competing providers are practically non-existent. In the case of wireless carriers in particular, the possibility of a competitive market for these circuits is even more doubtful, because, for zoning and other reasons, cell sites frequently are located in out-of-the way locations, such as along roadsides or atop surrounding hills. In the Boston metropolitan area, for example, 75 percent of Sprint Nextel's cellular radio towers are located outside of the core urban area, in the areas least likely to attract competitive offerings. Furthermore, alternative technologies, such as fixed wireless or a cable-provided circuit, rarely meet Sprint Nextel's service requirements.[8]

Despite the lack of competition for special access, even in places like metropolitan New York, the FCC deregulated the rates for these last mile special access circuits in many metropolitan areas around the country.

The result of deregulation in the face of a market failure has been predictable (and, frankly, perfectly rational from the BOC's point of view): astounding rates of return and, as a result, harm to the promise of wireless, mobile broadband. Premerger MCI noted to the FCC that between 1996 and 2003, the BOCs, "as a group enjoyed an almost six-fold increase in the rate-of-return for interstate special access (from 7.6 percent to 43.7 percent), with three BOCs reaping returns in excess of 60 percent in 2003."[9] The most recent data that the BOCs themselves have filed with the FCC show that they have continued to earn exorbitant profits from special access. For example, just last year AT&T/SBC earned a rate-of-return of 92 percent on its special access services; BellSouth earned nearly 98 percent.[10] Even Verizon, which historically has lagged behind the other BOCs, reported a return of 42 percent.[11]

These returns are not a one-year aberration—special access rates of return (or, their after-tax profits) have grown steadily over the past five years. Indeed, SBC's rate-of-return rose by more than 120 percent from 2001 to 2005, and the rates of return for the rest of the BOCs increased by more than 167 percent for BellSouth and 175 percent for Verizon.[12] Moreover, one study has suggested that even these astronomical returns may understate the BOCs' earnings; the costs of other services may have been misallocated to the special access category, thereby overstating the BOCs' special access costs and understating their rates of return.[13] These high BOC

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[4] AT&T Comments, WC Docket 05–25, at p. 5 (June 13, 2005).

[5] Ad Hoc Telecommunications Users Committee Reply Comments, Attachment B, Declaration of Susan M. Gately, ¶ 18 (May 10, 2005).

[6] Such circuits require high-fixed, sunk costs to serve an individual customer location. No firm can match the scale economies that the BOCs enjoy in furnishing DS1 special access service, since they alone had the opportunity to construct a ubiquitous local network over a period of decades, while protected against competition. *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04–313, CC Docket No. 01–338, Order on Remand, at ¶ 166 (rel. Feb. 4, 2005).

[7] AT&T Reply Comments, RM–10593 at 11 (Jan. 23, 2003) (emphasis in original).

[8] *See, e.g.,* Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets at pp. 22–24 (ETI Aug. 2004) (*"ETI Report"*), attached to *Ex Parte* Letter from Colleen Boothby, counsel for Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, FCC, RM No. 10593 (Aug. 26, 2004).

[9] MCI Comments, WC Docket 04–313, at p. 157–58 (Oct. 4, 2004).

[10] These returns are computed from data the BOCs filed with the FCC in their annual ARMIS 43–01 reports.

[11] *Id.*

[12] *Id.*

[13] *See ETI Report* at 33–34 (noting that the net investment allocated to the special access category is "completely disproportionate" to the number of special access loops as a percentage of loops in service, raising "suspicions that costs are being *over-allocated* to the special access category.") (emphasis in the original); Gately Declaration ¶ 12.

returns are evidence of a market failure: the lack of competition for special access has allowed the BOCs to charge exorbitant prices without restraint.

Without effective rules or meaningful competition, the BOCs' special access earnings are likely to grow at an even faster pace in the future—a future in which special access will become even more critical to the telecom marketplace as more and more capacity will be required to support the burgeoning broadband marketplace that this committee is committed to encouraging.

It is noteworthy that the largest providers of special access services are also the parents of our wireless competitors. These integrated firms, therefore, have the incentive and ability to raise the special access costs of, and thereby disadvantage, Sprint Nextel and other competing providers of retail wireline and wireless services.

What is the solution to the special access market failure and rate gouging? Congress needs to mandate that the FCC rollback its premature deregulation of special access services, and implement the pricing discipline that the marketplace has failed to provide. Let me be clear: failure to do so will thwart broadband deployment and competition.

