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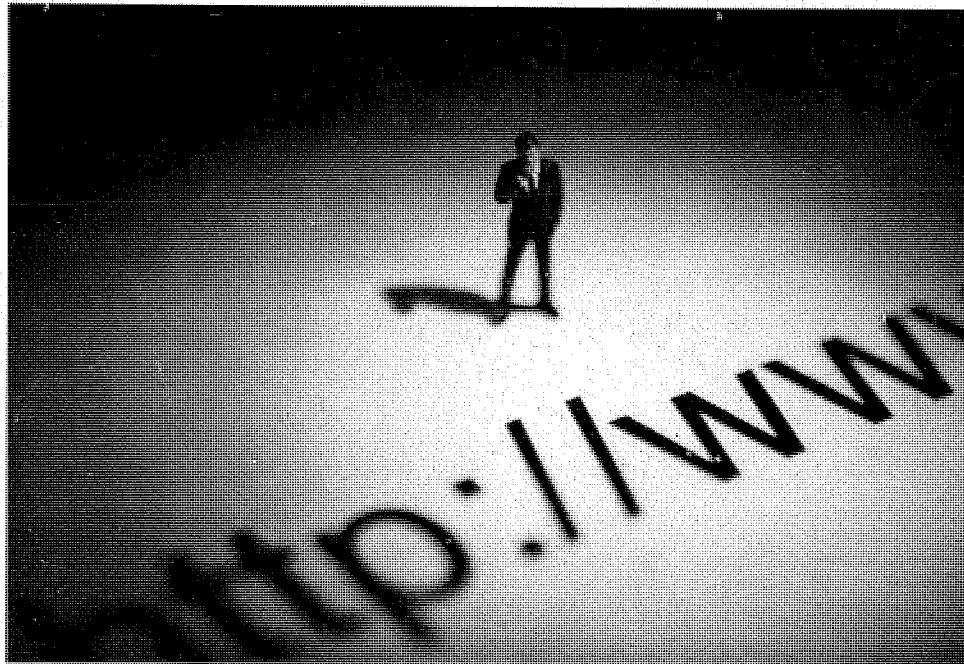
# PUBLIC ADVOCATE OFFICE

## REPORT ON

Resolve, Regarding Full, Fair and  
Nondiscriminatory Access to the Internet

February 15, 2008

Full Report







JOHN ELIAS BALDACCI  
GOVERNOR

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2068

STATE OF MAINE  
EXECUTIVE DEPARTMENT  
PUBLIC ADVOCATE OFFICE  
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AUGUSTA, MAINE  
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RICHARD DAVIES  
PUBLIC ADVOCATE

February 15, 2008

Senator Philip Bartlett II, Senate Chair  
Representative Lawrence Bliss, House Chair  
Joint Standing Committee on Utilities and Energy  
123<sup>rd</sup> Maine Legislature  
100 State House Station  
Augusta, ME 04333-0100

RE: Public Advocate Report on "Resolve, Regarding Full, Fair and  
Nondiscriminatory Access to the Internet"

Dear Senator Bartlett and Representative Bliss:

In compliance with the provisions of Resolves of 2007, Chapter 106, I am pleased to submit the report required in that Resolve.

During the 2007 legislative session the Utilities and Energy Committee considered **LD 1675, "An Act to Protect Network Neutrality"**. After a lengthy public hearing and two work sessions, the committee issued a divided report with a majority of the committee favoring a proposal which replaced the original bill with a Resolve which directed the Office of Public Advocate to take several actions "to monitor and review state and federal activity on issues relating to full, fair and nondiscriminatory access to the Internet". This amended version of LD 1675, now entitled "**Resolve, Regarding Full, Fair and Nondiscriminatory Access to the Internet**", was ultimately passed by the Legislature and signed by the Governor.

The Office of Public Advocate intended to carry out the tasks in the revised version of LD 1675 through a consultant but, because of an unexpected budget problem, had to withdraw the Request for Proposals for a consultant before it was implemented in order to conserve funds to offset the budget problem. As a result of our withdrawal of the RFP, and the fact that the attorneys on the OPA staff who have some familiarity with the issues in LD 1675 were otherwise engaged in the FairPoint/Verizon merger and other ongoing cases, this report has been delayed beyond its due date of February 1, 2008. The committee chairs graciously granted us a one month extension on our reporting date.



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The primary work in preparation of this report has been done by Patty Moody-D'Angelo, our Public Service Manager II and Research Assistant, much of it done on her personal time in order to get this report prepared within the time provided. Her extensive efforts over the past months in preparing this report are deeply appreciated. Please note that the information we collected for this report was voluminous, and reproducing it all in paper form seems wasteful. Except for the reports prepared for the chairs of the committee, which include paper copies of the materials, copies of the report provide information to allow readers to access these materials in electronic form.

Thank you for the opportunity to provide the Committee with this information in response to Resolves, Chapter 106.

Sincerely,



Richard Davies  
Public Advocate

cc: Utilities and Energy Committee  
Lucia Nixon, OPLA  
Kelly Arata, OOG

Kristen Gottlieb, U&E  
Chris Simpson, PUC

## **Report of the Public Advocate pursuant to LD 1675**

### **Introduction**

During the 2007 legislative session the Utilities and Energy Committee considered **LD 1675, “An Act to Protect Network Neutrality”**. After a lengthy public hearing and two work sessions, the committee issued a divided report with a majority of the committee favoring a proposal which replaced the original bill with a Resolve which directed the Office of Public Advocate to take several actions “to monitor and review state and federal activity on issues relating to full, fair and nondiscriminatory access to the Internet”. This amended version of LD 1675, now entitled “**Resolve, Regarding Full, Fair and Nondiscriminatory Access to the Internet**”, was ultimately passed by the Legislature and signed by the Governor.

The Office of Public Advocate had intended to carry out the tasks in the revised version of LD 1675 through a consultant but, because of an unexpected budget problem, had to withdraw the Request for Proposals for a consultant before it was implemented in order to conserve funds to offset the budget problem. As a result of the withdrawal of the RFP, and the fact that the attorneys on the OPA staff who might have some familiarity with the issues in LD 1675 were otherwise engaged in the FairPoint/Verizon merger and other ongoing cases, this report has been delayed beyond its due date of February 1, 2008. The committee chairs have graciously granted us a one month extension on our reporting date.

The primary work in preparation of this report has been done by Patty Moody-D’Angelo, a Public Service Manager II and our Research Assistant, much of it done on her personal time in order to get this report prepared within the time provided. Her efforts in preparing this report are deeply appreciated. Please note that the information we collected for this report was voluminous, and reproducing it all in paper form seems wasteful. Except for the copies prepared for the chairs of the committee, which include paper copies the materials, copies of the report provide information to allow readers to access most of these materials in electronic form.

**Our tasks:**

- 1. Evaluate the actions of the Federal Communications Commission, the United State Congress and other appropriate agencies with respect to ensuring that citizens' rights to full, fair and nondiscriminatory access to the Internet are not impeded.**

**FEDERAL COMMUNICATIONS COMMISSION**

**FCC Order & Consent Decree** - In the Matter of Madison River Communications, LLC and affiliated companies (DA 05-543) - FCC approved a consent decree against Madison River Communications, LLC and Madison River Telephone Company, LLC. In this consent decree, the FCC fined Madison River \$15,000 for allegedly blocking VOIP traffic on the company's ISP network. **(Attachment 1)**

- McCullagh, Declan. "Telco Agrees to Stop Blocking VoIP Calls." (March 3, 2005),  
[http://www.news.com/2102-7352\\_3-5598633.html?tag+st.util.print](http://www.news.com/2102-7352_3-5598633.html?tag+st.util.print)
- Liptak, Adam. "Verizon Blocks Messages of Abortion Rights Groups." (September 27, 2007),  
[http://www.nytimes.com/2007/09/27/us/27verizon.html?\\_r=1&pagewanted=print&oref=slogin](http://www.nytimes.com/2007/09/27/us/27verizon.html?_r=1&pagewanted=print&oref=slogin)
- Svensson, Peter. "Comcast Blocks Some Internet Traffic." (October 19, 2007),  
<http://www.msnbc.msn.com/id/21376597/print/1/displaymode/1098/>
- Marra, William. "Pearl Jam's Anti-Bush Lyrics Jammed by AT&T - Rock Band Upset After 15 Seconds of Lyrics Cut From Webcast; AT&T Apologizes." (August 10, 2007),  
<http://abcnews.go.com/print?id=3467093>

**FCC Policy Statement - Adopted August 5, 2005** - In The Matters of Appropriate Framework for Broadband Access to the Internet over Wireless Facilities (CC Docket No. 02-33); Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket No. 01-337); Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements (CC Docket Nos. 95-20, 98-10); Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities (GN Docket No. 00-185); Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities (CS Docket No. 02-52) **(Attachment 2)**

Policy Statement - Four Principles: Consumers are entitled to

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

**FCC Notice of Inquiry March 22, 2007** - In The Matter of Broadband Industry Practices (WC Docket 07-52) (**Attachment 3**)

**FCC - Ex Parte Filing United States Department of Justice** - In The Matter of Broadband Industry Practices (WC Docket 07-52) - DOJ cautioned against imposing regulations that could hamper the development of the Internet and related services in response to the FCC Notice of Inquiry. Senators Olympia Snowe and Byron Dorgan are included as Ex Parte filers as well. (**Attachment 4**)

**FCC - Comments of the National Association of State Utility Consumer Advocates** - In The Matter of Broadband Industry Practices (WC Docket 07-52) (WC Docket No. 07-52) (**Attachment 5**)

**FCC - 28,146 Comments filed with the FCC to-date (12/17/2007)** - In The Matter of Broadband Industry Practices (WC Docket 07-52) (WC Docket No. 07-52) (**Attachment 6**)

**FCC Mergers** - Verizon-MCI merger was completed January 6, 2006. Verizon must maintain as many settlement-free “peering” arrangements (meaning – sender keeps all, neither party pays the other for the exchanged traffic, instead each derives revenue from its own customers) as it had on the merger closing date until January 2009. Verizon is to honor the FCC's net neutrality principles until January 2008. AT&T-BellSouth merger was completed December 29, 2006. AT&T must also honor the FCC's net neutrality policy statement until June 2009, which is to maintain a neutral network and neutral routing in its wireline broadband Internet access service through December 2008. (**Attachment 7**)

## **FEDERAL TRADE COMMISSION**

**FTC Issues Staff Report on Broadband Connectivity Competition Policy (6/7/2007) (Reports Urges Caution on Network Regulation)** – The report identifies guiding principles that policymakers should consider in evaluating proposed regulations or relating to broadband Internet access and network neutrality. (**Attachment 8**) Too voluminous to copy. Full Report can be obtained at <http://www.ftc.gov/reports/broadband/v070000report>

UNITED STATE CONGRESS

**S. 215**: The Internet Freedom Preservation Act - A bill to amend the Communications Act of 1934 to ensure network neutrality. (**Attachment 9**)

**H.R. 5252**: Communications Opportunity, Promotion, and Enhancement (COPE) Action of 2006 - A bill to promote the deployment of broadband networks and services. (**Attachment 10**) ) Too voluminous to copy. Full Report can be obtained at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5252>:

**DRAFT S.** : Consumer Competition and Broadband Promotion Act - A Bill to provide for increased competition in telecommunications services, promote the expanded use of broadband services, and for other purposes. (**Attachment 11**)

**S. 2917**: Internet Freedom Preservation Act - A bill to amend the Communications Act of 1934 to ensure net neutrality. (**Attachment 12**)

**H.R. 5417**: Internet Freedom and Nondiscrimination Act of 2006 - A bill to amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet. (**Attachment 13**)

**H.R. 5273**: Network Neutrality Act Of 2006 - A bill to promote open broadband networks and innovation, foster electronic commerce, and safeguard consumer access to online content and services. (**Attachment 14**)

**S. 2686**: Communications, Consumer's Choice, and Broadband Deployment Act of 2006 - A bill to amend the Communications Act of 1934 and for other purposes. (**Attachment 15**)

**S. 2360**: Internet Non-Discrimination Act of 2006 - A bill to ensure and promote a free and open Internet for all Americans. (**Attachment 16**)

**2. Monitor the Federal Communications Commission's inquiry into broadband industry practices, FCC-07-31, WC Docket No. -7-52.**

**See Attachments 4, 5 & 6 - Federal Communications Commission** - Currently there are over 28,000 comments that have been filed in WC Docket No. 07-52 ([http://gullfoss2.fcc.gov/prod/ecfs/comsreh\\_v2.cgi](http://gullfoss2.fcc.gov/prod/ecfs/comsreh_v2.cgi)) (enter into the PROCEEDING Box = 07-52)

**3. Collect information on legislative and regulatory actions of other states on these issues.**

**Illinois adopted a House Resolution (HR0307)** essentially calling upon the Congress of the United States of America to refrain from legislation that would regulate the Internet and to maintain today's approach that allows the competitive marketplace to drive broadband and broadband-related applications development and deployment free from governmental regulation. (Attachment 17)

**Maryland Legislature House Bill 1069 Introduced February 9, 2007 - An Act concerning Public Service Commission - Broadband Internet Service** - For the propose of requiring the Public Service Commission to adopt regulations requiring certain broadband providers to submit certain reports periodically to the Commission on the deployment of certain Internet service to the public; specifying the required contents of the reports; requiring the Commission to publish the reports on the Commission's website; stating the intent of the General Assembly; defining certain terms; and generally relating to broadband internet service in Maryland. Del. Herman Taylor, having introduced the legislation, asked that the bill not be considered at a committee meeting. The boost came from Attorney General Douglas F. Gansler who provided an extensive letter reaffirming that jurisdiction of Internet regulation is a federal matter. Karen Rowe, Assistant Attorney General further cautioned that HB 1069 "would raise significant federal preemption issues, and could be found to violate the Commerce Clause." (Attachment 18)

**Michigan Legislature House Bill 6456 (2006)** - A bill to provide for state video service authorization; to promote competition in providing video services; to ensure local control of rights-of-way; to provide for fees payable to local units of government; to provide for local programming; and to prescribe the powers and duties of certain state and local agencies and officials. Enacted and Approved by the Governor on December 21, 2006 (Act No. 480, Public Acts of 2006). (Attachment 19)

**New York State Assembly Introduced A 1423/S.744** which was rolled into a larger comprehensive telecom reform bill (A.3980B) that was later introduced in the Senate (S.5124). This so-called "Omnibus bill" incorporated massive regulation of cable, broadband, wireless and telecommunications. Establishes statewide cable franchises for the purposes of competitive cable service, promoting the widespread development of high-capacity broadband internet access, and increasing the availability and quality of services in this key economic development area, and ensuring the safety, reliability, and affordability of telecommunications services. The line-state franchising and net neutrality legislation was not enacted. (Attachment 20)

**Pennsylvania on March 28, 2007 "The Internet Freedom Preservation Act S. 215" was introduced to the General Assembly of the Commonwealth of Pennsylvania (See Attachment 9) -** Essentially the General Assembly found and declared that it is in the public interest:

- 1) to maintain and enhance the competitive free market that currently exists for the Internet and Internet services upon which Internet commerce relies;
- 2) to preserve and promote the open and interconnected nature of the net and consumer power and choice;
- 3) to foster innovation, investment and competition among network providers, as well as application, content and service providers; and
- 4) to preserve the security and reliability of the Internet and the services that enable consumers to access content, applications and services over the Internet.

**National Conference of State Legislatures (2006-2007 Policies for the Jurisdiction of the Communications, Technology and Interstate Commerce Committee) -** Network Neutrality (Action Resolution) calls upon Congress to avoid adopting new rules and limit such action to providing the FCC with clear authority to oversee, but not proactively intervene in, the broadband Internet marketplace by adopting principles that focus on assessing whether the market continues to ensure that consumers can:

- 1) receive meaningful information regarding their broadband service plans;
- 2) have access to their choice of legal Internet content within the bandwidth limits and quality of service of their service plan;
- 3) 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; and
- 4) be permitted to attach any devices they choose to their broadband connection at the consumer's premise; 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.

**(Attachment 21)**

**National Governors Association (Key Committee Issues, Federal Relations) – Telecommunications – House Activity** – June 8<sup>th</sup>, 2006, House passed COPE Act (H.R. 5252) by a vote of 321-101. A portion of the COPE Act gives the FCC authority to enforce the four net neutrality principles it adopted that allow consumers to access all lawful Internet content and services. However, it does not prevent broadband providers from favoring their own online traffic or the traffic of business affiliates. An amendment to require phone and cable companies to



give equal treatment to similar types of Internet traffic was defeated (by a vote of 152-269). Other amendments to the House-approved version include provisions that would:

- increase penalties (to \$750,000 from \$500,000) against video service providers that deny service to residents because of income;
- preserve the FCC's authority to require Voice-over-Internet-Protocol (VoIP) service providers to contribute to the Universal Service Fund when they interconnect, either directly or indirectly, with incumbent local exchange carrier networks, and to properly compensate network owners for the use of their network; and
- clarify language giving the FCC exclusive authority to adjudicate network neutrality "does not affect the applicability of the antitrust laws to cases involving network neutrality or the jurisdiction of the courts to hear such cases."

(Attachment 22)

**4. Review the State's telecommunications and technology policies, including the ConnectME Authority established pursuant to the Maine Revised Statutes, Title 35-A, section 9203, and evaluate the extent to which those policies are encouraging adequate investment in technology infrastructure to support a strong Internet system and continued expansion of broadband access in this State; and (Attachment 23)**

We believe that the existing language (see text-below) at Title 35-A §9204(5) may be discouraging investment that would support a strong Internet system in Maine:

*5. The authority may not take the action if a service provider franchised or certificated to provide a communications service to the area submits a timely certification to the authority that the service provider will commence within 45 days and will complete within one year the installation of sufficient advanced communications technology infrastructure to provide broadband or wireless service in a manner that would render the authority's action unnecessary or redundant.*

In addition, we propose that a new sub-§6 should be added to §9204, that would read something like the following:

**6. Audit.** A full accounting of the project(s) in both narrative and fiscal form must be supplied to ConnectME within sixty days following the completion of the project. Such accounting shall be supplied on the standard ConnectME grant report form and is subject to audit by the responsible state agency. Financial records must be kept on file a minimum of three years by the Grant Recipient official following the completion of the project.

**5. Review the extent of the State's authority to protect the rights of users of the Internet in the State to full, fair and nondiscriminatory access to the Internet.**

We recommend that the Maine Legislature ensure that full disclosure is provided by Internet service providers to their customers and potential customers in such a way that consumers will understand the services they are obtaining and any how those services are delivered. When these Internet services are bundled as a telecommunications package the consumer still must benefit from full disclosure and non-misleading information. See Chapters 8 and 9 of the Federal Trade Commission Report, June 2007 (**see Attachment 8**) elaborates in great detail about consumers receiving truthful, full and meaningful disclosure.

# ATTACHMENT 1

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	File No. EB-05-IH-0110
	)	
Madison River Communications, LLC	)	Acct. No. 200532080126
and affiliated companies	)	
	)	FRN: 0004334082
	)	

**ORDER**

**Adopted: March 3, 2005**

**Released: March 3, 2005**

By the Chief, Enforcement Bureau:

1. In this Order, we adopt a Consent Decree terminating an investigation into the compliance of Madison River Communication, LLC, its parent company Madison River Telephone Company, LLC, and its affiliated companies under common control or ownership of Madison River Telephone Company, LLC ("Madison River") with section 201(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 201(b).

2. The Enforcement Bureau ("Bureau") and Madison River have negotiated the terms of a Consent Decree that would terminate the Bureau's investigation. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. We have reviewed the terms of the Consent Decree and evaluated the facts before us. We believe that the public interest would be served by approving the Consent Decree and terminating the investigation.

4. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by section 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the attached Consent Decree IS ADOPTED.

5. IT IS FURTHER ORDERED that the above captioned investigation IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon  
Chief, Enforcement Bureau

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	File No. EB-05-IH-0110
	)	
Madison River Communications, LLC	)	Acct. No.
and affiliated companies	)	
	)	FRN: 0004334082

## CONSENT DECREE

### I. INTRODUCTION

1. The Enforcement Bureau ("Bureau") of the Federal Communications Commission (the "FCC" or the "Commission") and Madison River Communication, LLC on behalf of itself, its parent company Madison River Telephone Company, LLC, and its affiliated companies under common control or ownership of Madison River Telephone Company, LLC ("Madison River" or the "Company"), by their authorized representatives, hereby enter into this Consent Decree to resolve an investigation (the "Investigation") by the Bureau regarding Madison River's compliance with section 201(b) of the Communications Act of 1934, as amended,<sup>1</sup> with respect to the blocking of ports used for Voice over Internet Protocol ("VoIP") applications, thereby affecting customers' ability to use VoIP through one or more VoIP service providers. The Investigation was undertaken pursuant to sections 4(i), 4(j), 218, and 403 of the Communications Act.<sup>2</sup>

### II. DEFINITIONS

2. For the Purposes of this Consent Decree, the following definitions shall apply:

- (a) "Adopting Order" means an Order of the Bureau adopting the terms and conditions of this Consent Decree without change, addition or modification.
- (b) "Madison River" or the "Company" means Madison River Communications, LLC, and any affiliate, d/b/a, predecessor-in-interest, parent companies and any direct or indirect subsidiaries of such parent companies, or other affiliated companies or businesses, and their successors and assigns, including but not limited to, Madison River Telephone Company, LLC, and its direct and indirect subsidiaries.
- (c) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
- (d) "Communications Act" or "Act" means the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*
- (e) "Effective Date" means the date on which the Bureau releases the Adopting Order.

<sup>1</sup> 47 U.S.C. § 201(b).

<sup>2</sup> 47 U.S.C. §§ 154(i), 154(j), 218 and 403.

- (f) The "FCC" or the "Commission" means the Federal Communications Commission.
- (g) "Investigation" means the investigation commenced by the Bureau's Letter of Inquiry dated February 11, 2005.
- (h) "Parties" means Madison River and the Bureau.

### III. BACKGROUND

3. On February 11, 2005, the Bureau issued a Letter of Inquiry ("LOI") to Madison River, initiating an investigation. Specifically, the Bureau inquired about allegations that Madison River was blocking ports used for VoIP applications, thereby affecting customers' ability to use VoIP through one or more VoIP service providers.<sup>3</sup> Madison River submitted its initial response to the LOI on February 18, 2005, and supplemented that response on February 22, 2005.<sup>4</sup>

### IV. AGREEMENT

4. To avoid the expenditure of additional resources that would be required to further litigate the issues raised in the Investigation, and in consideration for the termination of the Investigation in accordance with the terms of this Consent Decree, Madison River agrees to make a voluntary payment to the United States Treasury, without further protest or recourse to a trial *de novo*, in the amount of fifteen thousand dollars (\$15,000.00) within ten (10) business days after the Effective Date of the Adopting Order. The payment may be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Acct. No. and FRN No. referenced above. Payment by check or money order must be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, IL, 60673-7482. Payment by overnight mail must be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer must be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

5. In order to resolve and terminate the Investigation, the Bureau requires, and Madison River agrees, that Madison River shall not block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.

6. The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement of the Investigation. In express reliance on the covenants and representations contained herein, and in order to avoid the potential expenditure of additional public resources, the Bureau agrees to terminate the Investigation. In consideration for the termination of this Investigation, Madison River agrees to the terms, conditions, and procedures contained herein.

7. The Bureau agrees that, in the absence of new evidence relating to incidents that were not the subject of the Investigation, the Bureau will not use the facts developed in the Investigation, or the existence of this Consent Decree, to institute, on its own motion, any new proceedings, formal or

<sup>3</sup> See Letter dated February 11, 2005 from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, FCC, to Steve Vanderwoude, Chairman & CEO, Madison River Communications, LLC, ("February 11 LOI").

<sup>4</sup> See Letter dated February 18, 2005 from Kenneth E. Hardman, Attorney for Madison River Telephone Company, LLC, et al., to Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, FCC ("Madison River Response"); Letter dated February 22, 2005 from Kenneth E. Hardman, Attorney for Madison River Telephone Company, LLC, et al., to Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, FCC ("Madison River Supplement").

informal, or to take any actions on its own motion against Madison River, including referral of this matter to any other government agency, concerning the matters that were the subject of the Investigation.

8. Madison River waives any objection to the authority of the Bureau to enter into and adopt this Consent Decree.

9. Madison River represents and warrants that it is the properly named party to this Consent Decree and is solvent and has sufficient funds available to meet fully all financial and other obligations set forth herein. Madison River further represents and warrants that it has caused this Consent Decree to be executed by its authorized representative, as a true act and deed, as of the date affixed next to said representative's signature. Said representative and Madison River respectively affirm and warrant that said representative is acting in his/her capacity and within his/her authority as a corporate officer of Madison River, and on behalf of Madison River and that by his/her signature said representative is binding Madison River to the terms and conditions of this Consent Decree.

10. The Parties agree that this Consent Decree does not constitute either an adjudication on the merits or a factual or legal finding regarding any compliance or noncompliance with the requirements of the Act and the Commission's orders and rules. The Parties agree that this Consent Decree is for settlement purposes only.

11. Nothing in this Consent Decree shall limit the Commission's authority to enforce this Consent Decree in accordance with its terms, nor shall anything in this Consent Decree limit the Commission's authority to consider and adjudicate any formal complaint that may be filed pursuant to section 208 of the Act, 47 U.S.C. § 208, and to take any action in response to such complaint.

12. Madison River waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Order adopts the Consent Decree without change, addition, or modification.

13. Madison River's decision to enter into this Consent Decree is expressly contingent upon the Bureau's issuance of an Adopting Order.

14. In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

15. The Parties also agree that if any provision of this Consent Decree conflicts with any subsequent rule or order adopted by the Commission (except an order specifically intended to revise or otherwise modify the terms of this Consent Decree to which Madison River does not consent) that provision will be superseded by such Commission rule or order.

16. By this Consent Decree, Madison River does not waive or alter its right to assert and seek protection from disclosure of any privileged or otherwise confidential and protected documents and information, or to seek appropriate safeguards or confidentiality for any competitively sensitive or proprietary information. Nothing in this Consent Decree shall be deemed to prejudice Madison River's rights to seek exemption from disclosure pursuant to the Freedom of Information Act and the Commission's implementing regulations for documents provided by Madison River to the Commission, or for Madison River to contest any request for disclosure of agency records relating to the subject of this Consent Decree.

17. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Madison River nor the Bureau shall contest the validity of the Consent Decree or the Adopting Order, and Madison River and the Bureau will waive any statutory

right to a trial *de novo* with respect to the issuance of the Adopting Order and shall consent to a judgment incorporating the terms of this Consent Decree.

18. Madison River agrees that any violation of the Consent Decree or the Adopting Order will constitute a separate violation of a Commission order, entitling the Commission, or its delegated authority, to exercise any rights or remedies attendant to the enforcement of a Commission order.

19. The Parties agree that the requirements of this Consent Decree shall expire on the earlier of thirty (30) months from the Effective Date, or the effective date of a federal statute or Commission rule or order declaring or clarifying that the conduct described in paragraph 5 above does or does not violate the Act or Commission rules.

20. This Consent Decree may be signed in counterparts.

For: Madison River Communications, LLC.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Matt L. Springer  
Vice President and General Counsel

For: Enforcement Bureau  
Federal Communications Commission

\_\_\_\_\_  
Date

\_\_\_\_\_  
David H. Solomon  
Chief, Enforcement Bureau





## Telco agrees to stop blocking VoIP calls

By Declan McCullagh

[http://www.news.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352\\_3-5598633.html](http://www.news.com/Telco-agrees-to-stop-blocking-VoIP-calls/2100-7352_3-5598633.html)

Story last modified Thu Mar 03 15:26:17 PST 2005

**A North Carolina telecommunications company accused of deliberately blocking Internet phone traffic has reached a deal with federal regulators to halt the controversial practice.**

The Federal Communications Commission said Thursday that Madison River Communication will "refrain from blocking" VoIP, or voice over Internet Protocol, calls and will pay a \$15,000 fine to the government.

"We saw a problem, and we acted swiftly to ensure that Internet voice service remains a viable option for consumers," FCC Chairman Michael Powell said in a statement. The consent decree prevents Madison River from VoIP blocking for 30 months.

Based in Mebane, N.C., Madison River reported \$194.4 million in revenue for the 2004 calendar year from 120,649 residential voice subscribers, 60,563 business voice subscribers, and 39,562 DSL customers. The company has filed a registration statement for a proposed

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VoIP provider Vonage confirmed that Madison River was the broadband provider it complained to the FCC about earlier this month, leading to the FCC's investigation.

"We're very pleased that the commission took very swift action to address the concerns that we had regarding an Internet service provider's ability to block our customers' communications with

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## Telco agrees to stop blocking VoIP calls

each other," Vonage CEO Jeffrey Citron said. "This sends a clear message that port blocking will not be tolerated."

Port blocking occurs when a company may prevent certain types of Internet traffic from traveling through its networks, for instance in an attempt to prevent voice subscribers from switching to VoIP.

Port blocking isn't reserved for high-profile VoIP carriers like Vonage. Nuvio, a small Net phone service provider based in Kansas City, Mo., says its customers' calls have been affected by at least one cable operator. Nuvio has yet to make any formal complaint to the FCC, however. In September, Nuvio told the FCC that port blocking was inevitable, given just how easy it was to do and the economic incentives for doing so.

Vonage's Citron said Madison River was the largest company to attempt port-blocking against Vonage customers. "We've identified one or two others that are very small," Citron said, adding that the information will be forwarded to the FCC. Many large cable companies have pledged never to engage in the practice.

Madison River did not immediately return phone calls.

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*CNET News.com's Ben Charny  
contributed to this report.*

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September 27, 2007

## Verizon Blocks Messages of Abortion Rights Group

By **ADAM LIPTAK**

Saying it had the right to block “controversial or unsavory” text messages, Verizon Wireless has rejected a request from Naral Pro-Choice America, the abortion rights group, to make Verizon’s mobile network available for a text-message program.

The other leading wireless carriers have accepted the program, which allows people to sign up for text messages from Naral by sending a message to a five-digit number known as a short code.

Text messaging is a growing political tool in the United States and a dominant one abroad, and such sign-up programs are used by many political candidates and advocacy groups to send updates to supporters.

But legal experts said private companies like Verizon probably have the legal right to decide which messages to carry. The laws that forbid common carriers from interfering with voice transmissions on ordinary phone lines do not apply to text messages.

The dispute over the Naral messages is a skirmish in the larger battle over the question of “net neutrality” — whether carriers or Internet service providers should have a voice in the content they provide to customers.

“This is right at the heart of the problem,” said Susan Crawford, a visiting professor at the University of Michigan law school, referring to the treatment of text messages. “The fact that wireless companies can choose to discriminate is very troubling.”

In turning down the program, Verizon, one of the nation’s two largest wireless carriers, told Naral that it does not accept programs from any group “that seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users.” Naral provided copies of its communications with Verizon to The New York Times.

Nancy Keenan, Naral’s president, said Verizon’s decision interfered with political speech and activism.

“No company should be allowed to censor the message we want to send to people who have asked us to send it to them,” Ms. Keenan said. “Regardless of people’s political views, Verizon customers should decide what action to take on their phones. Why does Verizon get to make that choice for them?”

A spokesman for Verizon said the decision turned on the subject matter of the messages and not on Naral’s

position on abortion. "Our internal policy is in fact neutral on the position," said the spokesman, Jeffrey Nelson. "It is the topic itself" — abortion — "that has been on our list."

Mr. Nelson suggested that Verizon may be rethinking its position. "As text messaging and multimedia services become more and more mainstream," he said, "we are continuing to review our content standards." The review will be made, he said, "with an eye toward making more information available across ideological and political views."

Naral provided an example of a recent text message that it has sent to supporters: "End Bush's global gag rule against birth control for world's poorest women! Call Congress. (202) 224-3121. Thnx! Naral Text4Choice."

Messages urging political action are generally thought to be at the heart of what the First Amendment protects. But the First Amendment limits government power, not that of private companies like Verizon.

In rejecting the Naral program, Verizon appeared to be acting against its economic interests. It would have received a small fee to set up the program and additional fees for messages sent and received.

Text messaging programs based on five- and six-digit short codes are a popular way to receive updates on news, sports, weather and entertainment. Several of the leading Democratic presidential candidates have used them, as have the Republican National Committee, Save Darfur and Amnesty International.

Most of the candidates and advocacy groups that use text message programs are liberal, which may reflect the demographics of the technology's users and developers. A spokeswoman for the National Right to Life Committee, which is in some ways Naral's anti-abortion counterpart, said, for instance, that it has not dabbled in text messaging.

Texting has proved to be an extraordinarily effective political tool. According to a study released this month by researchers at Princeton and the University of Michigan, young people who received text messages reminding them to vote in November 2006 were more likely to go to the polls. The cost per vote generated, the study said, was much smaller than other sorts of get-out-the-vote efforts.

Around the world, the phenomenon is even bigger.

"Even as dramatic as the adoption of text messaging for political communication has been in the United States, we've been quite slow compared to the rest of the world," said James E. Katz, the director of the Center for Mobile Communication Studies at Rutgers University. "It's important in political campaigns and political protests, and it has affected the outcomes of elections."

Timothy Wu, a law professor at Columbia, said it was possible to find analogies to Verizon's decision abroad. "Another entity that controls mass text messages is the Chinese government," Professor Wu said.

Jed Alpert, the chief executive officer of Mobile Commons, which says it is the largest provider of mobile services to political and advocacy groups, including Naral, said he had never seen a decision like Verizon's.

"This is something we haven't encountered before, that is very surprising and that we're concerned about," Mr. Alpert said.

Professor Wu pointed to a historical analogy. In the 19th century, he said, Western Union, the telegraph company, engaged in discrimination, based on the political views of people who sought to send telegrams. "One of the eventual reactions was the common carrier rule," Professor Wu said, which required telegraph and then phone companies to accept communications from all speakers on all topics.

Some scholars said such a rule was not needed for text messages because market competition was sufficient to ensure robust political debate.

"Instead of having the government get in the game of regulating who can carry what, I would get in the game of promoting as many options as possible," said Christopher S. Yoo, a law professor at the University of Pennsylvania. "You might find text-messaging companies competing on their openness policies."

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## Comcast blocks some Internet traffic

Tests confirm data discrimination by number 2 U.S. service provider

By Peter Svensson

The Associated Press

updated 9:36 a.m. ET, Fri., Oct. 19, 2007

NEW YORK - Comcast Corp. actively interferes with attempts by some of its high-speed Internet subscribers to share files online, a move that runs counter to the tradition of treating all types of Net traffic equally.

The interference, which The Associated Press confirmed through nationwide tests, is the most drastic example yet of data discrimination by a U.S. Internet service provider. It involves company computers masquerading as those of its users.

If widely applied by other ISPs, the technology Comcast is using would be a crippling blow to the BitTorrent, eDonkey and Gnutella file-sharing networks. While these are mainly known as sources of copyright music, software and movies, BitTorrent in particular is emerging as a legitimate tool for quickly disseminating legal content.

The principle of equal treatment of traffic, called "Net Neutrality" by proponents, is not enshrined in law but supported by some regulations. Most of the debate around the issue has centered on tentative plans, now postponed, by large Internet carriers to offer preferential treatment of traffic from certain content providers for a fee.

Comcast's interference, on the other hand, appears to be an aggressive way of managing its network to keep file-sharing traffic from swallowing too much bandwidth and affecting the Internet speeds of other subscribers.

### Number two provider

Comcast, the nation's largest cable TV operator and No. 2 Internet provider, would not specifically address the practice, but spokesman Charlie Douglas confirmed that it uses sophisticated methods to keep Net connections running smoothly.

"Comcast does not block access to any applications, including BitTorrent," he said.

Douglas would not specify what the company means by "access" — Comcast subscribers can download BitTorrent files without hindrance. Only uploads of complete files are blocked or delayed by the company, as indicated by AP tests.

But with "peer-to-peer" technology, users exchange files with each other, and one person's upload is another's download. That means Comcast's blocking of certain uploads has repercussions in the global network of file sharers.

Comcast's technology kicks in, though not consistently, when one BitTorrent user attempts to share a complete file with another user.

Each PC gets a message invisible to the user that looks like it comes from the other computer, telling it to stop communicating. But neither message originated from the other computer — it comes from Comcast. If it were a telephone conversation, it would be like the operator breaking into the conversation, telling each talker in the voice of the other: "Sorry, I have to hang up. Good bye."

Matthew Elvey, a Comcast subscriber in the San Francisco area who has noticed BitTorrent uploads being stifled, acknowledged that the company has the right to manage its network, but disapproves of the method, saying it appears to be deceptive.

"There's the wrong way of going about that and the right way," said Elvey, who is a computer consultant.

### All types of content

Comcast's interference affects all types of content, meaning that, for instance, an independent movie producer who wanted to distribute his work using BitTorrent and his Comcast connection could find that difficult or impossible — as would someone pirating music.

Internet service providers have long complained about the vast amounts of traffic generated by a small number of subscribers who are avid users of file-sharing programs. Peer-to-peer applications account for between 50 percent and 90 percent of overall Internet traffic, according to a survey this year by ipoque GmbH, a German vendor of traffic-management equipment.

"We have a responsibility to manage our network to ensure all our customers have the best broadband experience possible," Douglas said. "This means we use the latest technologies to manage our network to provide a quality experience for all Comcast subscribers."

The practice of managing the flow of Internet data is known as "traffic shaping," and is already widespread among Internet service providers. It usually involves slowing down some forms of traffic, like file-sharing, while giving others priority. Other ISPs have attempted to block some file-sharing application by so-called "port filtering," but that method is easily circumvented and now largely ineffective.

Comcast's approach to traffic shaping is different because of the drastic effect it has on one type of traffic — in some cases blocking it rather than slowing it down — and the method used, which is difficult to circumvent and involves the company falsifying network traffic.

The "Net Neutrality" debate erupted in 2005, when AT&T Inc. suggested it would like to charge some Web companies more for preferential treatment of their traffic. Consumer advocates and Web heavyweights like Google Inc. and Amazon Inc. cried foul, saying it's a bedrock principle of the Internet that all traffic be treated equally.

To get its acquisition of BellSouth Corp. approved by the Federal Communications Commission, AT&T agreed in late 2006 not to implement such plans or prioritize traffic based on its origin for two and a half years. However, it did not make any commitments not to prioritize traffic based on its type, which is what Comcast is doing.

The FCC's stance on traffic shaping is not clear. A 2005 policy statement says that "consumers are entitled to run applications and services of their choice," but that principle is "subject to reasonable network management." Spokeswoman Mary Diamond would not elaborate.

### **Opposition**

Free Press, a Washington-based public interest group that advocates Net Neutrality, opposes the kind of filtering applied by Comcast.

"We don't believe that any Internet provider should be able to discriminate, block or impair their consumers ability to send or receive legal content over the Internet," said Free Press spokeswoman Jen Howard.

Paul "Tony" Watson, a network security engineer at Google Inc. who has previously studied ways hackers could disrupt Internet traffic in manner similar to the method Comcast is using, said the cable company was probably acting within its legal rights.

"It's their network and they can do what they want," said Watson. "My concern is the precedent. In the past, when people got an ISP connection, they were getting a connection to the Internet. The only determination was price and bandwidth. Now they're going to have to make much more complicated decisions such as price, bandwidth, and what services I can get over the Internet."

Several companies have sprung up that rely on peer-to-peer technology, including BitTorrent Inc., founded by the creator of the BitTorrent software (which exists in several versions freely distributed by different groups and companies).

Ashwin Navin, the company's president and co-founder, confirmed that it has noticed interference from Comcast, in addition to some Canadian Internet service providers.

"They're using sophisticated technology to degrade service, which probably costs them a lot of money. It would be better to see them use that money to improve service," Navin said, noting that BitTorrent and other peer-to-peer applications are a major reason consumers sign up for broadband.

BitTorrent Inc. announced Oct. 9 that it was teaming up with online video companies to use its technology to distribute legal content.

### **Affecting others**

Other companies that rely on peer-to-peer technology, and could be affected if Comcast decides to expand the range of applications it filters, include Internet TV service Joost, eBay Inc.'s Skype video-conferencing program and movie download appliance Vudu. There is no sign that Comcast is hampering those services.

Comcast subscriber Robb Topolski, a former software quality engineer at Intel Corp., started noticing the interference when trying to upload with file-sharing programs Gnutella and eDonkey early this year.

In August, Topolski began to see reports on Internet forum DSLreports.com from other Comcast users with the same problem. He now believes that his home town of Hillsboro, Ore., was a test market for the technology that was later widely applied in other Comcast service areas.

Topolski agrees that Comcast has a right to manage its network and slow down traffic that affects other subscribers, but disapproves of their method.

"By Comcast not acknowledging that they do this at all, there's no way to report any problems with it," Topolski said.