The CHAIRMAN. Thank you very much.

There is a vote on. And, as a matter of fact, it's almost over. We—if you don't object, we'd prefer to ask you to respond to written questions that Members may submit to you pertaining to your testimony. And try to respond, if you can, in a week.

The CHAIRMAN. This completes 29 hearings now, six listening sessions. We had three full legislative sessions like this on specific drafts. I think we're now ready to start working on the final draft, and we will have an announcement soon of the markup date. We are going to change the markup date, and postpone it, I think, a few days, but we will go into markup soon.

We do thank you. This is not your first time, for many of you, to come and give us your views. We do review these views, and we thank you very much for them. I thank you for your cooperation and your contributions. Thank you very much, gentlemen.

[Whereupon, at 12:35 p.m., the hearing was adjourned.]

A P P E N D I X

USTELECOM
Washington, DC, June 15, 2006

Hon. TED STEVENS,
Chairman,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Mr. Chairman:

Thank you again for the opportunity to provide the views of USTelecom's 1,200 members at yesterday's hearing. S. 2686 is a significant step forward in delivering video choice to consumers, and fulfilling your commitment to stabilizing the future of Universal Service.JLW

This letter and the accompanying Discussion Paper respond to questions about special access competition arising from yesterday's hearing. At the hearing, Robert Foosaner, Senior Vice President of Government Affairs for Sprint Nextel Corporation devoted his testimony to calling for dramatic re-regulation of the special access services [1] offered by incumbent local exchange carriers (ILECs). One would not know from the Sprint Nextel testimony that only two years ago the United States Court of Appeals for the District of Columbia Circuit found that "wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic," [2] and the Federal Communications Commission (FCC) thereafter declined to order unbundling of special access circuits for wireless carriers. Now, despite the findings of the D.C. Circuit and the FCC, Sprint Nextel is asking Congress to force ILECs to subsidize the construction of its wireless networks rather than making the investment itself.

The staff working draft released May 24, 2006, by the Committee's minority staff would go even further by extending special access regulation to all ILEC broadband services, and entangling the United States Congress in setting specific prices for special access services. This proposal, like Sprint Nextel's appeal for regulation, is completely unnecessary because: (1) special access markets are competitive today; (2) special access customers, particularly large telecommunications carriers, are capable of deploying their own circuits; and (3) the FCC still has the responsibility and all the tools it needs to ensure that special access rates are just and reasonable. Moreover, the proposed re-regulation of ILEC special access services, and extension of this regulation to broadband services would thwart competition, innovation, investment, and network deployment.

Should you or any Members of the Committee, or its staff, wish to discuss these important matters further, we stand ready to respond. Once again, Mr. Chairman, we thank you for your efforts to promote video competition and a sustainable Universal Service program.

Sincerely,

WALTER B. MCCORMICK, JR.
President/CEO.

ATTACHMENT—USTELECOM DISCUSSION PAPER ON SPECIAL ACCESS

I. Special Access Markets Are Competitive, With Many Alternative Providers

Sprint Nextel and Minority Staff Would Substantially Reverse Many Decisions by the FCC—the Expert Agency—Determining that Special Access Markets are Competitive. The Federal Communications Commission (FCC) has jurisdiction over special access services. Over the past two decades, the FCC has followed a policy of remov-

[1] Special access services are high-capacity telecommunications circuits dedicated to individual customers (usually telecommunications service providers or large businesses) to deliver large volumes of traffic between two points in a network.

[2] *United States Telecom Assoc.* v. *FCC,* 359 F.3d 554, 575 (D.C. Cir. 2004) (*USTA II*).

ing barriers to entry, allowing competition to develop and flourish, and deregulating ILEC special access services. In particular, the Commission established a framework for granting ILECs special access pricing flexibility when there is strong evidence of competition in the relevant geographic area.[3] Based on these criteria, which were specifically affirmed by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit),[4] ILECs have made the requisite competitive showings and obtained pricing flexibility in much of the country. Sprint Nextel and minority staff would reverse this pricing flexibility, which is essential for competitive markets to function efficiently.