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# Pearl Jam's Anti-Bush Lyrics Jammed by AT&T

Rock Band Upset After 15 Seconds of Lyrics Cut From Webcast; AT&T Apologizes

By WILLIAM MARRA

Aug. 10, 2007 —

Eddie Vedder, lead singer of the rock band Pearl Jam, is using his powerful pipes to call out corporate censorship after an AT&T webcast of the band's Lollapalooza performance that edited out Vedder's anti-George Bush musings.

The improvised lyrics in question were sung to the tune of Pink Floyd's "The Wall": "George Bush leave this world alone. George Bush find yourself another home."

The telecom giant has been contrite after last weekend's live webcast, calling the censorship an unacceptable mistake and saying its policies strictly forbid editing political messages out of webcasts.

But the politically charged band and activists are saying that the 15 seconds of silence is a resounding signal of a much larger issue: the power of Internet service providers to regulate what users can access when they surf the net.

"AT&T's actions strikes at the heart of the public's concerns over the power that corporations have when it comes to determining what the public sees and hears through communications media," the band said in a statement on their Web site.

Following a rendition of Pearl Jam's song "Daughter" during the show at Chicago's Grant Park, Vedder transitioned into the Pink Floyd classic, singing the Bush lyrics to an enthusiastic crowd that shouted "No more war!" and held up homemade anti-war signs.

The first time Vedder sang "George Bush leave this world alone," the lyrics were transmitted to users on AT&T's Blue Room Web site. The second two anti-Bush verses were cut.

AT&T employs the firm Davie-Brown Entertainment (DBE) to edit their webcasts for profanity that is not a part of a song's lyrics, and also for nudity, company spokesman Michael Coe said. Political messages and curse words that are part of a song are not edited, he said.

DBE insisted that the censoring of the Pearl Jam lyrics was an honest mistake, not part of some broader political agenda to protect the president, and that they are undertaking a review of the incident.

"I don't think it was politically motivated," said DBE president Tom Meyer. "My guess is [the webcast editor] felt that it was something controversial and they had to make a snap decision, and they made the wrong one."

But Nicole Vandenberg, a spokeswoman for Pearl Jam, said that even if it was a genuine mistake, these excuses miss the point.

"This issue with the censorship of this rock webcast is just one small example of how easily this sort of 'mistake' can happen, and when you start thinking about what other 'mistakes' could happen, it makes this seemingly small incident one worth thinking about carefully," Vandenberg said.

The blogosphere was up in arms this week as well, rushing to Pearl Jam's defense and criticizing AT&T for overzealously monitoring the net.

The Hot Potato Mash blog noted the irony of the situation, that the censored lyrics were set to the tune of the famous Pink Floyd song that includes the line "We don't need no thought control," before writing: "This little 'mistake' was the last straw for me regarding AT&T. I will begin the process of transferring my cell phone number to another carrier today."

Pearl Jam has posted the entire unedited version of their "The Wall" performance on its Web site. AT&T said it is currently negotiating with Pearl Jam for the rights to post the unedited version as well.

But Vandenberg indicated the band might not release the video, saying that only when AT&T addresses Pearl Jam's concerns about censorship and the webcast editing process will the band consider releasing it.

The incident has sparked debate over whether so-called net neutrality regulations are necessary to rein in the power of Internet providers. Net neutrality legislation would strip ISPs of their ability to limit content users' access to certain Web sites, particularly those of their competitors.

Because the webcast in question was on a private AT&T Web site, it would be regulated by net neutrality laws even if they were adopted by Congress.

But Tim Carr, a neutrality advocate at the Save the Internet coalition, said AT&T's censorship is an excellent example of what could go wrong when ISPs control what their users see and hear.

"The censorship of Pearl Jam gives us a clear view of what the problem is: When you allow large Internet providers to also become gatekeepers to content there's too often a temptation to limit what people get to see," Carr said.

But AT&T's spokesman Coe called net neutrality laws "a solution without a problem." He added, "We have said repeatedly over and over that we will not block customers' access to legal content. We've said that in front of Congress. We've stated it as conditions of our merger with Bell South."

And at least one person said Pearl Jam and other activists are blowing this issue out of proportion to push their own personal agenda for net neutrality.

"To say that they're censoring is ridiculous? It's propaganda and it seems to be working," Derek Hunter, the executive director of the Media Freedom Project, said.

"Fifteen seconds of a concert sounds like a mistake to me."

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# ATTACHMENT 2

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matters of	)	
	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband Telecommunications	)	
Services	)	
	)	
Computer III Further Remand Proceedings: Bell	)	CC Docket Nos. 95-20, 98-10
Operating Company Provision of Enhanced	)	
Services; 1998 Biennial Regulatory Review –	)	
Review of Computer III and ONA Safeguards and	)	
Requirements	)	
	)	
Inquiry Concerning High-Speed Access to the	)	GN Docket No. 00-185
Internet Over Cable and Other Facilities	)	
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband	)	CS Docket No. 02-52
Access to the Internet Over	)	
Cable Facilities	)	

## POLICY STATEMENT

**Adopted: August 5, 2005**

**Released: September 23, 2005**

By the Commission:

### I. INTRODUCTION

1. The availability of the Internet has had a profound impact on American life. This network of networks has fundamentally changed the way we communicate.<sup>1</sup> It has increased the speed of

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<sup>1</sup> The Internet is “the international computer network of both Federal and non-Federal interoperable packet switched data networks.” 47 U.S.C. § 230(f)(1). The Internet is also described as “the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.” 47 U.S.C. § 231(e)(3). The Supreme Court has described the Internet as a “network of interconnected computers.” *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688, slip op. at 2 (2005) (*NCTA v. Brand X*); see also *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997). No single entity controls the Internet; rather it is a “worldwide mesh or matrix of hundreds of thousands of (continued . . . )

communication, the range of communicating devices and the variety of platforms over which we can send and receive information.<sup>2</sup> As Congress has noted, “[t]he rapidly developing array of Internet . . . services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.”<sup>3</sup> The Internet also represents “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”<sup>4</sup> In addition, the Internet plays an important role in the economy, as an engine for productivity growth and cost savings.<sup>5</sup>

2. In section 230(b) of the Communications Act of 1934, as amended (Communications Act or Act), Congress describes its national Internet policy. Specifically, Congress states that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet”<sup>6</sup> and “to promote the continued development of the Internet.”<sup>7</sup> In section 706(a) of the Act, Congress charges the Commission with “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability” – broadband – “to all Americans.”<sup>8</sup>

3. In this Policy Statement, the Commission offers guidance and insight into its approach to the Internet and broadband that is consistent with these Congressional directives.

## II. DISCUSSION

4. The Communications Act charges the Commission with “regulating interstate and foreign commerce in communication by wire and radio.”<sup>9</sup> The Communications Act regulates telecommunications carriers, as common carriers, under Title II.<sup>10</sup> Information service providers, “by contrast, are not subject to mandatory common-carrier regulation under Title II.”<sup>11</sup> The Commission, however, “has jurisdiction to impose additional regulatory obligations under its Title I ancillary

(continued from previous page) —————  
networks, owned and operated by hundreds of thousands of people.” John S. Quarterman & Peter H. Salus, *How the Internet Works*, <http://www.mids.org/works.html> (visited Dec. 17, 2003) (quoted at *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4869 n.23 (2004) (*IP-Enabled Services NPRM*)).

<sup>2</sup> *IP-Enabled Services NPRM*, 19 FCC Rcd at 4869-70, para. 8.

<sup>3</sup> 47 U.S.C. § 230(a)(1).

<sup>4</sup> 47 U.S.C. § 230(a)(3).

<sup>5</sup> See, e.g., Hal Varian et al., *The Net Impact Study: The Projected Economic Benefits of the Internet in the United States, United Kingdom and Germany*, available at: [http://www.netimpactstudy.com/NetImpact\\_Study\\_Report.pdf](http://www.netimpactstudy.com/NetImpact_Study_Report.pdf) (January 2002) (visited July 31, 2005).

<sup>6</sup> 47 U.S.C. § 230(b)(2).

<sup>7</sup> 47 U.S.C. § 230(b)(1).

<sup>8</sup> 47 U.S.C. § 157 nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)).

<sup>9</sup> 47 U.S.C. § 151.

<sup>10</sup> See *NCTA v. Brand X*, slip op. at 1.

<sup>11</sup> *Id.* at 3.

jurisdiction to regulate interstate and foreign communications.”<sup>12</sup> As a result, the Commission has jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner. Moreover, to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers, the Commission adopts the following principles:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.<sup>13</sup>
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>14</sup>

### III. CONCLUSION

5. The Commission has a duty to preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age. To foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition, the Commission will incorporate the above principles into its ongoing policymaking activities.<sup>15</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

<sup>12</sup> *Id.* at 3-4. We also note that the Enforcement Bureau recently entered into a consent decree to resolve an investigation with respect to the blocking of ports used for voice over Internet Protocol (VoIP). See *Madison River LLC and Affiliated Companies*, File No. EB-05-IH-0110, Order, 20 FCC Rcd 4295 (Enf. Bur. 2005).

<sup>13</sup> See *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956); *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

<sup>14</sup> See Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996) (enacting 1996 Act “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”).

<sup>15</sup> Accordingly, we are not adopting rules in this policy statement. The principles we adopt are subject to reasonable network management.

# ATTACHMENT 3

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Broadband Industry Practices

)  
)  
)  
)

WC Docket No. 07-52

NOTICE OF INQUIRY

Adopted: March 22, 2007

Released: April 16, 2007

Comment Date: June 15, 2007

Reply Comment Date: July 16, 2007

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; and Commissioners Copps and Adelstein concurring and issuing separate statements.

I. INTRODUCTION

1. In this Notice of Inquiry, we seek to enhance our understanding of the nature of the market for broadband and related services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by these policies, and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We ask for specific examples of beneficial or harmful behavior, and we ask whether any regulatory intervention is necessary.

II. BACKGROUND

2. Over a year ago, the Commission issued a Policy Statement<sup>1</sup> "offer[ing] guidance and insight into its approach to the Internet and broadband" consistent with Congress's direction in sections 230<sup>2</sup> and 706.<sup>3</sup> In that Policy Statement, the Commission announced the following principles:

<sup>1</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Policy Statement*).

<sup>2</sup> 47 U.S.C. § 230(b):

It is the policy of the United States – (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

<sup>3</sup> 47 U.S.C. § 157 nt (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications

(continued....)



- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>4</sup>

3. Since that time, the Commission has had the occasion to review several providers' practices. In several proceedings evaluating wireline mergers, the Commission found that no commenter had alleged that the entities engage in packet discrimination or degradation,<sup>5</sup> and that, given conflicting incentives, it was unlikely that the merged companies would do so.<sup>6</sup> Nonetheless, the Commission specifically recognized the applicants' commitments to act in a manner consistent with the principles set forth in the Policy Statement, and their commitments were incorporated as conditions of their mergers.<sup>7</sup> Likewise, in its review of the Adelphia-Time Warner-Comcast transaction, the Commission found that the transaction was not likely to increase incentives for the applicants to engage in conduct harmful to consumers, and found no evidence that the applicants were operating in a manner inconsistent with the Policy Statement.<sup>8</sup>

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capability to all Americans . . ."); *see also* 47 U.S.C. § 157(a) ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

<sup>4</sup> *Policy Statement*, 20 FCC Rcd at 14988, para. 4; *see also* Statement of Administration Policy, H.R. 5252 – Communications Opportunity, Promotion, and Enhancement Act of 2006, Executive Office of the President, Office of Management and Budget (June 8, 2006) ("The Administration supports the broadband policy statement of the Federal Communications Commission (FCC) and . . . believes the FCC currently has sufficient authority to address potential abuses in the marketplace.").

<sup>5</sup> *See infra* note 16.

<sup>6</sup> *See SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18366-68, paras. 141-43 (2005) (*SBC-AT&T Merger Order*); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18507-09, paras. 140-42 (2005) (*Verizon-MCI Merger Order*); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189, paras. 151-53 (rel. Mar. 26, 2007) (*AT&T-BellSouth Merger Order*).

<sup>7</sup> *See SBC-AT&T Merger Order*, 20 FCC Rcd at 18368, para. 144, 18414, Appx. F; *Verizon-MCI Merger Order*, 20 FCC Rcd at 18509, para. 143, 18561, Appx. G.

<sup>8</sup> *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8296-99, paras. 217-23 (2006).

4. The Commission, under Title I of the Communications Act, has the ability to adopt and enforce the net neutrality principles it announced in the Internet Policy Statement. The Supreme Court reaffirmed that the Commission “has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.”<sup>9</sup> Indeed, the Supreme Court specifically recognized the Commission’s ancillary jurisdiction to impose regulatory obligations on broadband Internet access providers.<sup>10</sup>

5. The Commission may exercise ancillary jurisdiction under Title I when: (1) Title I confers subject matter jurisdiction over the service to be regulated; and (2) the assertion of jurisdiction is reasonably ancillary to the effective performance of the Commission’s responsibilities.<sup>11</sup> Both of these conditions are met with respect to the four principles of the Commission’s 2005 Policy Statement. Indeed, the Commission found “that both of the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers.”<sup>12</sup>

6. First, as the Commission stated, broadband services are “wire communications” or “radio communications,” as defined in sections 3(52) and 3(33) of the Act,<sup>13</sup> and section 2(a) of the Communications Act gives the Commission subject matter jurisdiction over “all interstate and foreign communications by wire or radio.”<sup>14</sup>

7. Second, section 1 of the Communications Act confers responsibility on the Commission “to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” This responsibility is guided by the “policy of the United States . . . (1) to promote the continued development of the Internet”; “(2) to preserve the vibrant and competitive free market that presently exists for the Internet”; and “(3) to encourage the deployment of technologies which maximize user control over what information is received by . . . [users of] the Internet.”<sup>15</sup>

### III. DISCUSSION

8. We seek a fuller understanding of the behavior of broadband market participants today, including network platform providers, broadband Internet access service providers, other broadband transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others. First, we ask commenters to describe today’s packet management practices. That is, do providers treat different packets in different ways? How<sup>16</sup> and why? Are these providers operating

<sup>9</sup> *National Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 976 (2005) (*Brand X*).

<sup>10</sup> *Brand X*, 545 U.S. at 996 (“[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction. In fact, it has invited comment on whether it can and should do so.”).

<sup>11</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

<sup>12</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14914, para. 109. (2005) (*Wireline Broadband Internet Access Services Order*), *pets. for review pending sub nom. Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3d Cir. filed Oct. 26, 2005).

<sup>13</sup> 47 U.S.C. § 153(33), (52).

<sup>14</sup> 47 U.S.C. § 152(a).

<sup>15</sup> 47 U.S.C. § 230; see also 47 U.S.C. § 157 nt (Advanced Telecommunications Incentives).

<sup>16</sup> For example, a packet header contains an IP destination address field, which carries routing information, and a protocol field, which informs the receiving system of the format of the contents of the packet. The destination

(continued....)

consistent with the Policy Statement? Are there specific examples of packet management practices that commenters consider reasonable or unreasonable? More specifically, are providers engaging in packet management that is helpful or harmful to consumers? For example, during times of congestion,<sup>17</sup> do providers prioritize packets for latency-sensitive applications such as voice calls, video conferencing, live video, or gaming? Do providers prioritize packets for safety- and security-related applications such as health monitoring, home monitoring, and emergency calls? Do providers block packets containing child pornography, spyware, viruses, or spam? Do providers offer parental controls that block packets containing sexually explicit material? Do providers manage packets to improve their network performance, engineering, or security? Do providers deprioritize or block packets for certain content when the providers or their affiliates offer similar content, or do providers prioritize packets containing their own content over packets containing similar content from unaffiliated providers? Do providers deprioritize or block packets containing material that is harmful to their commercial interests, or prioritize packets relating to applications or services in which they have a commercial interest? Are any of these packet management practices in place to implement other legal requirements?<sup>18</sup> Are there other packet management practices of which the Commission should be aware? Commenters should provide specific, verifiable examples with supporting documentation, and should limit their comments to those practices that are technically feasible today.

9. Next, we ask commenters to describe today's pricing practices for broadband and related services. Do providers charge different prices for different speeds or capacities? Given the greater availability of bandwidth-intensive applications, do providers charge a premium to download a particular amount of content? Do broadband providers charge upstream providers for priority access to end users? Should our policies distinguish between content providers that charge end users for access to content and those that do not? Do providers currently discriminate in the prices they charge to end users and/or

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address field in a packet sent from an end user may reveal, for example, the address of a well-known application provider. The protocol field informs the destination system as to which end-to-end protocol applies to the data contained within the packet. The most common end-to-end protocols are the Transmission Control Protocol (TCP), indicated by a Protocol field value of 6, and the User Datagram Protocol (UDP), indicated by a value of 17. A Protocol field value of 50, for example, indicates the use of the Encapsulating Security Payload and may suggest that the user is sending information over a virtual private network. TCP and UDP protocol headers in turn contain Source and Destination Port fields. The Port fields can reveal the type of application with which the packet is associated. For example, a TCP or UDP Destination Port field value of 25 may suggest that the user is transferring email to an email server using the Simple Mail Transfer (SMTP). A port field value of 26,000 suggests that the user is playing the game "Quake." In addition, service providers may also be able to identify certain applications by the pattern of packet flow, rather than by the information contained in the header. For example, the use of certain voice over Internet Protocol (VoIP) applications or file-sharing applications may be detectable by the size of the packets or the spacing between them. Thus, the various parties involved in sending, transmitting, and receiving packets may be able to manage traffic in various ways by analyzing the information in these fields and using that information to decide how to process the packet.

<sup>17</sup> Indeed, as Moore's Law would suggest in the context of integrated circuit capacity, speed and capacity of broadband networks will continue to increase. See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14874, para. 36 n.101. Is congestion a problem? Are consumers' demands for bandwidth-intensive applications being met with higher-capacity broadband services?

<sup>18</sup> For example, the Children's Internet Protection Act and associated Commission rules require schools and libraries receiving discounts for Internet access or internal connections to implement and enforce Internet safety policies that, among other things, must include technology protection measures that protect against Internet access to visual depictions that are obscene, child pornography, or harmful to minors. See 47 U.S.C. § 254(h), (l); 47 C.F.R. § 54.520. As another example, the Digital Millennium Copyright Protection Act provides service providers a limitation on liability for copyright infringement with respect to material that users store on the service provider's system or network if, among other things, upon notification of complained infringement the service provider responds expeditiously to remove, or disable access to, the material. See 17 U.S.C. § 512(c).

upstream providers? Does behavior vary depending on the number of broadband Internet access service providers offering service in a geographic area? With regard to all practices commenters describe in response to the questions in paragraphs 8 and 9, we ask whether providers disclose their practices to their customers, to other providers, to application developers, and others. Do they offer their subscribers the option to purchase extra bandwidth or specialized processing? How have consumers responded to these pricing practices? How have higher speed broadband networks changed the value proposition for consumers? Are the real prices (*i.e.*, price per Mbps) paid by consumers for broadband nevertheless falling?

10. We next ask whether the Policy Statement should be amended. Do commenters believe that the specific practices described in response to the questions in paragraphs 8 and 9 are helpful or harmful to consumers? In light of the responses to paragraphs 8 and 9, are there specific changes to the Policy Statement that commenters would recommend? We also ask whether we should incorporate a new principle of nondiscrimination.<sup>19</sup> If so, how would “nondiscrimination” be defined, and how would such a principle read? Would it permit any exclusive or preferential arrangements among network platform or access providers and content providers? How would a principle of non-discrimination affect the ability of content and access providers to charge their customers different prices, or to charge them at all?

11. Finally, does the Commission have the legal authority to enforce the Policy Statement in the face of particular market failures or other specific problems?<sup>20</sup> What specific conduct or other factors give rise to any such problems? Does the ever increasing intermodal competition among broadband providers prevent such problems from developing in the first place? If the Commission were to promulgate rules in this area, what would be the challenges in tailoring the rules only to reach any identified market failures or other specific problems, and not to prevent policies that benefit consumers?<sup>21</sup> Would regulations further our mandate to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”?<sup>22</sup> Assuming it is not necessary to adopt rules at this time, what market characteristics would justify the adoption of rules?

#### IV. PROCEDURAL MATTERS

##### A. Ex Parte Presentations

12. This is an exempt proceeding in which *ex parte* presentations are permitted (except during the Sunshine Agenda period) and need not be disclosed.<sup>23</sup>

##### B. Comment Filing Procedures

13. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper<sup>1</sup> copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

<sup>19</sup> See *Adelphia-Time Warner-Comcast Merger Order*, Attach. (Dissenting Statement of Commissioner Michael J. Copps).

<sup>20</sup> The Policy Statement did not contain rules. See *Policy Statement*, 20 FCC Rcd at 14988, para. 5 n.15.

<sup>21</sup> The principles announced in the Commission’s Policy Statement were “subject to reasonable network management.” *Policy Statement*, 20 FCC Rcd at 14988, para. 5 n.15.

<sup>22</sup> 47 U.S.C. § 157 nt.

<sup>23</sup> See 47 C.F.R. § 1.1204(b)(1).

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

14. **People with Disabilities:** To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

15. In addition, one copy of each pleading must be sent to each of the following:

- (1) The Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12<sup>th</sup> Street, S.W., Room CY-B402, Washington, D.C. 20554; website: [www.bcpweb.com](http://www.bcpweb.com); phone: 1-800-378-3160;
- (2) Janice M. Myles, Competition Policy Division, Wireline Competition Bureau, 445 12<sup>th</sup> Street, S.W., Room 5-C140, Washington, D.C. 20554; e-mail: [janice.myles@fcc.gov](mailto:janice.myles@fcc.gov).

16. Publicly available filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C., 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554.

Customers may contact BCPI through its website: [www.bcpweb.com](http://www.bcpweb.com), by e-mail at [fcc@bcpweb.com](mailto:fcc@bcpweb.com), by telephone at (202) 488-5300 or (800) 378-3160, or by facsimile at (202) 488-5563.

**V. ORDERING CLAUSE**

17. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201, 202, and 303(r), 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201, 202, 303(r), this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

In 2005, the Commission adopted an Internet Policy Statement containing four principles. The intent of these principles was to protect consumers' access to the lawful online content of their choice and to foster the creation, adoption and use of Internet broadband content, applications, and services. Although we are not aware of any current blocking situations, the Commission remains vigilant in protecting consumers' access to content on the Internet. At the same time, I believe that it is useful for the Commission, as the expert communications agency, to collect a record about the current practices in the broadband marketplace.

This inquiry will provide a convenient forum for various providers, including network and content providers, to tell us what is happening in the market and about their concerns. For example, we seek comment on how broadband providers are managing their Internet traffic, whether certain traffic is prioritized, and whether our policies should distinguish between content providers that charge end users for access to content and those that do not. Gathering this information will allow us to better monitor this market and determine the extent to which providers are acting consistently with our Internet Policy Statement. The Commission is ready, willing, and able to step in if necessary. We have the dual responsibilities of creating an environment that promotes infrastructure investment and broadband deployment and to ensure that consumers' access to content on the Internet is protected. We can best fulfill these responsibilities by being fully informed.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

We live in a world where a very few concentrated broadband providers exercise powerful and not always consumer-friendly control over the pipes that come into our homes and businesses. While we welcome telephone companies and cable providers competing to sell high-speed services, FCC statistics show that together these duopoly operators control some 96 percent of the residential broadband market, with too many consumers lacking a choice even between those two providers. Wireless and broadband over powerline are exciting prospects, but the reality is we are nowhere near seeing the kind of ubiquitous third or fourth player necessary to turn broadband into a vibrantly competitive market.

If eventually we develop a truly competitive marketplace with consumers enjoying broadband speeds like those available to our counterparts in other industrial countries, we can step back and rely on the genius of that marketplace. But in the meantime, the concentrated providers out there increasingly have the ability—and some think the business incentive—to build networks with traffic management policies that could restrict how we use the Internet. I haven't taught history for many years, but I remember enough of it to know that if someone has both the technical capacity and the commercial incentive to control something, it's going to get tried.

Don't take my word for it. It was the *Wall Street Journal* that said large carriers "are starting to make it harder for consumers to use the Internet for phone calls or swapping video files." The more powerful and concentrated our facilities providers grow, the greater their motivation will be to close off Internet lanes and block IP byways. After all, some have already touted their support for segregating Internet traffic by charging premium tolls for passage for favored websites, while consigning everyone else's websites and applications to bumpy travels in steerage.

This brings us to the item before us. It really puts the Commission at a crossroads and the path we choose has the potential to recast and shape the Internet for years to come. At issue is whether a few broadband behemoths will be ceded gatekeeper control over the public's access to the full bounty of the Internet. We have a choice to make.

Down one road lies a FCC committed to honor and preserve the fundamental openness that made the Internet so great—a place of freedom and choice where anyone with a good idea and a little tech-savvy can create an idea or business with global reach. On this road the FCC would adopt policies to ensure that the Internet remains a dynamic technology for creating economic and educational opportunity, a fierce economic engine for innovation and entrepreneurship, and a tool for the sustenance and growth of democracy across the land.

Down the other road lies a FCC that, while it celebrates the Internet, sits idly by as broadband providers amass the power and technical ability to dictate where you can go and what you can do on the Internet. This FCC would see no public interest harms when providers set up gated communities and toll booths on the Internet, altering the openness that has characterized this medium from the very start and endangering the principles of packet equality and non-discrimination. Make no mistake—the practical effect of what is being proposed by some network operators is to invert the democratic genius of the Internet. The original idea was to have neutral dumb networks with intelligence invested at the edges, with you and me and millions of other users. Now some seem bent on making the pipe intelligent and all-controlling even while they make all of us users at the edges dumb. Maybe the Internet entrepreneurs of the future will have to seek permission to innovate from the owner of the broadband pipe. That would be really hard to square with what I think should be our responsibility at the FCC, and that is to do



everything we can to preserve the openness that made the Internet so great. You know what? I have enough confidence in this technology and enough confidence in American innovation and creativity to believe we can get to the promised land without that kind of discrimination.

I know what I want. I want an FCC that unconditionally states its preference for non-discrimination on the Internet. I think consumers want that, too. Polls from Consumers Union and the Consumer Federation tell us that two-thirds of Internet users have serious concerns about practices by network owners to block or impair their access to information and services over the Internet. My own informal poll, taken by listening to Americans in dozens of forums around the country, confirms those findings.

How did we get to this unfortunate junction? Let's review a little history. Back in 2003, in a speech at the New America Foundation, I suggested the Internet as we know it could be dying. Some thought that was a rather controversial claim at the time, I know, but let's look at what has happened since. In 2005, the Commission decided to reclassify broadband transmission facilities as Title I "information services" rather than Title II "telecommunications services." To the uninitiated this sounds like semantics. But it had real consequences. That's because the nondiscrimination obligations that attach to telecommunications traffic and which were vital to keeping the Internet open in the dial-up era no longer apply to broadband services.

So when the Commission set off on this course, I asked my colleagues to at least adopt an Internet Policy Statement. They did, and I appreciate that, and as a result, today the Commission has a public document that summarizes the basic rights of Internet end-users. The Internet policy statement states that consumers are entitled to: access content; run applications and services; connect devices to the network; and enjoy competition among network providers, application and service providers and content providers. So far, so good.

But time has taught us that something is missing from this document and another step is needed. In a world where big and concentrated broadband providers are searching for new business models and suggesting that web sites may have to pay additional tolls for the traffic they generate, we need to keep our policies current. It is time for us to go beyond the original four principles and commit industry and the FCC unequivocally to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.

We proceed too leisurely here. Rather than strike out and unflinchingly proclaim this agency's commitment to an open and non-discriminatory Internet, we satisfy ourselves with one tiny, timid step. Let's be frank. Putting out a Notice of Inquiry is not the way to sail boldly forth. History shows that Notices of Inquiry like this have a way of disappearing into the regulatory dustbin, putting off decisions that need to be made now. These are no longer new and novel questions. We adopted our Four Principles of Internet Freedom nearly two years ago. And these issues come back to us in just about every major merger that comes before us—and there have been a lot of those!

We should be building on what we have already approved and going with at least a Notice of Proposed Rulemaking with a commitment to move to an Order within a time certain. These are not esoteric, inside-the-Beltway issues—they go to the very core of what kinds of opportunities are going to be available to all of us in this digital age. We're being left behind in broadband globally, the country is paying a steep cost, and we face the stark challenge to decide if we are going to do something about it or not. We're talking here about the greatest small "d" democratic technology platform that has ever

existed. Taking another year or two to decide if we want to keep it that way shortchanges the technology, shortchanges consumers and shortchanges our future. I will not dissent from the one small step forward we take today, but I do lament our not making a Neil Armstrong giant leap for mankind.

**CONCURRING STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

The Inventor of the World Wide Web, Sir Tim Berners Lee, has said: "The Internet is increasingly becoming the dominant medium binding us. The neutral communications medium is essential to our society. It is the basis of a fair competitive market economy. It is the basis of democracy, by which a community should decide what to do. It is the basis of science, by which human kind should decide what is true."<sup>24</sup>

His eloquent observation highlights precisely why it is so critical that we maintain the potential and promise that the Internet holds for enriching our economic and social well-being. I support this effort to open a proceeding because it is critical that the Commission focus a spotlight on this issue. Nevertheless, given the importance of Internet freedom, I would have preferred a more pro-active approach, including the adoption of a Notice of Proposed Rulemaking. This Commission must not send a signal that preserving the open character of the Internet is anything less than a top priority.

The open nature of the Internet has enabled those with unique interests and needs, or with unique cultural heritage, to meet and form virtual communities like no tool before it. It also means that consumers are being empowered as citizens and as entrepreneurs, and they are increasingly creative in the way that they use these new technologies. The Internet has been a source of remarkable innovation and an engine for extraordinary economic growth and productivity. It has fostered democracy and opened a new world of opportunities for those who have access. It is such a transformative tool precisely because of its openness and diversity.

Yet, there are increasing pressures that have the potential to alter dramatically consumers' on-line experiences. We now face important questions about whether we can preserve those unique characteristics of the Internet, particularly given the Commission's recent efforts to reshape the legal framework that we have operated under since the dawn of the Internet. By largely deregulating broadband Internet access, the Commission is moving outside of the scope of the traditional protections afforded under the Act.

As a counter-balance to this decision, the FCC adopted a set of Internet Policy principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet. While the Internet Policy Statement was an important step, the debate over what consumers and companies can expect from the Internet has taken on a new dimension as network providers discuss new plans that suggest a fundamental shift in the character of the Internet. Some may suggest that there is a lack of hard evidence of a problem, but we miss important signals if we do not take these leading broadband providers at their word. Providers may be on their best behavior for now with the spotlight turned on net neutrality. But decisions being made today about the architecture of the Internet could affect its character for years to come, so it is important that we make our expectations clear.

Although this is a complex issue -- one made more so by continually-evolving technologies -- I share the growing concern that the leading broadband providers which control the last mile connections to the home may have the ability and incentive to discriminate, and to limit the choices available over the Internet. While we all have high hopes for the development of alternate technologies to promote greater competition in the broadband access market, right now, we see a broadband market in which, according

<sup>24</sup> Tim Berners-Lee "Neutrality of the Net", Decentralized Information Group (May 2, 2006).

to FCC statistics, telephone and cable operators control over a 95 percent share. For many consumers, there is no meaningful choice of providers.

Since the FCC's deregulation of broadband services, we have also witnessed a dramatic consolidation among the nation's leading providers. We've seen the formation of the largest broadband provider in the nation, last mile providers have purchased backbone providers, providers are clustering their service territories, and we've seen new combinations of content and services. In major mergers between both cable and telephone companies, I have urged my colleagues to condition approval on compliance with the Commission's Internet Policy Statement. Notwithstanding AT&T's significant commitment to abide by the four principles of the FCC Internet Policy Statement and to maintain a neutral network and neutral routing in its wireline broadband Internet access service, it is critical that we remain vigilant and continue to explore comprehensive approaches to this issue.

Policymakers both here at the FCC and in Congress are faced with important choices about what the future of Internet access will look like in a broadband world. Will our policies continue to foster an open and diverse Internet? Will our policies create incentives for network providers to build capacity to respond to consumer demand or to foster scarcity? What will it mean for the consumer experience if network providers play a greater role in selecting which Internet applications and services work best? What does it mean if an innovator has to ask permission before deploying an Internet application?

Even as we launch this proceeding, we should be looking to add a new principle to our Policy Statement to address incentives for anti-competitive discrimination and to ensure the continued vibrancy of the Internet. It is clear that Americans view the Internet differently than they do other mediums. Consumers want to be able to choose an independent VoIP provider, or to be able to access video clips, and not just video programming from the largest media companies. Consumers don't want the Internet to become another version of TV, controlled by corporate giants.

Some have questioned whether policies that promote an open Internet are compatible with giving network providers the incentive to build out their facilities. I firmly believe that preserving the vibrant quality of the Internet and promoting high speed access to the Internet are goals that go hand-in-hand. Yet, the U.S. faces critical challenges in achieving these goals. Compared to the global leaders, broadband connections in the U.S. are "slow, expensive, and not available to everyone," as described by a recent report from a coalition of consumer advocates.<sup>25</sup> This report found that U.S. consumers pay nearly twice as much as Japanese customers for connections that are 20 times as slow. For millions of low income consumers, that means that broadband connections remain out of reach. And the situation is far from ideal for residents and businesses in many rural communities as well. The GAO recently confirmed again that rural residents are less likely to have broadband than their urban counterparts. One thing is clear in the Internet Age: access translates to opportunity. Leaving millions of our citizens without access to affordable and high performance broadband Internet access disadvantages them and fails to draw on all the resources our country can bring to bear in a global economy. This is not a public relations problem, it's a productivity problem.

Whether this Notice will appreciably further efforts to preserve an open Internet and promote high speed Internet access remains to be seen. Soliciting a clear understanding of facts and developing rigorous analyses are integral to the FCC mission. Yet, this Notice is short on analysis and could do far more to draw out discussion about the plans of our increasingly large and concentrated network providers and the implications for consumers.

<sup>25</sup> See *Broadband Reality Check II*, Free Press, Consumers Union, Consumer Federation of America (rel. Aug. 2006).

Of particular concern is the decision to cast this item as a Notice of Inquiry. Unfortunately, some parties may be tempted to read this decision itself as sending a message about how low it ranks on the Commission's list of priorities. Given the importance of this issue, and the fact that the Commission has acted on it repeatedly, including issuing a seminal statement of principles, and including increasingly comprehensive versions of it in a number of major mergers, the time is ripe for an NPRM. Fairly or not, NOIs are often perceived as the Commission's way delaying and downgrading an issue. But we cannot stick our head in the sand on this. The future of the Internet is simply too important. We will need to keep this issue at the fore and move quickly if we are serious about addressing Internet freedom. For these reasons, I can only concur in this item.

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

Today's item seeks input on how the broadband industry functions, including the relationships between broadband providers, content and application providers, and consumers. We also seek comment on how industry practices regarding the management of broadband data affect the deployment of broadband and innovation in the development of content, applications and network equipment that are all crucial to enhancing the value of broadband to consumers. It is essential that we, as the expert agency, carefully evaluate what is taking place in today's broadband marketplace to ensure that America remains a leader in an increasingly global economy. We must also employ our regulatory humility to recognize that imposing any new strictures on a blossoming industry could have significant and lasting stifling effects on the growth of broadband – and our overall economy.

The debate over broadband network practices has been percolating under several names in recent years – “net freedoms,” “connectivity principles,” “Internet policy,” and, of course, “net neutrality.” Whatever one chooses to call it, I prefer to try to view this issue from the perspective of consumers. The previous Commission did so in its Policy Statement and I hope it will continue to do so. While it remains important for us to understand the industry structure and the relationships between each of the different elements in the market, we must ensure that our policies promote, not deter, investment, innovation, and new entry in networks, products, and services that will help America remain competitive in the increasingly global economy.

As I have stated previously, I am skeptical of the present need to impose new rules, or even principles. In many ways, I think this issue has focused too much on the need to define a cure before there has been a disease, or even a high fever. That is why I am pleased that today's item signifies two important Commission ideals as we move further along into the broadband era: a willingness to engage with consumers and industry to discover exactly how the marketplace is functioning; and the humility to recognize the gravity of our actions. Accordingly, I support today's measured step of seeking more information about what is going on in the marketplace – what companies and consumers are experiencing, or not able to experience.

STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL

**Re: *Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52**

During the past two years, our nation's discussion regarding net neutrality has been a vigorous and healthy one. The dialogue has heightened awareness of issues that are vital to the future of the American—and global—economies. Where particular parties sit vis-à-vis the Internet determines their perspectives on this issue. Consumers, network owners, content providers and many others, all have differing and important points of view. In fact, differing names and definitions of the term “net neutrality” abound and continue to change.

Quickly after its debut to the general public a mere 13 years ago, the “Internet” became the communications lifeblood of the world economy and the primary means of communication for American consumers. While it is absolutely essential that broadband network and service providers have the proper incentives to deploy new technologies, it is equally as important that consumers have the freedom to pull or post the content of their choice anytime, anywhere and on any device. In fact, this powerful new wave of consumer demand is shaping a beautiful explosion of entrepreneurial brilliance that will change our lives for decades to come.

In anticipation of these developments, in 2005, the Commission adopted a *Policy Statement* that set forth four broad principles designed “to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet.” Today, we are adopting a *Notice of Inquiry* that asks broad questions about the state of the market for broadband and related services, whether abuses are occurring in the market that affect the offering of content on the Internet or the development of new technologies, and the ultimate effect on consumers. For those who fear or allege market failure, this NOI gives them an opportunity to present detailed evidence, of which we have none, thus far. For those who argue that the market is working well and no further regulation is needed, now is the time to make their case.

I agree with my colleagues that we must remain vigilant against possible market failure or anti-competitive conduct that would hamper the full development of the Internet and related services being provided to consumers. But we also must resist the temptation to impose regulations that are based merely on theory. Today, we take a sensible, thoughtful and reasonable step that should give the Commission a factual record upon which to make a reasoned determination whether additional action is justified or not, pursuant to the Commission's ancillary jurisdiction to regulate interstate and foreign communications. I look forward to reviewing the information that this proceeding yields.

**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

In 2005, the Commission adopted an Internet Policy Statement containing four principles. The intent of these principles was to protect consumers' access to the lawful online content of their choice and to foster the creation, adoption and use of Internet broadband content, applications, and services. Although we are not aware of any current blocking situations, the Commission remains vigilant in protecting consumers' access to content on the Internet. At the same time, I believe that it is useful for the Commission, as the expert communications agency, to collect a record about the current practices in the broadband marketplace.

This inquiry will provide a convenient forum for various providers, including network and content providers, to tell us what is happening in the market and about their concerns. For example, we seek comment on how broadband providers are managing their Internet traffic, whether certain traffic is prioritized, and whether our policies should distinguish between content providers that charge end users for access to content and those that do not. Gathering this information will allow us to better monitor this market and determine the extent to which providers are acting consistently with our Internet Policy Statement. The Commission is ready, willing, and able to step in if necessary. We have the dual responsibilities of creating an environment that promotes infrastructure investment and broadband deployment and to ensure that consumers' access to content on the Internet is protected. We can best fulfill these responsibilities by being fully informed.



**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

We live in a world where a very few concentrated broadband providers exercise powerful and not always consumer-friendly control over the pipes that come into our homes and businesses. While we welcome telephone companies and cable providers competing to sell high-speed services, FCC statistics show that together these duopoly operators control some 96 percent of the residential broadband market, with too many consumers lacking a choice even between those two providers. Wireless and broadband over powerline are exciting prospects, but the reality is we are nowhere near seeing the kind of ubiquitous third or fourth player necessary to turn broadband into a vibrantly competitive market.

If eventually we develop a truly competitive marketplace with consumers enjoying broadband speeds like those available to our counterparts in other industrial countries, we can step back and rely on the genius of that marketplace. But in the meantime, the concentrated providers out there increasingly have the ability—and some think the business incentive—to build networks with traffic management policies that could restrict how we use the Internet. I haven't taught history for many years, but I remember enough of it to know that if someone has both the technical capacity and the commercial incentive to control something, it's going to get tried.

Don't take my word for it. It was the *Wall Street Journal* that said large carriers "are starting to make it harder for consumers to use the Internet for phone calls or swapping video files." The more powerful and concentrated our facilities providers grow, the greater their motivation will be to close off Internet lanes and block IP byways. After all, some have already touted their support for segregating Internet traffic by charging premium tolls for passage for favored websites, while consigning everyone else's websites and applications to bumpy travels in steerage.

This brings us to the item before us. It really puts the Commission at a crossroads and the path we choose has the potential to recast and shape the Internet for years to come. At issue is whether a few broadband behemoths will be ceded gatekeeper control over the public's access to the full bounty of the Internet. We have a choice to make.

Down one road lies a FCC committed to honor and preserve the fundamental openness that made the Internet so great—a place of freedom and choice where anyone with a good idea and a little tech-savvy can create an idea or business with global reach. On this road the FCC would adopt policies to ensure that the Internet remains a dynamic technology for creating economic and educational opportunity, a fierce economic engine for innovation and entrepreneurship, and a tool for the sustenance and growth of democracy across the land.