The FCC has also looked at special access prices in a number of other proceedings over the past decade. Most recently, the FCC evaluated competition in most of our country's special access markets in the *SBC-AT&T* and *Verizon-MCI* merger review proceedings.[5] The FCC determined that only limited merger conditions[6] were warranted to address potential harms to competition in special access markets. Sprint Nextel and minority staff would reverse all of those findings, without any evidence to the contrary.

Special Access Markets Today Exhibit Extensive Competition. There are many competitors in special access markets today, particularly fiber-based competitors (an average of 19 competitive networks in each of the top 50 MSAs) providing high-capacity circuits purchased by telecommunications carriers and large business customers.[7] Moreover, these entrants are winning many contracts and establishing meaningful and growing market shares. In addition to actual competition evidenced by market offerings, the record in other recent proceedings shows great amounts of collocation, and other entry and investment.[8] This is not surprising because special access demand is highly concentrated in relatively few geographical locations—most special access circuits are sold in areas where large businesses are located, such as urban areas. This concentration of demand allows for greater ease of entry and exit.

Special access competition is occurring throughout the country via traditional wireline alternatives and intermodal competitors, and, increasingly, most special access customers are able to choose from among several providers' offerings when entering into new contracts or buying new circuits out of tariffs. Moreover, both competitors and customers often are able to build, and many routinely do build, their own special access circuits. These competitors can serve many other customers in each area where they have deployed networks, once presented with requests for service. Therefore, the relevant area in which competitors discipline market prices is far greater than the individual routes on which they have won customers and installed circuits.

In many ways, it is easier to enter and compete in special access markets than in many other telecommunications markets. In particular, demand for special access services is highly concentrated,[9] as the FCC has recognized many times.[10] This makes special access markets more competitive than many other telecommunications markets, as competitors do not require as substantial scale and scope economies in order to compete effectively.

Increased competition has led to substantial changes in special access markets. Special access prices increasingly are responsive to competition, actual cost of service, and customer preference, rather than being set at average prices for the whole market. For example, USTelecom members offer substantial volume and term dis-

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[3] *Access Charge Reform,* CC Docket No. 96–262, Fifth Report & Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) *(Pricing Flexibility Order).* The FCC's pricing flexibility triggers are based on competitive collocation within metropolitan statistical areas (MSAs).

[4] *WorldCom* v. *FCC,* 238 F.3d 441 (D.C. Cir. 2001).

[5] *SBC Communications, Inc. and AT&T Corp. Applications for Transfer of Control,* WC Docket 05–65, Memorandum Opinion and Order, 20 FCC Rcd 18,290 (2005); *Verizon Communications, Inc. and MCI, Inc. Applications for Transfer of Control,* WC Docket 05–75, Memorandum Opinion and Order, 20 FCC Rcd 18,433 (2005).

[6] The principal FCC merger conditions related to special access are (1) a 30-month rate freeze for existing customers, and (2) somewhat greater availability of unbundled network elements (UNEs). *Id.*

[7] *See, e.g.,* Letter dated October 4, 2004 from Evan T. Leo, Counsel for BellSouth Corporation, SBC Communications, Inc., Qwest Communications International, Inc., & the Verizon telephone companies, to Marlene Dortch, Secretary of the Federal Communications Commission, submitting UNE Fact Report 2004, *Unbundled Access to Network Elements,* WC Docket No. 04–313 (October 2004) (*UNE Fact Report*).

[8] *Id.*

[9] Concentrated demand means that the market is characterized by relatively few buyers who purchase substantial network capacity, particularly within narrow geographic areas.

[10] *E.g., Pricing Flexibility Order,* 14 FCC Rcd at 14,276 ¶ 97; *Access Charge Reform,* CC Docket No. 96–262, First Report & Order, 12 FCC Rcd 15,982 (1997).

counts and, where permitted by FCC pricing flexibility rules, they use contract tariffs to reach commercial arrangements to suit customers' individualized needs.