Down the other road lies a FCC that, while it celebrates the Internet, sits idly by as broadband providers amass the power and technical ability to dictate where you can go and what you can do on the Internet. This FCC would see no public interest harms when providers set up gated communities and toll booths on the Internet, altering the openness that has characterized this medium from the very start and endangering the principles of packet equality and non-discrimination. Make no mistake—the practical effect of what is being proposed by some network operators is to invert the democratic genius of the Internet. The original idea was to have neutral dumb networks with intelligence invested at the edges, with you and me and millions of other users. Now some seem bent on making the pipe intelligent and all-controlling even while they make all of us users at the edges dumb. Maybe the Internet entrepreneurs of the future will have to seek permission to innovate from the owner of the broadband pipe. That would be really hard to square with what I think should be our responsibility at the FCC, and that is to do

everything we can to preserve the openness that made the Internet so great. You know what? I have enough confidence in this technology and enough confidence in American innovation and creativity to believe we can get to the promised land without that kind of discrimination.

I know what I want. I want an FCC that unconditionally states its preference for non-discrimination on the Internet. I think consumers want that, too. Polls from Consumers Union and the Consumer Federation tell us that two-thirds of Internet users have serious concerns about practices by network owners to block or impair their access to information and services over the Internet. My own informal poll, taken by listening to Americans in dozens of forums around the country, confirms those findings.

How did we get to this unfortunate junction? Let's review a little history. Back in 2003, in a speech at the New America Foundation, I suggested the Internet as we know it could be dying. Some thought that was a rather controversial claim at the time, I know, but let's look at what has happened since. In 2005, the Commission decided to reclassify broadband transmission facilities as Title I "information services" rather than Title II "telecommunications services." To the uninitiated this sounds like semantics. But it had real consequences. That's because the nondiscrimination obligations that attach to telecommunications traffic and which were vital to keeping the Internet open in the dial-up era no longer apply to broadband services.

So when the Commission set off on this course, I asked my colleagues to at least adopt an Internet Policy Statement. They did, and I appreciate that, and as a result, today the Commission has a public document that summarizes the basic rights of Internet end-users. The Internet policy statement states that consumers are entitled to: access content; run applications and services; connect devices to the network; and enjoy competition among network providers, application and service providers and content providers. So far, so good.

But time has taught us that something is missing from this document and another step is needed. In a world where big and concentrated broadband providers are searching for new business models and suggesting that web sites may have to pay additional tolls for the traffic they generate, we need to keep our policies current. It is time for us to go beyond the original four principles and commit industry and the FCC unequivocally to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.

We proceed too leisurely here. Rather than strike out and unflinchingly proclaim this agency's commitment to an open and non-discriminatory Internet, we satisfy ourselves with one tiny, timid step. Let's be frank. Putting out a Notice of Inquiry is not the way to sail boldly forth. History shows that Notices of Inquiry like this have a way of disappearing into the regulatory dustbin, putting off decisions that need to be made now. These are no longer new and novel questions. We adopted our Four Principles of Internet Freedom nearly two years ago. And these issues come back to us in just about every major merger that comes before us—and there have been a lot of those!

We should be building on what we have already approved and going with at least a Notice of Proposed Rulemaking with a commitment to move to an Order within a time certain. These are not esoteric, inside-the-Beltway issues—they go to the very core of what kinds of opportunities are going to be available to all of us in this digital age. We're being left behind in broadband globally, the country is paying a steep cost, and we face the stark challenge to decide if we are going to do something about it or not. We're talking here about the greatest small "d" democratic technology platform that has ever

existed. Taking another year or two to decide if we want to keep it that way shortchanges the technology, shortchanges consumers and shortchanges our future. I will not dissent from the one small step forward we take today, but I do lament our not making a Neil Armstrong giant leap for mankind.

**CONCURRING STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

The Inventor of the World Wide Web, Sir Tim Berners Lee, has said: "The Internet is increasingly becoming the dominant medium binding us. The neutral communications medium is essential to our society. It is the basis of a fair competitive market economy. It is the basis of democracy, by which a community should decide what to do. It is the basis of science, by which human kind should decide what it true."<sup>1</sup>

His eloquent observation highlights precisely why it is so critical that we maintain the potential and promise that the Internet holds for enriching our economic and social well-being. I support this effort to open a proceeding because it is critical that the Commission focus a spotlight on this issue. Nevertheless, given the importance of Internet freedom, I would have preferred a more pro-active approach, including the adoption of a Notice of Proposed Rulemaking. This Commission must not send a signal that preserving the open character of the Internet is anything less than a top priority.

The open nature of the Internet has enabled those with unique interests and needs, or with unique cultural heritage, to meet and form virtual communities like no tool before it. It also means that consumers are being empowered as citizens and as entrepreneurs, and they are increasingly creative in the way that they use these new technologies. The Internet has been a source of remarkable innovation and an engine for extraordinary economic growth and productivity. It has fostered democracy and opened a new world of opportunities for those who have access. It is such a transformative tool precisely because of its openness and diversity.

Yet, there are increasing pressures that have the potential to alter dramatically consumers' on-line experiences. We now face important questions about whether we can preserve those unique characteristics of the Internet, particularly given the Commission's recent efforts to reshape the legal framework that we have operated under since the dawn of the Internet. By largely deregulating broadband Internet access, the Commission is moving outside of the scope of the traditional protections afforded under the Act.

As a counter-balance to this decision, the FCC adopted a set of Internet Policy principles to encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet. While the Internet Policy Statement was an important step, the debate over what consumers and companies can expect from the Internet has taken on a new dimension as network providers discuss new plans that suggest a fundamental shift in the character of the Internet. Some may suggest that there is a lack of hard evidence of a problem, but we miss important signals if we do not take these leading broadband providers at their word. Providers may be on their best behavior for now with the spotlight turned on net neutrality. But decisions being made today about the architecture of the Internet could affect its character for years to come, so it is important that we make our expectations clear.

Although this is a complex issue -- one made more so by continually-evolving technologies -- I share the growing concern that the leading broadband providers which control the last mile connections to the home may have the ability and incentive to discriminate, and to limit the choices available over the Internet. While we all have high hopes for the development of alternate technologies to promote greater competition in the broadband access market, right now, we see a broadband market in which, according

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<sup>1</sup> Tim Berners-Lee "Neutrality of the Net", Decentralized Information Group (May 2, 2006).

to FCC statistics, telephone and cable operators control over a 95 percent share. For many consumers, there is no meaningful choice of providers.

Since the FCC's deregulation of broadband services, we have also witnessed a dramatic consolidation among the nation's leading providers. We've seen the formation of the largest broadband provider in the nation, last mile providers have purchased backbone providers, providers are clustering their service territories, and we've seen new combinations of content and services. In major mergers between both cable and telephone companies, I have urged my colleagues to condition approval on compliance with the Commission's Internet Policy Statement. Notwithstanding AT&T's significant commitment to abide by the four principles of the FCC Internet Policy Statement and to maintain a neutral network and neutral routing in its wireline broadband Internet access service, it is critical that we remain vigilant and continue to explore comprehensive approaches to this issue.

Policymakers both here at the FCC and in Congress are faced with important choices about what the future of Internet access will look like in a broadband world. Will our policies continue to foster an open and diverse Internet? Will our policies create incentives for network providers to build capacity to respond to consumer demand or to foster scarcity? What will it mean for the consumer experience if network providers play a greater role in selecting which Internet applications and services work best? What does it mean if an innovator has to ask permission before deploying an Internet application?

Even as we launch this proceeding, we should be looking to add a new principle to our Policy Statement to address incentives for anti-competitive discrimination and to ensure the continued vibrancy of the Internet. It is clear that Americans view the Internet differently than they do other mediums. Consumers want to be able to choose an independent VoIP provider, or to be able to access video clips, and not just video programming from the largest media companies. Consumers don't want the Internet to become another version of TV, controlled by corporate giants.

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Of particular concern is the decision to cast this item as a Notice of Inquiry. Unfortunately, some parties may be tempted to read this decision itself as sending a message about how low it ranks on the Commission's list of priorities. Given the importance of this issue, and the fact that the Commission has acted on it repeatedly, including issuing a seminal statement of principles, and including increasingly comprehensive versions of it in a number of major mergers, the time is ripe for an NPRM. Fairly or not, NOIs are often perceived as the Commission's way delaying and downgrading an issue. But we cannot stick our head in the sand on this. The future of the Internet is simply too important. We will need to keep this issue at the fore and move quickly if we are serious about addressing Internet freedom. For these reasons, I can only concur in this item.

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

Today's item seeks input on how the broadband industry functions, including the relationships between broadband providers, content and application providers, and consumers. We also seek comment on how industry practices regarding the management of broadband data affect the deployment of broadband and innovation in the development of content, applications and network equipment that are all crucial to enhancing the value of broadband to consumers. It is essential that we, as the expert agency, carefully evaluate what is taking place in today's broadband marketplace to ensure that America remains a leader in an increasingly global economy. We must also employ our regulatory humility to recognize that imposing any new strictures on a blossoming industry could have significant and lasting stifling effects on the growth of broadband – and our overall economy.

The debate over broadband network practices has been percolating under several names in recent years – “net freedoms,” “connectivity principles,” “Internet policy,” and, of course, “net neutrality.” Whatever one chooses to call it, I prefer to try to view this issue from the perspective of consumers. The previous Commission did so in its Policy Statement and I hope it will continue to do so. While it remains important for us to understand the industry structure and the relationships between each of the different elements in the market, we must ensure that our policies promote, not deter, investment, innovation, and new entry in networks, products, and services that will help America remain competitive in the increasingly global economy.

As I have stated previously, I am skeptical of the present need to impose new rules, or even principles. In many ways, I think this issue has focused too much on the need to define a cure before there has been a disease, or even a high fever. That is why I am pleased that today's item signifies two important Commission ideals as we move further along into the broadband era: a willingness to engage with consumers and industry to discover exactly how the marketplace is functioning; and the humility to recognize the gravity of our actions. Accordingly, I support today's measured step of seeking more information about what is going on in the marketplace – what companies and consumers are experiencing, or not able to experience.

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL**

***Re: Broadband Industry Practices, Notice of Inquiry, WC Docket No. 07-52***

During the past two years, our nation's discussion regarding net neutrality has been a vigorous and healthy one. The dialogue has heightened awareness of issues that are vital to the future of the American—and global—economies. Where particular parties sit vis-à-vis the Internet determines their perspectives on this issue. Consumers, network owners, content providers and many others, all have differing and important points of view. In fact, differing names and definitions of the term “net neutrality” abound and continue to change.

Quickly after its debut to the general public a mere 13 years ago, the “Internet” became the communications lifeblood of the world economy and the primary means of communication for American consumers. While it is absolutely essential that broadband network and service providers have the proper incentives to deploy new technologies, it is equally as important that consumers have the freedom to pull or post the content of their choice anytime, anywhere and on any device. In fact, this powerful new wave of consumer demand is shaping a beautiful explosion of entrepreneurial brilliance that will change our lives for decades to come.

In anticipation of these developments, in 2005, the Commission adopted a *Policy Statement* that set forth four broad principles designed “to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet.” Today, we are adopting a *Notice of Inquiry* that asks broad questions about the state of the market for broadband and related services, whether abuses are occurring in the market that affect the offering of content on the Internet or the development of new technologies, and the ultimate effect on consumers. For those who fear or allege market failure, this NOI gives them an opportunity to present detailed evidence, of which we have none, thus far. For those who argue that the market is working well and no further regulation is needed, now is the time to make their case.

I agree with my colleagues that we must remain vigilant against possible market failure or anti-competitive conduct that would hamper the full development of the Internet and related services being provided to consumers. But we also must resist the temptation to impose regulations that are based merely on theory. Today, we take a sensible, thoughtful and reasonable step that should give the Commission a factual record upon which to make a reasoned determination whether additional action is justified or not, pursuant to the Commission's ancillary jurisdiction to regulate interstate and foreign communications. I look forward to reviewing the information that this proceeding yields.



# ATTACHMENT 4

This document is available in three formats: this web page (for browsing content), PDF (comparable to original document formatting), and Word. To view the PDF you will need Acrobat Reader, which may be downloaded from the [Adobe site](#). For an official signed copy, please contact the [Antitrust Documents Group](#).

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

Broadband Industry Practices

WC Docket No. 07-52

**EX PARTE FILING**  
**UNITED STATES DEPARTMENT OF JUSTICE**

The United States Department of Justice ("Department")<sup>(1)</sup> submits this *ex parte* filing to respond to suggestions by some companies and individuals that the Federal Communications Commission ("FCC" or "Commission") adopt new regulations governing the transmission of traffic over the Internet--so-called "net neutrality" rules. The FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws. Marketplace restrictions proposed by some proponents of "net neutrality" could in fact prevent, rather than promote, optimal investment and innovation in the Internet, with significant negative effects for the economy and consumers.

The public policy objective here is clear: a thriving and dynamic Internet capable of meeting the demands of consumers for fast and reliable access to a rich variety of content and applications. Many commenters in this proceeding agree that the best way to achieve this objective is through marketplace competition. Other commenters, however, have urged the FCC to consider imposing prophylactic "neutrality" regulations to prohibit what they regard to be undesirable differentiation in the provision of Internet services. Some of these proposals, for example, could restrict broadband providers from offering different levels of quality of service at varying costs to content and application providers in a manner that efficiently responds to market demands. Other proposals would require interconnection, open access, and structural separation of companies offering both Internet access services or transmission and content or applications deliverable over the Internet.<sup>(2)</sup>

The Department submits, however, that free market competition, unfettered by unnecessary governmental regulatory restraints, is the best way to foster innovation and development of the Internet. Free market competition drives scarce resources to their fullest and most efficient use, spurring businesses to invest in and sell as efficiently as possible the kinds and quality of goods and services that consumers desire. Past experience has demonstrated that, absent actual market failure, the operation of a free market is a far superior alternative to regulatory restraints.

However well-intentioned, regulatory restraints can inefficiently skew investment, delay

innovation, and diminish consumer welfare, and there is reason to believe that the kinds of broad marketplace restrictions proposed in the name of "neutrality" would do just that with respect to the Internet. Congress passed the Telecommunications Act of 1996 to "promote competition and reduce regulation," and to "encourage the rapid deployment of new telecommunications technologies."<sup>(3)</sup> In response, the Commission has deregulated various aspects of broadband services.<sup>(4)</sup> Against this background, commenters proposing special regulation of the Internet should bear a substantial burden of demonstrating that it is appropriate.

Based on the record in this proceeding to date, proponents of "net neutrality" regulation have failed to show that a sufficient case exists for imposing the sorts of broad marketplace restrictions that have been proposed. Moreover, the Department has grave concerns about the potential negative consequences of such restrictions were they to be enacted. Given the dynamic and evolving nature of the Internet, the Department finds that there are especially strong reasons to be cautious about imposing restrictive regulations in this context.

- In response to the FCC's request, commenters provided scant evidence that consumers are being harmed by the business practices of Internet industry participants. To the contrary, Internet usage is soaring. Consumers are reaping substantial benefits from new services and technologies.
- The types of conduct that some proponents of regulation seek to prohibit--e.g., the prioritization of certain content and content providers (such as streaming video and other latency-sensitive content), offering of premium services and different levels of quality of service, preferential treatment of certain content, and vertical integration--in many instances actually may be procompetitive. A blanket prohibition on such conduct would likely result in significant marketplace distortion. Even assuming that a potential danger exists, the ambiguity of what conduct needs to be prohibited raises a real possibility that regulation would prohibit some conduct that is beneficial, while failing to stop other conduct that may be harmful.
- A number of proposed "neutrality" restrictions have the potential to harm consumers. For example:
  - Precluding broadband providers from charging fees for priority service could shift the entire burden of implementing costly network expansions and improvements onto consumers. Because the average consumer may be unwilling or unable to pay significantly more for access to the Internet in order to ensure smooth delivery to consumers demanding bandwidth-intensive and latency-sensitive content, critical network expansion and improvement may be significantly reduced or delayed.
  - Mandating a single, uniform level of service for all content could limit the quality and variety of services that are available to consumers and discourage investment in new facilities. Services that are particularly vulnerable to delays in delivery or other network problems may either not be offered or will be offered at a lower level of quality than a competitive marketplace would have provided. In addition, the resulting one-size-fits-all uniform level of service may deprive consumers of the choice to pay for the quality they want--leaving some unhappy with the low quality and others unhappy with the high price.
  - Proposed regulations could unreasonably limit the ability of broadband providers to manage their networks efficiently. There are benefits to treating certain

content differently. A number of companies offer services to provide faster delivery of content and/or to avoid some of the congestion and delay on the public Internet. Owners of network facilities have legitimate reasons to manage their facilities in ways that lessen congestion and address public safety issues.

The Department urges the Commission to weigh carefully the potential negative implications of regulation as it considers requests to initiate a rulemaking. Regulatory restraints in this dynamic and evolving sector of the economy could perversely stifle innovation and investment, reduce consumer choice, and increase prices to consumers. Anticompetitive conduct about which the proponents of regulation are concerned will remain subject to the antitrust laws and enforcement actions by government as well as private plaintiffs, and the Department will continue to monitor developments, taking enforcement action where appropriate to ensure a competitive broadband Internet access market.

## **I. THE GOVERNMENT SHOULD LIMIT REGULATION IN DYNAMIC INDUSTRIES SUCH AS THE INTERNET**

As a general matter, market forces, rather than regulatory restraints on competition, are better at fostering innovation and investment, stimulating new products and services, reducing costs, and expanding choice.<sup>(5)</sup> Accordingly, regulation should be avoided except in those rare instances of market failure (e.g., where competition cannot work because of a "natural monopoly") or where regulation is necessary to protect a clearly defined and compelling public policy goal that cannot be achieved through competition. There is neither a sound theoretical nor empirical basis for restricting broadband competition at this time. From a theoretical perspective, differentiated products and pricing can provide consumers (and content providers) a broader array of choices that meets service preferences more effectively and efficiently. Further, such practices can enable greater investment that will speed innovation and development.

On the empirical side, despite the Commission's request for evidence of harmful discrimination or behavior, as discussed further below, commenters failed to present evidence suggesting that a problem exists. To the contrary, it appears that the Internet is flourishing without the proposed sectoral regulation. Statistics evidence an explosion in Internet usage in recent years due to new applications and increased broadband subscribership. According to press accounts, in June 2006 alone 2.5 *billion* videos were watched on YouTube;<sup>(6)</sup> by May 2007, "hundreds of millions" of videos were being downloaded every day.<sup>(7)</sup> Consumers increasingly are utilizing the Internet for everything from shopping, to news and information. E-commerce accounted for sales of \$31 billion in the first quarter of 2007, an 18 percent increase from the first quarter of 2006.<sup>(8)</sup> Internet advertising produced \$16.9 billion in revenues in 2006, a 35 percent increase from 2005.<sup>(9)</sup>

The number of Internet subscribers also continues to grow, with reports indicating that there were approximately 65 million new broadband subscribers worldwide from June 2006 to May 2007.<sup>(10)</sup> In 2000, there were 420 million online users worldwide, a number that increased to 1 billion in 2005 and is expected to double by 2010.<sup>(11)</sup> In the United States, the FCC found that high-speed (or broadband) lines increased by 26 percent during the first half of 2006, from 51.2 million to 64.6 million lines in service. Between June 2005 and June 2006, the Commission found that high-speed lines increased by 52 percent (or 22.2 million lines).<sup>(12)</sup>

The increased usage and popularity of new services that are sensitive to delays in delivery (known as latency-sensitive traffic) has increased demand for bandwidth.<sup>(13)</sup> In response,

broadband providers have made, and continue to make, significant investments in Internet infrastructure to meet rising demand and reduce Internet congestion.<sup>(14)</sup> The Commission's statistics report that the total number of broadband fiber lines increased from 40,627 in 2000 to 698,990 as of June 30, 2006,<sup>(15)</sup> and the number of residential broadband fiber lines likewise increased from 325 in 2000 to 442,027 fiber lines as of June 30, 2006.<sup>(16)</sup>

In addition, several companies have developed services to provide faster delivery of content and/or to avoid much of the congestion and delay on the public Internet.<sup>(17)</sup> For example, commercial content distribution networks, such as Akamai, Limelight Networks, and Internap Network Services, operate thousands of servers throughout the world that cache content and services to provide faster and more reliable access to specific Internet websites.<sup>(18)</sup> Even though these arrangements allow participating content and access providers to pay for a higher quality of service, and thus create unequal treatment vis-à-vis other content providers, proponents of "net neutrality" do not allege that such services need to be prohibited.<sup>(19)</sup> In addition to these caching services, the Department believes that there can be significant benefits in allowing broadband providers to manage their networks and differentiate among some traffic on the Internet.<sup>(20)</sup>

## **II. THE CASE FOR REGULATING THE INTERNET HAS NOT BEEN MADE, AND REGULATORY RESTRAINTS CAN STIFLE INVESTMENT AND INNOVATION TO THE DETRIMENT OF THE ECONOMY AND CONSUMERS**

Commenters failed to submit evidence in response to the Commission's request for evidence of harmful discrimination or other behavior suggesting the existence of a systematic or widespread problem. Rather, commenters advocating regulation cited only a few isolated examples of problematic conduct, such as in Madison River, where a small, rural incumbent local exchange carrier in North Carolina allegedly blocked the traffic of a competing VoIP service. The FCC promptly addressed the issue and commenters submitted no evidence of any such blocking or other harmful conduct since this 2005 incident. A few commenters cited examples of alleged harmful behavior that occurred outside the United States, which are irrelevant to the instant proceeding.<sup>(21)</sup> Other commenters stated that there is not widespread evidence of a problem.<sup>(22)</sup>

In contrast to the paucity of evidence of present harm to correct, there is reason to believe that the type of regulatory restraints proposed by some commenters under the mantle of "neutrality" could actually deter and delay investment and innovation, and result in less choice and higher prices to consumers of Internet services. Proponents of "net neutrality" regulation do not agree on a definition of what conduct should be prohibited, nor what networks would be regulated (wireline and/or wireless), or even the extent to which pieces of the Internet need to be regulated (just the last-mile or the Internet backbone). The mere fact that a definition of "net neutrality" remains elusive should give the Commission great pause before imposing regulation. Without knowing what services and technologies will be introduced in the future, it will be difficult to craft regulations that take into account the dynamic nature of the Internet. Indeed, given the ambiguity surrounding what conduct regulatory proposals seek to prohibit, there is a real possibility that regulation would prohibit some conduct that is beneficial, while failing to stop other conduct that is harmful.