II. There is No Credible Evidence That Special Access Prices Are Unreasonable

Regulatory Accounting Cannot Be Used To Measure Rates Of Return On Individual Services. Sprint Nextel points to data filed in the Automated Reporting Management Information System (ARMIS) to claim that ILEC special access prices are unreasonably high. ARMIS was created, however, to provide a generalized overview of the industry before price cap regulation, not to measure service-specific rates of return under price cap regulation. For this reason, the FCC has repeatedly recognized that these ARMIS rates of return cannot be used to evaluate rates and "do not serve a rate-making purpose."[11]

The Same ARMIS Data Shows Implausible Switched Access Losses Over the Same Time Period. When one looks at ARMIS data more closely, it becomes apparent that it offers no meaningful data about special access profits. During the same time, and in the same places, where ILECs are alleged to have made excessive special access margins, ARMIS also shows switched access margin declines and even losses. This is an improbable result, and the only natural interpretation of these two events is that ARMIS is not accurately assigning costs to the various services provided over the network, particularly after the separations freeze. This conclusion is bolstered by the fact that ARMIS data shows negative costs for some special access service elements, which is economically impossible.[12]

Market Performance is Good. Even as reported in ARMIS, special access prices taken together measured as revenue per line have declined significantly over the past five years.[13] This is even more impressive when considered together with the fact that special access demand has increased substantially over the same time period, which generally puts upward pressure on prices. These declines have been greater than would have been mandated under the productivity factor calculation required by the minority staff draft. Moreover, competitors offer similar prices and terms, and there do not appear to be any clear distinctions between prices in markets that have multiple competitors and those with fewer competitors. This is particularly significant for one would expect to see lower prices in markets with multiple competitors if Sprint Nextel and the minority staff were right about their claim that special access markets are not competitive, and that prices are not just and reasonable.

In reality, therefore, prices are declining more rapidly than prescribed by regulation; supply and demand are increasing rapidly; competitors offer similar prices and terms; there do not appear to be clear distinctions between prices in markets that have multiple competitors and those with fewer competitors; and customers are increasingly putting special access services to new and different uses.

III. Special Access Customers, Particularly Wireless Carriers, Could and Should Build Their Own Network Circuits If Prices Were Unreasonable

Special Access Customers Can Build Their Own Circuits. Special access circuits are generally sold to large, well-financed, facilities-based telecommunications providers. These customers can, and do, build their own network connections. This provides a formidable check on special access prices—if prices are too high, then the customers will buy from competitors or deploy their own facilities.

The D.C. Circuit Court of Appeals Determined that Wireless Carriers Are Not Impaired in Their Ability to Compete When Buying Special Access Services. Wireless carriers, such as Sprint Nextel, are not impaired in their ability to compete by their purchases of special access services. Indeed, the D.C. Circuit noted:

> that wireless providers have traditionally purchased such access from ILECs at wholesale rates (a transaction classified, since adoption of the Act, under *§ 251(c)(4)*). And the data above clearly show that wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic. Indeed, the multi-million dollar sums that the Commission regularly collects in its auctions of such spectrum, see, e.g., *576 **224 *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Seventh Re-*

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[11] *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket 87–313, Order on Reconsideration, 6 FCC Rcd 2,637 ¶ 194 (1991).

[12] *See* USTelecom Reply Comments, *Special Access Rates for Incumbent Local Exchange Carriers,* WC Docket 05–25 (filed Jul. 29, 2005).

[13] Declaration of Alfred E. Kahn and William E. Taylor, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM–10593 (filed Dec. 2004).

port, FCC 02–179 (July 3, 2002), Table 1B, and that firms pay to buy already-issued licenses, see, e.g., *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Eighth Report, FCC 03–150 (July 14, 2003),* ¶¶42–44, seem to indicate that wireless firms currently expect that net revenues will, by a large margin, more than recover all their non-spectrum costs (including return on capital).[14]

On remand, the FCC analyzed whether wireless carriers needed access to discounted (below cost in many cases) unbundled network elements, including the dedicated transport links that are currently offered as special access circuits. The FCC concluded that they do not need such access.[15] Indeed, the FCC found that wireless carriers are competing vigorously, growing rapidly, winning customers from ILECs and CLECs, and generating impressive cash flows.[16] Now, Sprint Nextel is here before the Senate Commerce Committee asking for unprecedented regulatory intervention from Congress that, in effect, would give it the discounted network facilities that the D.C. Circuit and FCC decided it does not need. In sum, wireless carriers do very well today using special access circuits, and there is no reason to believe that they need legislative intervention to give them cheaper network facilities.

Wireless Companies, in Particular, Should Build Their Own Circuits If They Feel that ILECs Are Charging Too Much. Not only are wireless carriers thriving with current special access prices, but they are entirely capable of building such circuits themselves. In fact, there is little reason to think that wireless carriers would be substantially less efficient than ILECs at building components of the wireless carriers' own networks. In particular, wireless companies have been experiencing rapid growth, and they have impressive cash flows. They also have ample telecommunications network expertise. In fact, wireless companies are uniquely able to determine the appropriate cost for the special access circuits they purchase rather than build because they are the sole customers at their tower sites. If wireless carriers were being charged too much, they would build their own circuits. This approach is consistent with Congressional policy favoring facilities-based competition rather than imposing outdated price regulation.

IV. There Is No Need for Special Access Legislation In Any Event as the FCC Closely Scrutinizes Special Access Markets and Applies Any Regulation It Deems Necessary

The FCC Regulates Special Access Today Where There Isn't Competition. Under FCC rules, special access pricing flexibility is only granted where there is competition. In the *Pricing Flexibility Order,* the FCC established competitive triggers for ILEC pricing flexibility. If those triggers have not been met, ILEC special access services remain subject to the FCC's full range of price regulation. The triggers measure the development of facilities-based competition, specifically collocation arrangements, and pricing flexibility is available in two phases depending on the development of competition.

> Phase I Relief: ILECs can begin offering contract tariffs and volume and term discounts, and they may file new tariffs on one-day's notice, where "competitors have made irreversible investments in the facilities needed to provide the services at issue, thus discouraging incumbent LECs from successfully pursuing exclusionary strategies."[17]
>
> Phase II Relief: ILECs may offer services outside of price cap regulation, although they must still file generally available tariffs and remain subject to FCC enforcement actions for anticompetitive behavior. Phase II relief is available where "competitors have established a significant market presence in the provision of the services at issue."[18] To the extent customers feel aggrieved by special access contract conditions, therefore, they may file complaints at the FCC.

Under these rules, special access customers either have reasonably-available competitive alternatives, or they continue to receive services at regulated, "just and reasonable" prices. There simply is no substance to an allegation that special access customers lack alternatives and must pay unreasonable rates.[19]

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[14] *USTA II,* 359 F.3d, at 575–76.

[15] *Unbundled Access to Network Elements,* WC Docket 04–313, Order on Remand, 20 FCC Rcd 2533, 2553 ¶36 (2005) (TRRO).

[16] *Id.* at fn. 106.

[17] *Pricing Flexibility Order,* 14 FCC Rcd at 14,258 ¶69.

[18] *Id.*

[19] In the case of a wireless carrier, it may often be the case that there is only one wire going to any given cell tower because a competitor is not going to build a second circuit without first winning a contract that will pay for the construction. This does not mean that the wireless pro-

The FCC Is Looking at Its Rules in an Open Proceeding. New special access legislation is unnecessary for the additional reason that the FCC is considering special access prices and market performance in an active rulemaking proceeding.[20] Legislation would not give the FCC any new authority; instead it would prevent the FCC from acting in response to the full record that is developing at the agency in the open rulemaking proceeding.

V. The Minority Staff Draft, If Enacted, Would Be Even More Harmful Because It Would Extend Special Access Regulation to Broadband and Have Congress Set Prices

The Minority Staff Draft Would Impose Harsh Price Regulation on ILEC Broadband Services. The minority staff draft defines special access so as to include ILEC broadband services (which must be offered on a stand-alone basis). This would subject ILEC broadband (*e.g.,* DSL, FiOS, Lightspeed, etc.) services to rate regulation despite the fact that they face vigorous competition. Competing broadband services would not be regulated, however, creating regulatory asymmetry and harming competition by favoring one technology and class of providers over another. Price regulation of ILEC residential broadband services would also be illogical because competing cable modem services often have much larger market shares, yet they would remain free from price regulation.

The Minority Staff Draft Would Have Congress Micro-Manage Prices. Congress rarely (if ever) sets specific prices because that is something for which agencies are better suited, yet the minority staff draft would establish specific prices (based on June 2004 prices) without regard to actual market conditions (very competitive). Specifically, Congress would be establishing separate rates for AT&T and Verizon, on the one hand, and all other ILECs, on the other hand. AT&T and Verizon would be required to reduce their prices if they have not already done so (because of competition) to the levels at which they would be if the FCC had imposed a productivity factor for the past two years (since June 2004), and they would be further required to reduce prices in the future by an estimate of their improved productivity. Moreover, all ILECs would be prevented from raising prices other than inflation adjustments. Finally, the minority staff draft would set future special access prices in a vacuum, without considering how shortfalls in special access revenue may force ILECs to seek increased Universal Service funding (USF), which would further destabilize that vital program. In all of these ways, the Minority Staff Draft would be dragging Congress into the details of common carrier rate regulation for the first time, which seems unwise.