As noted above, much of the conduct that some proponents of "net neutrality" regulation are concerned about can be procompetitive. Differentiating service levels and pricing, for example, is a common and often efficient way of allocating scarce resources and meeting consumer preferences. The United States Postal Service, for example, allows consumers to

send packages with a variety of different delivery guarantees and speeds, from bulk mail to overnight delivery. These differentiated products respond to market demand and expand consumer choice. No one challenges the benefits to society of these differentiated products; nor does anyone seriously propose that the United States Postal Service be banned from charging different fees for next-day delivery than for bulk mailers. Whether or not the same type of differentiated products and services will develop on the Internet should be determined by market forces, not regulatory intervention.

One argument by some proponents of "net neutrality" regulation is that broadband providers should not charge content and application providers for faster and/or more reliable service. Such a rule, however, could force consumers, regardless of their usage of broadband services, to bear the costs of maintaining and upgrading broadband providers' networks.<sup>(23)</sup> Several studies have noted that prohibiting broadband providers from charging content providers directly would leave consumers shouldering a disproportionate share of the costs necessary to upgrade network infrastructure. A recent paper by Benjamin E. Hermalin and Michael L. Katz examines the relationships among consumers, broadband providers, and content providers, and suggests that "net neutrality" regulation that requires broadband providers to offer the same quality of service to everyone may be inefficient and reduce overall welfare.<sup>(24)</sup> Other studies have identified similar effects and have attempted to quantify the effect of proposed regulations.<sup>(25)</sup>

Other "net neutrality" proposals could prohibit broadband providers from offering differentiated quality of service. Such a rule, however, would eliminate choice and could deter the use and development of new, latency-sensitive applications that require more reliable delivery. A study by Robert Litan and Hal Singer concludes that without reliable low-latency packet delivery, applications that demand a high quality of service, such as telemedicine, may not be viable.<sup>(26)</sup> The Litan and Singer study examines online video gaming, another application that demands high-quality packet delivery, and attempts to estimate the cost to society of "net neutrality" regulation as to this application. The study estimates consumer surplus in the online video gaming industry to be \$195 million in 2006,<sup>(27)</sup> and argues that "net neutrality" regulation may reduce or eliminate this surplus entirely.

Finally, it may be efficient for content providers that demand higher quality of service to bear the cost of upgrades necessary to support those services. Any regulation that prohibits this type of pricing may leave broadband providers unable to raise the capital necessary to fund these investments. Most significantly, regulation may reduce or deter investment in current and future competitive alternatives for broadband access, such as wireless, fixed wireless/WiMAX, WiFi, broadband over power lines, and satellite providers.

### III. CONCLUSION

For the foregoing reasons, the Department urges the Commission to exercise caution before initiating a notice of proposed rulemaking and adopting rules that would regulate this dynamic sector.

Respectfully submitted,

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September 6, 2007

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### FOOTNOTES

1. Through its antitrust enforcement and competition advocacy efforts, the Department has substantial expertise in assessing competition and the effect of regulation with respect to the Internet and "net neutrality"-related issues. The Department has undertaken extensive examination of issues relating to Internet access and delivery services in connection with its investigations of the AT&T/Bell South, SBC/AT&T, Verizon/MCI, MCI/WorldCom/Sprint, and AT&T/MediaOne mergers. In AT&T/BellSouth, for example, the Department "investigated whether the merger would create competitive problems in Internet services, including 'net neutrality' concerns regarding the merged firm's ability or incentive to favor its own Internet content over that of its rivals." Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth at 3 (Oct. 11, 2006), *available at* [http://www.usdoj.gov/atr/public/press\\_releases/2006/218904.pdf](http://www.usdoj.gov/atr/public/press_releases/2006/218904.pdf).

2. *See, e.g.*, Comments of Google, *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52 ("*Broadband Industry Practices NOI*"), at 36 (June 15, 2007) ("Comments of Google") (encouraging the Commission to consider, among other things, interconnection and open access requirements); Comments of Computer & Communications Industry Association, *Broadband Industry Practices NOI*, at 5-6 (June 15, 2007) (urging the FCC to adopt structural separation rules).

3. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble).

4. *See, e.g.*, *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14,853, 14,896, paras. 1, 84 (2005) (removing common carrier regulations from "the dynamic and evolving broadband Internet access marketplace") ("*Wireline Broadband Order*").

5. As reported by the Antitrust Modernization Commission, for example, "[n]umerous studies of sectoral deregulation in the United States show that the unleashing of market forces has greatly increased efficiency and provided substantial benefits to consumer welfare." Antitrust Modernization Comm'n, *Report and Recommendations* 334 & nn.9, 10 (Apr. 2007), *available at* [http://www.amc.gov/report\\_recommendation/amc\\_final\\_report.pdf](http://www.amc.gov/report_recommendation/amc_final_report.pdf).

6. *YouTube Serves Up 100 Million Videos a Day Online*, USA Today, July 16, 2006, available at [http://www.usatoday.com/tech/news/2006-07-16-youtube-views\\_x.htm?](http://www.usatoday.com/tech/news/2006-07-16-youtube-views_x.htm?)

7. See Comments of AT&T, *Broadband Industry Practices NOI*, at 21 (June 15, 2007) (citing Rob Hof, *YouTube: 100 Million Videos a Day*, BusinessWeek, July 14, 2006, available at [http://www.businessweek.com/the\\_thread/techbeat/archives/2006/07/youtube\\_100\\_mil.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/07/youtube_100_mil.html)). According to AT&T, some analysts project that video traffic will represent 80 percent of all Internet traffic by 2010. *Id.*

8. Kristina Knight, *Online Retailing Sees 18% Growth in U.S.*, BizReport, May 18, 2007, available at [http://www.bizreport.com/2007/05/online\\_retailing\\_sees\\_18\\_growth\\_in\\_us.html](http://www.bizreport.com/2007/05/online_retailing_sees_18_growth_in_us.html).

9. Internet Advertising Bureau, *Internet Advertising Revenue Report 3* (May 2007), available at [http://www.iab.net/resources/adrevenue/pdf/IAB\\_PwC\\_2006\\_Final.pdf](http://www.iab.net/resources/adrevenue/pdf/IAB_PwC_2006_Final.pdf).

10. Michael Paxton & Elaine Potter, *Global Broadband Subscriber Base to Nearly Double*, In-Stat, May 30, 2007 ("*Global Broadband Subscriber Base*"), available at <http://www.in-stat.com/press.asp?ID=2016&sku=IN0703510MBS>.

11. See Thomas M. Lenard and Daniel B. Britton, *The Digital Economy Fact Book 8* (8th ed. 2006), available at [http://www.pff.org/issues-pubs/books/factbook\\_2006.pdf](http://www.pff.org/issues-pubs/books/factbook_2006.pdf).

12. FCC, *High-Speed Services for Internet Access: Status as of June 30, 2006* 1 (Jan. 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf) ("*2006 FCC High-Speed Services Report*").

13. For example, reports indicate that YouTube consumes as much bandwidth as the entire Internet consumed in 2000. See Jim Duffy, *Don't Expect Video to Exhaust Fiber Glut*, Network World (Feb. 15, 2007), available at <http://www.networkworld.com/newsletters/optical/2007/0219optical1.html>. In addition, according to Cisco, by 2010 "just 20 homes using the latest broadband technology to access video content will generate enough traffic to equal the entire load on the Internet in 1995." See *id.*; see also Comments of Packet Management System Manufacturers, *Broadband Industry Practices NOI*, at 1-2 (June 15, 2007).

14. For example, Verizon projects that it will spend nearly \$23 billion to deploy its FiOS service to 18 million customer premises by 2010. See Verizon Comments, *Broadband Industry Practices NOI*, at 10 (June 15, 2007). AT&T reports that it has invested over \$18 billion in capital expenditures since 2004. AT&T, *2006 Annual Report* 49 (2006), available at [http://www.att.com/Investor/ATT\\_Annual/downloads/ATT\\_2006\\_Annual\\_Report.pdf](http://www.att.com/Investor/ATT_Annual/downloads/ATT_2006_Annual_Report.pdf). AT&T recently announced plans to invest approximately \$500 million in fiber network upgrades to deliver broadband services (including video) to customers in Georgia alone. See *AT&T to Invest \$500 Million into Georgia Optical Infrastructure*, Lightwave (May 31, 2007), available at [http://lw.pennnet.com/display\\_article/294094/13/ARTCL/none/XNEWS/AT&T-to-invest-\\$500-million-into-Georgia-optical-infrastructure/](http://lw.pennnet.com/display_article/294094/13/ARTCL/none/XNEWS/AT&T-to-invest-$500-million-into-Georgia-optical-infrastructure/). Comcast reports that it devoted over \$11 billion to capital expenditures in the last three years, including over \$4 billion investment in 2006, of which \$320 million was devoted exclusively to upgrading its fiber-optic cable network. Comcast, *2006 Annual Report* 41 (2006), <http://www.comcast.com/2006ar/annual2006.pdf>. Press Release, Comcast, *Comcast Reports 2006 Results and Outlook for 2007 Announces 3-for-2 Stock Split* 3, 10 (Feb. 1, 2007), available at [http://media.corporate-ir.net/media\\_files/irol/11/118591/Earnings\\_4Q06/4q06\\_release.pdf](http://media.corporate-ir.net/media_files/irol/11/118591/Earnings_4Q06/4q06_release.pdf).



15. 2006 FCC High-Speed Services Report tbl. 2.

16. *Id.* tbl. 3. Increases in the availability of fiber and DSL occurred as the FCC relaxed wireline broadband regulation, see *id.* tbls. 1-3, which suggests that deregulation may be correlated with increased investment. The Commission previously concluded that historic regulation of the wireline broadband Internet access marketplace "constrain[ed] technological advances and deter[red] broadband infrastructure investment by creating disincentives to the deployment of facilities capable of providing innovative broadband Internet access services." *Wireline Broadband Order*, 20 F.C.C.R. at 14,865, para. ¶ 19.

17. Packets of traffic on the public Internet are processed on a "best efforts" basis, which does not provide any guarantees regarding speed, delivery, service quality, or priority treatment when the network is congested. When routers have more packets to process than capacity to do so, the overflow packets are queued up for processing in the order they arrive, up to the router's physical capacity. Any additional packets beyond the router's capacity are lost.

18. One of the largest content distribution networks, Akamai, reports that its services "reduce the impact of traffic congestion, bandwidth constraints and capacity limitations" by "accelerating and improving the delivery of content and applications over the Internet." Akamai, 2006 Annual Report 1, 2 (2006), available at [http://www.akamai.com/dl/investors/akamai\\_annual\\_2006.pdf](http://www.akamai.com/dl/investors/akamai_annual_2006.pdf). According to Akamai, its servers alone deliver 10-20 percent of all web traffic. Akamai, Facts & Figures 2, available at [http://www.akamai.com/html/about/facts\\_figures.html](http://www.akamai.com/html/about/facts_figures.html) (last visited on July 16, 2007). Another way in which a business service can obtain prioritized, more secure and reliable service is through a virtual private network.

19. See, e.g., Comments of Google at 4 n.6.

20. Broadband providers also need the ability to prioritize Internet traffic in order to (1) serve public safety officials better during emergencies, and (2) ensure the security of their networks.

21. See, e.g., Comments of the National Association of Telecommunications Officers and Advisors, *Broadband Industry Practices NOI*, at 8 (June 15, 2007) (citing a 2005 incident in which a Canadian broadband provider, Telus, allegedly blocked access to the website of a Telus union during a labor dispute between Telus and the union).

22. See Comments of Hands Off The Internet, *Broadband Industry Practices NOI*, at 4 (June 15, 2007); Comments of the Media Institute, *Broadband Industry Practices NOI*, at 3 (June 15, 2007); Comments of Fiber-to-the-Home Council, *Broadband Industry Practices NOI*, at 56 (June 15, 2007). Comments of Consumers for Cable Choice, *Broadband Industry Practices NOI*, at 1 (June 15, 2007); Comments of the United States Internet Industry Association, *Broadband Industry Practices NOI*, at 2 (June 15, 2007).

23. Consumers also would likely face higher prices due to the added costs incurred by providers to comply with regulations, such as monitoring and reporting requirements.

24. See Benjamin E. Hermalin & Michael L. Katz, *The Economics of Product-Line Restrictions With an Application to the Network Neutrality Debate* 28 (AEI-Brookings Joint Center for Regulatory Studies, Working Paper 07-02, 2007), available at <http://www.aei-brookings.com/admin/authorpdfs/page.php?id=1362&PHPSESSID=5db67c5b521ccdddb517c3dbe68ed2bb>.

25. For example, Steven Pociask estimates that, if consumers bear the entire cost of network upgrades through increases in broadband Internet access, this type of "net neutrality" regulation will cause consumer surplus to fall \$9.3 billion annually. *See* Steven B. Pociask, *Net Neutrality and the Effects on Consumers* 24 (American Consumer Institute 2007), available at <http://www.theamericanconsumer.org/ACI%20NN%20Final.pdf>. Although the study's approach depends on a number of key assumptions comparing market dynamics absent "net neutrality" regulation (e.g., that the entire cost of network upgrades are borne by content/application providers, which causes consumer prices for Internet access to fall and demand to increase) with market dynamics with "net neutrality" regulation (e.g., that consumers bear the entire cost of network upgrades, which causes consumer prices for Internet access to increase, and demand to fall), the magnitude of the estimated loss in consumer surplus suggests "net neutrality" regulation may not be in consumers' interests.

26. *See* Robert E. Litan & Hal J. Singer, *Unintended Consequences of Net Neutrality Regulation*, J. Telecomm. & High Tech. L. (forthcoming 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=942043](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942043) ("*Litan and Singer Study*"). This finding is consistent with comments submitted by users and providers of telemedicine, who fear that regulations that prevent prioritization of packets could "threaten continued advances in telemedicine." *See* Comments of Providea at 2, *Broadband Industry Practices NOI* (filed June 15, 2007). Providea is "a video communications and network integrator that supports health care and 'telemedicine' applications across the nation." *Id.* at 1; *see also* Comments of the Association of Washington Public Hospital Districts at 1-2, *Broadband Industry Practices NOI* (filed June 15, 2007) (urging against the enactment of "regulations that would stifle investment, innovation and network intelligence" because such action would harm telemedicine).

27. *Litan and Singer Study* at 26.



# Department of Justice

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## Department of Justice Comments on "Network Neutrality" in Federal Communications Commission Proceeding

### *Antitrust Division Says Regulatory Proposals Could Limit Consumer Choice and Deter Network Investment*

WASHINGTON — The Department of Justice cautioned against imposing regulations that could hamper the development of the Internet and related services in response to a Federal Communications Commission (FCC) Notice of Inquiry regarding broadband practices. In its filing the Department said that some regulatory proposals offered by various companies and organizations in the name of "net neutrality" could deter broadband Internet providers from upgrading and expanding their networks to reach more Americans.

The term "net neutrality" encompasses a variety of proposals that seek to regulate how broadband Internet providers transmit and deliver Internet traffic over their networks. The Department stated that precluding broadband providers from charging content and application providers directly for faster or more reliable service "could shift the entire burden of implementing costly network expansions and improvements onto consumers." If the average consumer is unwilling or unable to pay more for broadband Internet access, the result could be to reduce or delay critical network expansion and improvement.

The Department said in its filing that it may make economic sense for content providers who want a higher quality of service to pay for the Internet upgrades necessary to provide such service, arguing that "any regulation that prohibits this type of pricing may leave broadband providers unable to raise the capital necessary to fund these investments."

"Consumers and the economy are benefitting from the innovative and dynamic nature of the Internet," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "Regulators should be careful not to impose regulations that could limit consumer choice and investment in broadband facilities."

The Department also noted that differentiating service levels and pricing is a common and often efficient way of allocating scarce resources and satisfying consumer demand. The U.S. Postal Service, for example, allows consumers to send packages with a variety of different delivery guarantees and speeds, from bulk mail to overnight delivery. These differentiated services respond to market demand and expand consumer choice.

"No one challenges the benefits to society of these differentiated products," the Department stated in its filing. "Whether or not the same type of differentiated products and services will develop on the Internet should be determined by market forces, not regulatory intervention." Despite the FCC's call for specific information on harmful broadband activities, the Department noted that comments filed in response to this Notice of Inquiry did not provide evidence that would suggest the existence of a widespread problem that needs to be addressed. In addition, there is no consensus on what "net neutrality" means or what should be prohibited in the name of "neutrality."

"Even assuming that a potential danger exists, the ambiguity of what conduct needs to be prohibited raises a real possibility that regulation would prohibit some conduct that is beneficial, while failing to stop other conduct that may be harmful," the Department stated.

"The FCC should be highly skeptical of calls to substitute special economic regulation of the Internet for free and open competition enforced by the antitrust laws," the Department said in its filing. "Marketplace restrictions proposed by some proponents of 'net neutrality' could in fact prevent, rather than promote, optimal investment and innovation in the Internet, with significant negative effects for the economy and consumers."

While cautioning against premature regulation of the Internet, the Department noted its authority to enforce the

antitrust laws. "Anticompetitive conduct about which the proponents of regulation are concerned will remain subject to the antitrust laws and enforcement actions by government as well as private plaintiffs, and the Department will continue to monitor developments, taking enforcement action where appropriate to ensure a competitive broadband Internet access market," the Department stated.

A copy of the filing is available from the Department of Justice on the Antitrust Division's web site: <http://www.usdoj.gov/atr>. Paper copies of the filing are also available from the Justice Department's Antitrust Documents Group, which can be contacted by telephone at 202-514-2481, by fax at 202-514-3763, or by e-mail at [atrdoc.grp@usdoj.gov](mailto:atrdoc.grp@usdoj.gov).

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07-682

# ATTACHMENT 5

In the Matter of )  
 )  
Broadband Industry Practices. ) WC Docket No. 07-52

June 15, 2007

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**COMMENTS OF  
THE  
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER  
ADVOCATES**



broadband market require regulatory intervention.<sup>4</sup> In response to the NoI, the National Association of State Utility Consumer Advocates (“NASUCA”)<sup>5</sup> submits these comments to assist the Commission in understanding the importance of enacting policies that guarantee an open Internet.

## **B. Preliminary Recommendations**

As discussed in more detail below, NASUCA recommends that the Commission adopt a fifth broadband principle, which would protect net neutrality. NASUCA urges the Commission to establish the net neutrality requirement through a rulemaking proceeding to strengthen the Commission’s ability to enforce the principle, including the adoption of fines and threat of license withdrawals. NASUCA encourages the Commission to recognize the economic incentive and the potential for providers of the basic Internet infrastructure – as broadband service providers – to engage in anticompetitive behavior by limiting access, or by degrading service that they offer, to Internet application providers whose products compete with their products. In an earlier Commission proceeding, NASUCA addressed the dire consequences of network discrimination, stating: “Such discrimination against network content or services is not

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<sup>4</sup> *Id.*

<sup>5</sup> NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio, Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

sound public policy and will inhibit the numerous innovations and consumer benefits associated with broadband networks.”<sup>6</sup> NASUCA reiterates this concern.

NASUCA also urges the Commission to require Internet access providers to provide consumers with clear information about any limits that the providers may have on downloading, as well as about pricing practices and time limits on introductory rates. Such information is necessary for the public interest. Finally, during this period of time, while the Commission is investigating broadband industry practices, NASUCA urges the Commission to monitor the practices of broadband providers, to analyze consumer complaints carefully, and to collaborate with state regulators to assess the status of the market.

## **II. BACKGROUND**

The Commission has previously considered broadband policy and practices. In 2005, the Commission issued a Policy Statement, which propounded four principles for broadband regulation:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.

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<sup>6</sup> *In the Matter of Consumer Protection in the Broadband Era*, WC Docket No. 05-271, NASUCA Comments (January 17, 2006) at 9.

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.<sup>7</sup>

More recently, in March 2007, the Commission conditioned its approval of the merger of AT&T and BellSouth upon a commitment that the merged company would not only refrain from behavior contrary to the principles set forth in the Commission's existing *Policy Statement*,<sup>8</sup> but also, more significantly, would abide by a "net neutrality" condition. According to this condition, AT&T agreed "not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination."<sup>9</sup> The Commission described the commitment, which has a sunset clause, in the following manner:

This commitment shall apply to AT&T/BellSouth's wireline broadband Internet access service from the network side of the customer premise equipment up to and including the Internet Exchange Point closest to the customer's premise, defined as the point of interconnection that is logically, temporally or physically closest to the customer's premise where public or private Internet backbone networks freely exchange Internet packets.

This commitment shall sunset on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress subsequent to the Merger Closing Date that substantially addresses "network neutrality" obligations of broadband Internet access providers, including, but not limited to,

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<sup>7</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-151, Policy Statement, 20 FCC Rcd 14986, 14988 (2005) ("*Policy Statement*"), ¶ 4.

<sup>8</sup> *Id.*

<sup>9</sup> *NoI*, ¶ 3. See also *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, rel. March 26, 2007 ("AT&T/BellSouth Merger Order"), at Appendix F, at 154.

any legislation that substantially addresses the privileging, degradation, or prioritization of broadband Internet access traffic.<sup>10</sup>

This condition is significant for several reasons. To NASUCA's knowledge, the provision is the first and only government-mandated directive for net neutrality in the United States,<sup>11</sup> and, therefore, represents significant progress for consumer protection in the emerging broadband era. This protection should be extended to all consumers.

The sunset provision means that the protection will be relatively short-lived, however. Therefore, timely action in this proceeding, or in a separate rulemaking proceeding, is essential to provide more long-lasting net neutrality. Also, because the condition protects only AT&T's consumers, timely action is essential to provide comparable protection for consumers beyond AT&T's footprint.<sup>12</sup>

Finally, the divergent opinions expressed by the Commissioners in their statements accompanying the *AT&T/BellSouth Order* underscore the precarious future of net neutrality. As Commissioner Copps stated:

Perhaps most important, we have taken steps that will preserve and encourage the truly transformative openness and power of the Internet. The Internet is surely this generation's most transformative technology – perhaps as transformative as any technology in history. It was conceived and nurtured in freedom and it empowered not those who controlled the pipes but those at

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<sup>10</sup> *Id.*

<sup>11</sup> As a condition of the Commission's approval of the Verizon/MCI merger, Verizon is subject to the following provision: "Effective on the Merger Closing Date, and continuing for two years thereafter, Verizon/MCI will conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151)." *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, *Memorandum Opinion and Order*, rel. November 17, 2005, Appendix G. Although these conditions are enforceable, they lack the fifth, "net neutrality" principle that applies to AT&T.

<sup>12</sup> Although the network neutrality merger condition currently protects AT&T's customers, consumers elsewhere lack this fundamental protection, and, therefore, are vulnerable to the practices of their broadband access providers. There is no net neutrality commitment protecting customers of Qwest, Verizon, other incumbent local exchange carriers, and the various cable operators.

the edges – consumers, you and me. I know there are some who still believe that the government has no business overseeing any aspect of the Internet (ignoring, of course, government's formative role in creating the Internet in the first place). Their theory is that technology mandates from on high will inevitably stifle innovation and are antithetical to the de-centralized, non-hierarchical genius of the Internet. My response is that in an age when the Internet is increasingly controlled by a handful of massive private network operators, the source of centralized authority that threatens the Internet has dramatically shifted. The tiny group of corporations that control access to the Internet is the greatest threat to Internet freedom in our country today. If left unchecked, the merged entity resulting from today's decision would have gained the ability to fundamentally reshape the Internet as we know it – in whatever way best serves its own profit motives, rather than preserving the integrity and the effectiveness of the Internet.

The condition builds upon the four principles of net neutrality unanimously adopted by this Commission and made enforceable in the context of the Bell mergers completed last year. In addition to the company's compliance with these four principles, the condition agreed to by the merged entity includes a fifth principle that requires the company to maintain a "neutral network and neutral routing" of internet traffic between the customer's home or office and the Internet peering point where traffic hits the Internet backbone. The company is prohibited from privileging, degrading, or prioritizing any packets along this route regardless of their source, ownership, or destination. This obligation is enforceable at the FCC and is effective for two years. It ensures that all Internet users have the ability to reach the merged entities' millions of Internet users – without seeking the company's permission or paying it a toll. The next Drudge Report, Wikipedia, Craigslist, Instapundit, or Daily Kos should not have to seek a massive corporation's blessing before it can begin reaching out to the American public, and we can take considerable comfort from the fact that today's condition prohibits such behavior. While I might have preferred a longer duration, prior mergers resulted in similar time periods for the net neutrality conditions and it is in my view sufficient to allow Congress to take longer-term network neutrality action if it chooses to do so.<sup>13</sup>

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<sup>13</sup> *AT&T/BellSouth Merger Order*, at 171, Concurring Statement of Commissioner Michael J. Copps. See also Concurring Statement of Commissioner Jonathan S. Adelstein stating, among other things, "One hallmark of this Order is that it applies explicit, enforceable provisions to preserve and protect the open and interconnected nature of the Internet, including not only a commitment to abide by the four principles of the FCC Internet Policy Statement but also an historic agreement to ensure that the combined company will maintain a neutral network and neutral routing in its wireline broadband Internet access service. Together,

In sharp contrast, however, Chairman Martin and Commissioner Tate stated:

Other conditions, however, are unnecessary and may actually deter broadband infrastructure investment. The conditions regarding net-neutrality have very little to do with the merger at hand and very well may cause greater problems than the speculative problems they seek to address. These conditions are simply not warranted by current market conditions and may deter facilities investment. Accordingly, it gives us pause to approve last-minute remedies to address the ill-defined problem net neutrality proponents seek to resolve.<sup>14</sup>

The explicit reference in the AT&T/BellSouth conditions to the possibility of legislation (incorporated in the sunset provision of the merger condition for net neutrality) recognizes the possibility of Congressional action in this area. But legislation has not yet been forthcoming, which further elevates the importance of addressing net neutrality in this proceeding. Indeed, although the Commission's NoI raises various questions, the most important issue concerns the future of net neutrality.

The net neutrality condition is significant because of the importance of maintaining open pathways from Internet users, through their Internet service provider, to the content providers, and vice versa. NASUCA urges the Commission to afford significant weight to the perspective of Sir Tim Berners-Lee, known as the inventor of the World Wide Web, who stated: "It's better and more efficient for us all if we have a separate market where we get our connectivity, and a separate market where we get our content. Information is what I use to make all my decisions. Not just what to buy, but

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these provisions are critical to preserving the value of the Internet as a tool for economic opportunity, innovation, and so many forms of civic, democratic, and social participation." *Id.*, at 176.

<sup>14</sup> *Id.*, at 167, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate.

how to vote.”<sup>15</sup> In another forum, Berners-Lee stated, “When I invented the Web, I didn’t have to ask anyone’s permission. Now hundreds of millions of people are using it freely. I am worried that that is going end [sic] in the USA.”<sup>16</sup> NASUCA shares this concern that the control of consumers’ access to information should not reside with those companies that provide the “pipes” over which information flows.

### III. PACKET MANAGEMENT PRACTICES

Packet management practices are rules designed to manage the efficient flow of data packets over the networks that form the Internet. The Commission requests that commenters describe packet management practices in use today. The Commission asks, “Do providers treat different packets in different ways? How and why?”<sup>17</sup> In addition, the Commission requests comments on whether or not such packet management protocols are consistent with the Commission’s Policy Statement.

As a preliminary matter, NASUCA notes that packet management policies are largely invisible to the average consumer. The effect of such policies, when they work properly, is that the Internet functions in a “normal” manner, meeting customers’ expectations. It is only when something goes wrong that consumers might be alerted to underlying network traffic discrimination.

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<sup>15</sup> Jonathan Bennett, “Berners-Lee Calls for Net Neutrality,” C/Net News.com, May 23, 2006. [http://news.com.com/2100-1036\\_3-6075472.html](http://news.com.com/2100-1036_3-6075472.html).

<sup>16</sup> “Net Neutrality: This is serious,” submitted by timbl on June 21, 2006; <http://dig.csail.mit.edu/breadcrumbs/node/144>.

<sup>17</sup> *NoI*, ¶ 8 (footnote omitted).

NASUCA recognizes the importance of managing network traffic through various engineering practices, including packet management, in an effort to keep the Internet robust. The open nature of the Internet means that a great variety of protocols and standards exist, each one designed to fulfill its own particular purpose. Without these standards (which have generally been agreed upon by international governing bodies<sup>18</sup>), the Internet as we know it today would not exist.<sup>19</sup>

In particular, time-sensitive applications, such as voice calls, video, and gaming, require packets engineered differently than time-insensitive applications, such as text-based e-mail. Each type of application requires packets built to the application's own set of protocols. Effective use of the Internet requires that time-sensitive packets receive priority over time-insensitive packets. For example, an online video conference system whose packets go missing for several minutes would be extremely cumbersome to use and unproductive. Likewise, missing or delayed packets during a voice call over the Internet would degrade the quality of the call to such an extent that consumers would never adopt such technology. These applications, and others, require packet management techniques to ensure proper performance. On the other hand, a slight delay in e-mail transmission is not likely to be detected or to be important.

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<sup>18</sup> According to the Internet Society, "At the technical and developmental level, the Internet is made possible through creation, testing and implementation of Internet Standards. These standards are developed by the Internet Engineering Task Force. The standards are then considered by the Internet Engineering Steering Group, with appeal to the Internet Architecture Board, and promulgated by the Internet Society as international standards. The RFC Editor is responsible for preparing and organizing the standards in their final form. The standards may be found at numerous sites distributed throughout the world, such as the Internet Engineering Task Force." See <http://www.isoc.org/internet/standards>. The World Wide Web Consortium ("W3C") describes its mission as: "the creation of Web standards and guidelines. Since 1994, W3C has published more than ninety such standards, called W3C Recommendations." See <http://www.w3.org/Consortium>.

<sup>19</sup> According to W3C, "To achieve the goal of one Web, specifications for the Web's formats and protocols must be compatible with one another and allow (any) hardware and software used to access the Web to work together." See <http://www.w3.org/Consortium/technology>.



**A. The danger of unrestrained packet management**

There is a risk, however, associated with allowing broadband service providers a free hand in packet management. The danger is that broadband providers might use legitimate packet management techniques for illegitimate reasons, such as selective service degradation aimed at achieving strategic business goals.

A financial incentive is associated with such behavior. A broadband access provider that owns a voice over Internet protocol ("VoIP") service, for example, seeks to increase the customer base for its service. An illegitimate way to achieve this would be to monitor, slow, and choke off traffic to competitors' VoIP services. When consumers experience inferior service from competitors that are handicapped relative to the VoIP service of the access provider (even though they may not know why), consumers likely will migrate away from competitors and toward the access provider's product. The broadband access provider then will gain customers for its VoIP service by virtue of being the bottleneck provider in a position to degrade its competitors' services.

This danger is not theoretical. The threat to an open Internet, in which consumers make the choice as to which application providers prosper, has already been openly expressed. In December 2005, *BusinessWeek* quoted former AT&T CEO Edward Whitacre's now-famous "pipes" quip: "What [Google, Vonage, and others] would like to do is to use my pipes free. But I ain't going to let them do that."<sup>20</sup> The article explains that network providers are no longer content simply to provide the infrastructure. They now:

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<sup>20</sup> "At Stake: The Net as We Know It," Catherine Yang, Roger O. Crockett, and Moon Ihlwan, *BusinessWeek Online*, December 26, 2005.

also want to peddle more lucrative products, such as Internet-delivered TV programs, movies, and phone calls.... But selling those extras puts the phone and cable companies in competition with Web services big and small. The network operators could block consumers from popular sites such as Google, Amazon, or Yahoo! in favor of their own. Or they could degrade delivery of Web pages whose providers don't pay extra. Google's home page, for instance, might load at a creep, while a search engine backed by the network company would zip along.<sup>21</sup>

The Commission must be vigilant to prevent network operators from exercising their control in this way.

**B. Examples of packet management for strategic business reasons**

Even if network providers do not block competitors completely, they might use their market power to extort higher fees from competitors, to the detriment of consumers. The Commission has already found the need to address complaints regarding broadband access providers' limiting access to VoIP applications. In November 2004, a customer of Madison River Communications, LLC ("Madison"), a broadband access provider, found that he could no longer access his Vonage VoIP account. When he complained to Madison, he was told that the company had begun blocking calls through Internet phone companies such as Vonage. After an investigation by the FCC, Madison agreed to pay a \$15,000 fine and to refrain from blocking Internet telephone activity.<sup>22</sup>

The Commission's recognition of the potential for harm in this early case of traffic blocking provides clear precedent for a general policy of nondiscrimination. The fact that early enforcement quickly stemmed the problem underscores the compelling

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<sup>21</sup> *Id.*

<sup>22</sup> *In The Matter of Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, *Consent Decree*, Rel. March 3, 2005.

need for the Commission to establish rules to set forth the range of unacceptable behavior; it does not make such rules unnecessary.

As another real-world example, Canadian cable company Shaw Cable charges a \$10 premium for third party VoIP service; otherwise, Shaw's own VoIP service is prioritized. This is a clear example of a broadband service provider using its position in one business line (broadband access) to disadvantage competitors in another business line (VoIP service), in a jurisdiction where such action appears to be permitted. Shaw's website describes this "Quality of Service Enhancement":

Shaw is now able to offer its High Speed Internet customers the opportunity to improve the quality of Internet telephony services offered by third party providers. For an additional \$10 per month Shaw will provide a quality of service (QoS) feature that will enhance these services when used over the Shaw High Speed Internet network. Without this service customers may encounter quality of service issues with their voice over Internet service.<sup>23</sup>

The implied threat is clear: If you use our service, you must pay an extra fee or risk poor quality of service. Although the example involves a Canadian company, the principle and its potential impact on consumers apply equally in the United States. During this period of time, while the Commission is investigating broadband industry practices, NASUCA urges the Commission to monitor the practices of broadband providers, to analyze consumer complaints carefully, and to collaborate with state regulators to assess the status of the market.

### **C. A proposal for nondiscrimination**

NASUCA recommends that the Commission consider different approaches to preventing non-discrimination. One such solution might be to require broadband access

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<sup>23</sup><http://www.shaw.ca/en-ca/ProductsServices/Internet/ServiceEnhancement.htm>, accessed May 24, 2007.

providers to treat all packets of a certain type, for example all VoIP traffic, or all video conferencing traffic, the same. This way no provider of VoIP service, for example, is disadvantaged relative to other VoIP service providers. A broadband access provider that owns a VoIP product would not be able to slow the traffic to its competitors. Consumers, not the access providers, would then decide which service best suits their needs.

This solution is technically feasible because a portion of each packet sent over the Internet is assigned the task of declaring its purpose, just as another portion is dedicated to declaring the destination address. As long as standard protocols (a mainstay of the proper functioning of the Internet) are used, then all traffic of a particular type can be treated in a consistent manner. It would be up to network engineers to determine the proper relative priority of different types of traffic. However, the potential for an onslaught of complaints from customers *should* provide the discipline necessary to ensure that access providers get the relative priority scheme correct.

#### **D. Other reasons for packet management**

The Commission asks whether providers manage packets for safety- and security-related applications such as health monitoring, home monitoring, and emergency calls. NASUCA considers that these uses of the Internet fall under the category of “time-sensitive” applications. As such, network engineers should put into place policies that expedite the flow of these types of packets. NASUCA looks forward to reviewing the information that the industry submits in this proceeding regarding their ability to prioritize safety- and security-related applications with minimal disruption to other Internet traffic.

The Commission also asks whether access providers utilize packet management techniques as parental controls. NASUCA recommends that parental controls should be left to the end-use subscriber. In terms of technical feasibility, offensive content can appear the same, from the packet perspective, as innocuous content. The Commission should not attempt to police content through this proceeding, but rather should simply ensure that all material can be made available via the Internet on an equal basis.

#### **IV. PRICING FOR BROADBAND AND RELATED SERVICES**

##### **A. Pricing and speed**

The Commission requests information on pricing and speeds of broadband access plans.<sup>24</sup> First, the Commission asks whether providers charge different prices for different speeds or capacities. Based on research that NASUCA has conducted, it appears that prices vary significantly, for DSL and cable modem service – the most widely used technologies for consumer Internet access<sup>25</sup> – based on access speed and the company offering service. The following table includes examples of current pricing for broadband access.<sup>26</sup>

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<sup>24</sup> *NoI*, at ¶ 9.

<sup>25</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2006*, January 2007 (“High Speed Services January 2007 Report”), at Table I.

<sup>26</sup> It should be noted that the speeds in the table are those claimed by the provider, not necessarily the speed usually seen by customers.

### Survey of Broadband Internet Access Pricing<sup>27</sup>

Provider	Speed of Service	Price
Verizon	768 kbps	\$14.99
	3 mbps	\$29.99
AT&T (BellSouth)	1.5 mbps	\$32.95
	3 mbps	\$37.95
	6 mbps	\$42.95
Qwest	1.5 mbps	\$44.99
	7 mbps	\$54.99
Time Warner Cable	5 mbps	\$44.95
Cox	1.5 mbps	\$26.95
	7 mbps	\$41.05
	12 mbps	\$56.95
Comcast	6 mbps	\$57.95
	8 mbps	\$67.95

#### B. Premium for downloading material

The Commission asks whether end-users pay a premium to download a particular amount of material, and specifically asks: "Do [broadband access providers] offer

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<sup>27</sup> Prices contained in this table are available at:  
<http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm>;  
<http://www.bellsouth.com/consumer/inetsrvcs/index.html>;  
<http://www.qwest.com/residential/internet/pricing.html>; <http://www.rr.com/rdrun/>;  
<http://www.cox.com/gulfcoast/highspeedinternet/pricing.asp>;  
<http://www.comcast.com/shop/buyflow/default.ashx>. Comcast's prices are for consumers who do not subscribe to Comcast cable service. Comcast cable subscribers can receive 6 Mbps service \$29.99 for the first three months, and \$42.95 per month thereafter.

subscribers the option to purchase extra bandwidth or specialized processing?”<sup>28</sup> In contrast to the early days of the Internet, end-users generally no longer pay by the kilobyte of data downloaded. The exception to this is in the market for mobile broadband service, where service plans often include a specific quantity of data usage per month and exceeding the predetermined quantity results in additional fees.<sup>29</sup>

While not the result of a contractual limit imposed by the service provider, consumers face an effective limit on downloading, which is a consequence of the connection speed of consumers’ particular broadband service. For example, at any given connection speed, a large file (such as a film) requires more time to download than a small file. Therefore, some consumers may face a practical limit on their capacity to download material. Consumers often have the option, however, to improve download capabilities by purchasing a faster connection.

In addition to permanent service upgrades, some consumers are able to take advantage of temporary speed boosts that are available from some providers. For example, Cox Communications includes its “PowerBoost” product with its two top tiers of broadband service. Cox describes the service as follows:

Get an extra burst of speed when you need it most. PowerBoost is a new technology that allows you to temporarily experience download speeds that are significantly faster than our already blistering fast high-speed Internet speeds.<sup>30</sup>

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<sup>28</sup> *Nol*, ¶ 9.