SPRINT NEXTEL
Reston, VA, June 20, 2006

Hon. DANIEL K. INOUYE,
Co-Chairman,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Senator Inouye:

Thank you for the opportunity to testify on June 13, 2006, before the Senate Committee on Commerce, Science, and Transportation. Sprint Nextel continues to believe that to spur innovation, encourage competition, and provide better service for consumers, special access needs to be addressed in legislation.

USTelecom was critical of my testimony on special access. Please find a rebuttal to USTelecom's claims, and I respectfully request you put the attached in the record.

Sincerely,

ROBERT S. FOOSANER,
Senior Vice President, Government Affairs and Chief Regulatory Officer.

Sprint Nextel Response to USTA Letter—June 16, 2006

USTA argues (at 1) that "the United States Court of Appeals for the District of Columbia found that 'wireless carriers' reliance on special access has not posed a barrier that makes entry uneconomic' and the Federal Communications Commission

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vider lacks for competitive alternatives. To the contrary, this is precisely how a competitive market works when the service at issue is tailor-made for a specific customer, particularly where it involves a substantial sunk-cost investment.

[20] *Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05–25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).

(FCC) thereafter declined to order the unbundling of special access circuits for wireless carriers."

- The quoted language was taken from a paragraph in the D.C. Circuit's decision in which the court clearly was setting forth the ILECs' arguments, and in no way can be considered a "finding" of the court.
- In light of the D.C. Circuit's decision, the FCC declined to order the unbundling of UNEs "to provide service in the mobile wireless services market and the long distance services market," 20 FCC Rcd 2533, 2555 (2005), in part because "competition" in these markets "has evolved without access to UNEs" *Id.* at 2554. The "unbundling of special access circuits for wireless carriers" was not at issue in the FCC's decision and indeed makes no sense since special access are dedicated circuits provided on an "unbundled" basis. In fact, relying on UNEs to rebut arguments concerning special access are nothing more than red herrings because UNEs have long been off-limits to wireless carriers. USTA is throwing apples at a problem involving oranges.

  Stated differently, special access is not a leased component of the BOC network—*i.e.,* it is not a UNE; it is a service sold by the BOC. Moreover, the rates for special access are not subject to UNE rules or pricing at economic costs. Indeed, unlike UNEs, special access prices are not subject to pricing rules set by the FCC and utilized by the states in setting rates. Rather, special access is purchased under take it or leave it contracts that are virtually unregulated in most parts of the country. Sprint Nextel and other carriers are not asking Congress for the UNE economic cost-based rates. We want only to pay rates that would exist if the market were genuinely competitive.
- For these reasons, USTA's UNE arguments fall of their own weight, and demonstrate, by way of comparison, the intellectual bankruptcy of USTA's challenge to special access legislation.

USTA claims that the FCC's criteria to determine whether to grant special access pricing flexibility "were specifically affirmed by the [D.C. Circuit]."

- The court did not affirm the FCC's criteria themselves. The court instead affirmed the FCC's decision based on the "deferential standard" under which the court presumes that the agency action is valid. *Id.* at 457. The court noted that the FCC is acknowledged to have expertise in ratemaking matters and it is not the court's role to "second guess the FCC's policy judgment as long as it comports with established standards of administrative practice." *Id.* at 458. In short, the court did not "endorse" the criteria used by the FCC.

USTA argues that Sprint's reliance on ARMIS data to demonstrate that RBOCs are earning extraordinary rates of return on special access services is inapposite since "ARMIS was created . . . to provide a generalized overview of the industry before price cap regulation, not to measure service-specific rates of return under price cap regulation." In fact USTA states that "the FCC repeatedly has recognized that these ARMIS rates of returns cannot be used to evaluate rates and 'do not serve a rate making purpose'" citing 6 FCC Rcd 2937 ¶ 197 (1991).

- The language quoted from the FCC's decision cannot be found in ¶ 197. Rather it appears in ¶ 199 and in footnote (279). That language appears in a paragraph where the FCC was rejecting the argument by the LECs that ARMIS reporting amounted to "double regulation." The FCC at ¶¶ 198–199 discussed the importance of ARMIS data to a "performance review" of price cap regulation and to "the implementation of the sharing and adjustment mechanisms" adopted under price cap regulation.[1]
- Of equal, if not more, importance, USTA's argument that ARMIS cannot be used for ratemaking is a diversion and misses the point entirely. Even if ARMIS data are not used for ratemaking purposes, the fact is that such data show that the BOCs are earning extraordinary rates of return in their provision of special access. Such returns would not be possible if the special access market was truly competitive. USTA's letter and attachment completely ignore this fact. Indeed, if as USTA suggests the rates of return for special access reported by the BOCs to the FCC in their ARMIS filings are inaccurate, USTA should have sup-

[1] These mechanisms were adopted "[i]n recognition of the difficulty of determining a single, industry-wide productivity offset that will be accurate for all LECs" and enables the Commission to adjust rates in the event of unanticipated errors in the price cap formula." *Id.* at ¶ 86. Under sharing, the LECs earning above the prescribed industry rate-of-return must share their profits with customers in the form of price decreases. The adjustment mechanism allows for correcting of unusually low earnings. *Id.*

plied the rates of return the BOCs are actually earning from their provision of special access. That USTA does not, speaks volumes.[2]

USTA argues that the market for special access is robustly competitive, and that prices for special access "increasingly are responsive to competition."

- USTA fails to support its argument here with any data presumably because the data simply do not support its claims. Twenty two years after divestiture, and ten years after the Telecom Act of 1996, the BOCs retain effective control over special access. In the BOC service territories, 95 percent of large business locations are served only by the BOCs; and 99 percent of Sprint Nextel cell sites are served only by the BOC. Moreover, the BOCs are usually the *only* provider of special access in non-urban areas.
- USTA is correct that the competitive providers are highly concentrated. Such providers are located in certain core urban areas, and their offerings often are limited to a few city blocks. For most other areas, Sprint Nextel has no other option than the BOCs.
- Sprint also agrees with USTA that prices for special access services being demanded by the BOCs are reflective of the state of competition, and the pricing flexibility the BOCs have received from the FCC. But the data do not support what USTA would have the Committee Members, and their staffs, believe. As data submitted in the Commission's long-stalled Special Access Rulemaking proceeding demonstrates, BOC special access prices in areas in which they have been granted pricing flexibility—because those areas are allegedly competitive—are higher than the rates in areas that remain regulated. Basic economic teachings would suggest the opposite result. Competitive markets pressure entities to constantly look for ways to reduce their costs in order to maintain, or even gain market share, since market shares of inefficient carriers are subject to attack by more efficient competitors. If the special access market were competitive, the BOCs prices would have been falling in line with their cost reductions.
- In all events, and as stated, the rates of return being realized by the BOCs in their provision of special access are simply not sustainable in a competitive market.

USTA cites the FCC's decisions granting SBC's acquisition of AT&T and Verizon's acquisition of MCI, as further "proof" that the FCC regards the special access market as competitive. It points out that the FCC found that only "limited merger conditions were warranted to address potential harms to competition in special access markets."

- One of these "limited conditions" imposed by the Commission was a 30-month freeze on special access rates to be charged by the merged entities in their territories. If the special access market were as competitive as USTA says it is, the merged entities would not be able to raise their rivals' costs by increasing special access rates. That the FCC found it necessary to insist upon such a freeze provides additional evidence, as if more were needed, that the market for special access services in BOC territories is simply not competitive.

USTA argues that "special access prices taken together measured as revenue per line have declined significantly over the past five decades."

- The revenues per line measurement—and presumably the "line" is a DS1 equivalent—being touted by USTA again demonstrates the weakness of USTA's argument. USTA is not saying that actual prices of the actual pipes being purchased have declined. In fact, USTA simply cannot make that claim. Carriers need for bandwidth has been increasing over time, and, as such, they have been switching to higher bandwidth special access services, such as DS3 and OCn. These services are both multiples of DS1s. For example, a DS3 is equal to 28 DS1. Thus, by spreading the revenues received for a DS–3 pipe across 28 DS1 lines, USTA can provide the illusion of rate decline when the price of the DS3 pipe has actually increased. The only way to get an accurate picture of the BOCs

[2] If USTA believes that ARMIS does not accurately measure the rates of return they are earning on their special access services, it should seek to have its member BOCs provide data showing their rates of return for this service. However, if the past behavior is any guide, the BOCs will be reluctant to reveal such information. In the Notice of Proposed Rulemaking in the Special Access Rulemaking, the FCC invited parties to "comment on the relevance of [ARMIS] data . . ." To the extent that parties questioned ARMIS data, they were invited to comment on whether accounting rates of return were "meaningful statistics for evaluating the reasonableness of price cap rates" and "what factors may affect the relevance of ARMIS data." The RBOCs did not supply special studies.

special access prices is to examine the prices for each capacity type being offered individually, *e.g.,* DS1s, DS3s OCns, and not as USTA has done to added the prices for the various types of capacity together and divide that number by the total capacity measured in DS1 equivalents.

USTA accuses Sprint Nextel of "asking Congress to force ILECs to subsidize the construction of its wireless networks rather than making the investment itself."

- The only thing that Sprint Nextel is seeking is to pay for special access services at levels that would exist if the special access market was competitive. In such a market, no entity would be able to realize the exorbitant rates of return being achieved by the BOCs.
- Of course, if the BOCs were "forced" to charge competitive rates for special access, they would lose the "monopoly rents" for such services that they have been receiving, and that they, presumably, have been using to subsidize their broadband expansion. Loss of such subsidy from their competitors would necessarily "force" the BOCs to self-finance their broadband expansion. But this is what firms in truly competitive industries have to do. Such firms have no market power to exploit, so they cannot charge above cost prices for their products and services. Thus, Sprint Nextel is "making the investment itself" in a wireless broadband network; unlike the BOCs it cannot rely on monopoly rents to pay for such network.

TROPOS NETWORKS
Sunnyvale, CA, June 13, 2006

Hon. TED STEVENS,
Chairman,

Hon. DANIEL K. INOUYE,
Co-Chairman,

Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Mr. Chairman and Mr. Co-Chairman:

We write to express our appreciation for your recognition of the importance of community broadband networks in the Communications, Consumers' Choice, and Broadband Deployment Act of 2006. As the proven leader in delivering ubiquitous, metro-scale WiFi mesh network systems throughout the world, Tropos appreciates the opportunity to submit this letter for the hearing record in support of the Community Broadband Act, as proposed in Title V of the staff discussion draft circulated on June 9, 2006. In addition, we support your efforts to free up unlicensed "white spaces" spectrum for use by wireless community broadband networks.

Community broadband networks offer the promise of increased economic development and jobs, enhanced market competition, improved delivery of e-government services, and accelerated universal, affordable Internet access for all Americans. Moreover, these networks will help promote our homeland security. In the wake of Hurricanes Katrina, Rita, and Wilma, new technologies demonstrated the resiliency and reliability of communications systems that can be used by police, fire, and EMS departments every day. In the future, these locally deployed technologies can help first responders, volunteers, and local governments react quickly to disasters, particularly when old ways of communicating no longer work.

Nothing better illustrates how these public-private partnerships can serve America than the decision by the City of New Orleans to construct a wireless mesh network "cloud" available to the public. This network is helping bring back businesses, residents, students, and tourists. It will improve public safety and access to needed public services and information. And perhaps most importantly, it shows the world the "can do" spirit of America. Hurricane Katrina may have washed away the old copper lines and coax cables, but the City of New Orleans is now embarked on an effort to rebuild itself stronger than before.

Beyond New Orleans, communities across America are ready and eager to bring the economic and social benefits of broadband access to their citizens. Today, over 300 cities have chosen to build competitive broadband access networks, and hundreds more are now in the planning stages. They should be encouraged to move forward, and should have the freedom to choose what makes the most sense for their citizens. The revised staff draft will ensure that they can do so.

In closing, we want to thank Senators Lautenberg, McCain, and Ensign and their staffs for working so hard to achieve a compromise that will help promote the roll-out of community broadband networks throughout the country, will encourage pub-

lic-private partnerships, and will give the private sector an opportunity to bid on public projects. By freeing up "white spaces" spectrum for use by wireless community broadband networks, the draft bill will help promote universal access for all Americans.

Sincerely yours,

RON SEGE,
President/Chief Executive Officer.

cc: Hon. Frank Lautenberg, Hon. John McCain, and Hon. John Ensign.

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