<sup>29</sup> For example, Sprint Nextel offers the “Blackberry 5MB Email and Web” plan, which includes 5 megabytes of data transfer each month for a fixed price. There is an additional charge of \$0.01 per kilobyte of data usage over 5 megabytes. See [http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlans?filterString=Individual\\_Plans\\_Filter&id12=UHP\\_PlansTab\\_Link\\_IndividualPlans](http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlans?filterString=Individual_Plans_Filter&id12=UHP_PlansTab_Link_IndividualPlans).

<sup>30</sup> <http://www.cox.com/gulfcoast/HighSpeedInternet/Power-Boost/default.asp>.

According to Cox, the service recognizes when the user is moving large files, and automatically “kicks in when there is extra bandwidth to handle video, photos, and music faster.”<sup>31</sup> Comcast also offers a similar “PowerBoost” service.<sup>32</sup> According to Comcast, the subscriber does not need to do anything to take advantage of PowerBoost. The service is free to Comcast broadband subscribers.<sup>33</sup>

By contrast, some consumers have encountered ambiguous and ill-specified limits on the volume of information that they can download using their Internet access. As one newspaper article reported earlier this year, customers have received telephone calls from Comcast warning them that they were “using the Internet too much,” and, for one customer, “ordering her to curtail her Web use or lose her high-speed Internet connection for a year.”<sup>34</sup> According to the same newspaper article, when a customer, who apparently had been using the same broadband connection for years without encountering any problem, asked Comcast what the download limit was, “she was told there was no limit, that she was just downloading too much.”<sup>35</sup> As one consumer stated, this is “like if you’re driving down [sic] freeway, and there’s nothing to say what the speed limit is.”<sup>36</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> <http://www.comcast.com/shop/buyflow/default.ashx>. Comcast states that PowerBoost allows temporary speeds up to 12 Mbps.

<sup>33</sup> <http://www.comcast.com/customers/faq/FaqDetails.ashx?ID=3699>.

<sup>34</sup> “Not so fast, broadband providers tell big users: Firms impose limits even as demand rises,” Carolyn Y. Johnson, *Boston Globe*, March 12, 2007.  
[http://www.boston.com/business/personaltech/articles/2007/03/12/not\\_so\\_fast\\_broadband\\_providers\\_tell\\_big\\_users?mode=PF](http://www.boston.com/business/personaltech/articles/2007/03/12/not_so_fast_broadband_providers_tell_big_users?mode=PF)

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



The anecdotal evidence of Comcast shutting off consumers' service without informing consumers about the company's specific download limit raises several consumer protection concerns. First, Comcast's ability to direct customers to curtail their use or lose their service is evidence of Comcast's market power and the increasing control that a cable-telecommunications duopoly possesses over consumers' day-to-day access to electronic information. Second, even if there were legitimate reasons to limit consumers' use of the Internet, consumers are entitled to clear, unambiguous information from well-trained customer representatives about download policies. Comcast's actions do not give such information. NASUCA acknowledges that technology and applications are evolving quickly. But consumers nonetheless deserve to have guidelines about the acceptable use of Internet connections, even if such guidelines evolve.

**C. Priority access to end-users**

The Commission asks whether broadband providers charge upstream application providers for priority access to end users, a key question that directly addresses the ultimate purpose of this proceeding. Broadband providers do not currently charge upstream application providers for priority access to end-users, nor should they be allowed to do so in the future. Application providers already pay for a connection to the Internet, just as consumers do. Application providers, however, pay far more than do end-use consumers, and in return get far more capacity, which they need in order to provide material requested of them over the Internet. Forcing application providers to bid for priority access is a clear use of bottleneck monopoly power to extract additional fees from application providers. This would, in effect, amount to allowing access providers to auction off something they do not and should not own: exclusive access to end-users.

As discussed earlier in these comments, some instances of anti-consumer practices have already occurred (and have been threatened). NASUCA urges the Commission to anticipate and identify likely market failures, and to set consumer protection measures in place before such problems occur. NASUCA recommends proactive action by the Commission so that consumers are not harmed by industry practices. As seen in the Madison River case discussed above, early enforcement is vital and the Commission should establish rules to set forth unacceptable industry practices earlier, rather than later.

#### **D. Price-discrimination**

The Commission asks whether providers currently discriminate in the prices they charge to end-users and upstream application providers.<sup>37</sup> Currently, service providers price-discriminate among end-users in several ways. First, broadband access providers segment the market by offering higher levels of service to those consumers who are willing to pay more. Second, consumers are often able to obtain a better deal on broadband access when they buy several services bundled together. Comcast, for example, offers broadband Internet access for an ongoing rate of \$42.95 per month if the customer also purchases Comcast cable television. When purchased as a stand-alone product, however, the price for broadband access is \$57.99 per month, a 35% mark-up.<sup>38</sup> A third method of segmenting the market is to divide residential customers from business customers. For example, while Verizon offers 3 Mbps broadband service to residential

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<sup>37</sup> *Nol*, ¶ 9.

<sup>38</sup> <http://www.comcast.com/shop/buyflow/default.ashx>.

customers for an ongoing rate of \$29.99 per month, business customers must pay \$39.99.<sup>39</sup> These appear, however, to be reasonable forms of discrimination.

**E. Charging users for access to content**

The Commission asks whether policies should differentiate between those content providers that charge users for access to content, and those that do not. NASUCA's initial view is that the policies should not so differentiate. NASUCA intends to consider this issue further, however, as it reviews others' initial comments. At first blush, the relationship between the content provider and the customer is just like any other service-oriented relationship – e.g., the relationship between a customer and a dry cleaner, a house painter, or a dog groomer. NASUCA perceives no benefit to monitoring transactions between these willing parties. Furthermore, many content providers provide a substantial amount of content for free, and charge only for exclusive features. In addition, due to the vast and ever-evolving landscape that makes up the Internet, it would be difficult, if not impossible, for the Commission to determine which content providers charge for access.

**F. Disclosure of pricing and packet management policies**

The Commission asks whether packet management and pricing policies are disclosed to customers.<sup>40</sup> Based on the research of broadband access rates (as shown in the table above<sup>41</sup>), it appears that most providers adequately disclose their rates to consumers on their web sites, but that their policies regarding downloading volumes are

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<sup>39</sup> <http://www22.verizon.com/content/businessdsl/packages+and+prices/packages+and+prices.htm> and <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm>.

<sup>40</sup> *NoI*, ¶ 9.

<sup>41</sup> As previously noted, if the speeds actually supplied are measurably less than those actually achieved, then the accuracy of the pricing information is seriously undermined.

ill-specified. Regarding these prices, however, NASUCA is concerned that many service plans have introductory rates which last for three months, for example, before rising to a higher rate.<sup>42</sup> Unless the industry clearly advertises this practice, the burden inappropriately falls to consumers to be wary of such offers, and must carefully review the fine print to determine exactly the price of the service. NASUCA urges the Commission to remain vigilant to potential abuses from misleading advertising, and, as appropriate, to collaborate with state consumer advocates and regulators to identify and correct any patterns of deceptive consumer practices. This should specifically include monitoring whether providers' download and upload speeds are as advertised to consumers.

Packet management policies are less obvious to consumers than are pricing practices, and are not well-documented by access providers. NASUCA urges the Commission to ensure that broadband access providers clearly describe their packet management policies (e.g., whether they are the industry "norm," or entail degrading or prioritizing certain services). Providers must adequately inform consumers of their non-discrimination policies.

#### **G. Real prices for broadband access**

The Commission asks whether real prices (i.e., price per Mbps) paid by broadband consumers are falling. According to surveys conducted by the Pew Internet & American Life Project, the average price for broadband access dropped from \$39 per month in February 2004 to \$36 per month in December 2005. Pew's survey respondents reported DSL prices dropping from \$38 to \$32 over the period, while cable modem prices

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<sup>42</sup> See footnote 27, *supra*.

were essentially unchanged.<sup>43</sup> These rates continue to be high, however, and certainly exceed significantly the \$10 monthly rate that AT&T has agreed to charge for DSL as a condition of its merger with BellSouth.<sup>44</sup> NASUCA is concerned that broadband rates are not yet affordable for many Americans.<sup>45</sup>

Furthermore, as broadband becomes more integrated into all aspects of life, consumer expectations inevitably increase. For example, in 1992, the dial-up modem was an acceptable access method for most Americans connecting to the Internet from home. Dial-up technology is no longer acceptable for many Americans. It is simply too slow to adequately handle dynamic websites and advanced graphics, not to mention VoIP or video applications. Thus, while NASUCA agrees that the price per Mbps has probably declined in recent years, higher speeds (more Mbps) are necessary to take full advantage of the Internet, so that consumers may not be saving money. Among other things, various types of business and government agencies now utilize web interfaces, which consumers are expected to use to obtain access to information, to pay bills, and to file forms. Furthermore, broadband access is still unaffordable for many Americans; the Commission should not become complacent with respect to monitoring the price of access. Instead, the Commission should enact policies that help to spread the benefits of a more connected community to all Americans.

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<sup>43</sup> Horrigan, John, *Broadband Adoption 2006*, Pew Internet & American Life Project, May 28, 2006, at iv.

<sup>44</sup> *AT&T/BellSouth Merger Order*, Appendix F.

<sup>45</sup> NASUCA addresses broadband deployment more comprehensively in its comments filed on May 16 and May 31, 2007 in WC Docket No. 07-52.

## V. AMENDING THE POLICY STATEMENT

The Commission asks whether specific packet management practices by broadband service providers are helpful or harmful to consumers.<sup>46</sup> NASUCA submits that the intentional degradation by broadband service providers of traffic to or from a particular upstream application limits the usefulness of the Internet, negatively impacts consumers, and jeopardizes the innovative and free exchange of information and ideas that the Internet has historically supported. Further, consumers' decisions about which application to use, whether for VoIP, video, or web searching, should be based on the quality and price of that application, not whether the application provider has a special relationship with the broadband access provider.

The Commission asks whether it should incorporate a principle of nondiscrimination into its policies.<sup>47</sup> NASUCA urges the Commission to adopt such a principle. Indeed, although this proceeding raises several issues that bear directly on consumers, net neutrality, in NASUCA's view, is the most critically important issue raised in this proceeding. To those who would argue (incorrectly) that a nondiscrimination principle is unnecessary because no misbehavior has yet been reported, NASUCA responds that, under those circumstances, adopting the proposed principle would cause no harm to any broadband access provider. Such a principle can only serve to increase the trust of the general public in the Internet, a trust which benefits broadband access providers as well as consumers.

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<sup>46</sup> *NoI*, ¶ 10.

<sup>47</sup> *Id.*

The principle of nondiscrimination has been referred to in the general media as “net neutrality,” or “network neutrality.” As a *New York Times* editorial described it, net neutrality is what “keeps the Internet democratic.”<sup>48</sup> The editorial continues:

One of the Internet’s great strengths is that a single blogger or a small political group can inexpensively create a Web page that is just as accessible to the world as Microsoft’s home page. But this democratic Internet would be in danger if the companies that deliver Internet service changed the rules so that Web sites that pay them money would be easily accessible, while little-guy sites would be harder to access, and slower to navigate. Providers could also block access to sites they do not like.<sup>49</sup>

NASUCA recommends that the Commission assert a principle of nondiscrimination, where nondiscrimination is defined as the uniform treatment of all packets of the same type. This policy would allow packets of *different types* to be treated in different ways, as demanded by network engineering requirements, but would require that *similar* packets be treated the same, especially with regard to the source of the packet. No packet of a certain type could be prioritized over another packet of the same type. Broadband access providers would not be able to decide what upstream application provider is advantaged relative to its competitors. This definition of nondiscrimination will allow third-party application providers to compete on their technical, price, and quality of service merits.

The Commission asks whether a principle of nondiscrimination would allow any exclusive or preferential arrangements between infrastructure providers and content

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<sup>48</sup> Editorial, “Keeping a Democratic Web,” *New York Times*, May 2, 2006.

<sup>49</sup> *Id.*

providers.<sup>50</sup> A principle of nondiscrimination would not allow for exclusive or preferential arrangements between infrastructure providers and content providers. Such preferential arrangements are contrary not only to the principles guiding the development of the Internet, but also contrary to the guidance given by Congress to the Commission. The instructions for the Commission “to preserve the vibrant and competitive market that presently exists for the Internet” and “to encourage the deployment of technologies which maximize user control”<sup>51</sup> expressly prohibit the Commission from allowing any party to acquire effective editorial control of the Internet. If access providers were allowed to determine what content is made available to users, or if they were allowed to make preferential agreements with service providers, then the access providers would have control. Indeed, instead of serving as access *providers*, such companies would become access deniers or disablers, shutting off consumers from the ever-increasing diversity of content currently available to them.

The Commission asks how a principle of nondiscrimination would “affect the ability of content and access providers to charge their customers different prices, or to charge them at all?”<sup>52</sup> Currently, each subscriber to broadband access pays the broadband provider for access to the (whole) Internet. Much of the content on the Internet is available without charge, but some content providers require a paid subscription, e.g., full access to the *Wall Street Journal Online* or the *New York Times*. Nondiscrimination would not affect the ability of any party to collect fees from end users,

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<sup>50</sup> *NoI*, ¶ 10.

<sup>51</sup> 47 U.S.C. § 230(b).

<sup>52</sup> *NoI*, ¶ 10.



whether for providing access, or for providing content. The issue in this proceeding is the ability of an intermediary (the broadband access provider) to discriminate among content providers.

The Commission asks whether it has “the legal authority to enforce the Policy Statement in the face of particular market failures or other specific problems.”<sup>53</sup> In particular, the Commission asks what situations would give rise to such problems. NASUCA urges the Commission to set forth nondiscrimination/net neutrality requirements in rules for the purpose of increasing the industry’s accountability and the Commission’s options for enforcement. Open access to the Internet is too important to leave to chance. The Supreme Court has recognized the Commission’s jurisdiction to regulate Internet access providers.<sup>54</sup> As stated in the NoI:

- Broadband services are “wire communications” or “radio Communications,” as defined by the Act.
- The Act gives the Commission jurisdiction over “all interstate and foreign communications by wire or radio.”
- Section I of the Act imposes on the Commission the responsibility to ensure “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.” Included in this responsibility are the tasks: “to promote the continued development of the Internet”; “to preserve the vibrant and competitive market that presently exists for the Internet”; and “to encourage the deployment of technologies which maximize user control over what information is received by ... [users] of the Internet.”<sup>55</sup>

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<sup>53</sup> *Id.*, ¶ 11.

<sup>54</sup> *Id.*, ¶ 4, citing *National Cable & Telecomm. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 976 (2005).

<sup>55</sup> *NoI* at ¶ 4-7; see 47 U.S.C. Sections 153(33), (52), 152(a), and 230.

NASUCA urges the Commission to use its regulatory authority, as validated by the Supreme Court, to ensure that the Internet continues to develop in a way that benefits all consumers. To that end, NASUCA encourages the Commission to consider the provision of broadband access in light of the concept of common carriage. As expressed by Professor Eli M. Noam of Columbia University, "Common carriage ... is of substantial social value. It extends free speech principles to privately-owned carriers. It is an arrangement that promotes interconnection, encourages competition, assists universal service, and reduces transaction costs."<sup>56</sup> Continuing, he stated:

The common carrier system has served telecommunications participants well: it has permitted society to entrust its vital highways of information to for-profit companies, without the specter of unreasonable discrimination and censorship by government or private monopolies; it was an important element in establishing a free flow of information, neutral as to its content; it reduced the administrative cost and the burden of liability of a carrier, since it needed not, at least in theory, inquire as to a user's background and intended use; and it protected the telephone industry from various pressure groups who would prevent it from offering service to their targets of protest or competition.<sup>57</sup>

Columbia University Law Professor Tim Wu also compares the Internet infrastructure to traditional applications of the common carriage concept. He explains:

What we're ultimately asking is a question that Adam Smith struggled with. Is there something special about "carriers" and infrastructure—roads, canals, electric grids, trains, the Internet—that mandates special treatment? Since about the 17th century, there's been a strong sense that basic transport networks should serve the public interest without discrimination. This might be because so much depends on them: they catalyze entire industries.

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<sup>56</sup> "Beyond Liberalization II: The Impending Doom of Common Carriage (working paper)," Eli M. Noam, Columbia Institute for Tele-Information, March 15, 1994, (available at <http://www.columbia.edu/dlc/wp/citi/citinoam12.html>), at Introduction.

<sup>57</sup> *Id.*, at Section 2.

meaning that gratuitous discrimination can have ripple effects across the nation.<sup>58</sup>

Professor Wu uses a simple example to illustrate one discouraging implication of discrimination over the Internet – that application providers will be forced to turn their efforts to courting infrastructure providers rather than focusing on developing innovative products:

Now, let's think about the nation's highways. How would you feel if I-95 announced an exclusive deal with General Motors to provide a special "rush-hour" lane for GM cars only? That seems intuitively wrong.... And if highways really did choose favorite brands, you might buy a Pontiac instead of a Toyota to get the rush-hour lane, not because the Pontiac is actually a good car. As a result, the nature of competition among car-makers would change. Rather than try to make the best product, they would battle to make deals with highways.<sup>59</sup>

The Commission asks whether "increasing broadband competition prevents such problems from occurring."<sup>60</sup> NASUCA respectfully disagrees with the Commission's reference to "increasing broadband competition." In a significant portion of the U.S., consumers have little if any choice in the provision of broadband access. Typically, if even two choices are available, one is the incumbent telephone service provider, and the other is the cable television provider. Thus the "competition" is based on two different products – DSL service and cable modem service – with differing requirements, service

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<sup>58</sup> Wu, Tim, "Why You Should Care About Net Neutrality," *Slate*, May 1, 2006 (accessed at [www.slate.com/id/2140850](http://www.slate.com/id/2140850)).

<sup>59</sup> *Id.*

<sup>60</sup> *Not*, ¶ 11.

qualities, and prices.<sup>61</sup>

Even where there is competition, consumers could potentially face a choice of subscribing to “partial Internets” if the Commission allows infrastructure providers to become content gatekeepers. In a marketplace operating without requirements of nondiscrimination, each broadband service provider would be allowed effectively to run its own Internet, choosing which content providers to prioritize, and which to degrade, based on which content provider is most willing to pay for access to end-users. Subscribers to each broadband access provider would have unfettered access only to the websites and services allowed by that provider. Clearly, this is not the “vibrant and competitive” market for broadband access that the Supreme Court demands.

The Commission asks how it should target rules to address these specific problems, and whether such regulations further the mandate to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”<sup>62</sup> NASUCA urges the Commission to design rules to prevent a segmentation of the Internet. Specifically, the Commission should require that all packets of the same type, and thus all services of the same type, be treated equally. No Internet traffic should be degraded or prioritized based on its origin or destination.

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<sup>61</sup> See Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, “The Cable-Telco Duopoly’s Deployment of New Jersey’s Information Infrastructure: Establishing Accountability,” White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007 (“Cable-Telco Duopoly White Paper”). The Cable-Telco Duopoly White Paper was prepared on behalf of the Public Advocate of New Jersey Division of Rate Counsel and submitted as Attachment A to the Comments of the New Jersey Division of Rate Counsel in the proceeding *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, May 16, 2007.

<sup>62</sup> *NoI*, ¶ 11.

Ensuring the continued vitality and usefulness of the Internet makes it a more valuable resource for all Americans. This, in turn, creates additional demand for Internet access, which in turn stimulates continued investment in infrastructure and services. In short, a principle of nondiscrimination would serve as the necessary catalyst for moving our deployment of advanced technology to the next level, an issue which the Commission is investigating more broadly in GN Docket No. 07-45. Nondiscrimination benefits consumers, content providers, and ultimately, access providers, as well as the US economy and welfare.

The Commission asks what might cause regulations to be necessary in the future, if they are not necessary now. NASUCA encourages the Commission not to wait for proof that incumbent carriers can stifle innovation: The incentives for broadband access providers are clear; without nondiscrimination, those who control access will be able to control content. American consumers will suffer if the Commission fails to require neutrality in the treatment of content.

As Professor Wu has explained, the development of the Internet has thus far proceeded in an evolutionary fashion, with a "survival of the fittest" mechanism -- consumer demand -- determining what applications and services survive, and which fail.<sup>63</sup>

A communications network like the Internet can be seen as a platform for a competition among application developers. Email, the web, and streaming applications are in a battle for the attention and interest of end-users. It is therefore important that the platform be neutral to ensure the competition remains meritocratic.<sup>64</sup>

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<sup>63</sup> Wu, Tim, "Network Neutrality, Broadband Discrimination," *Journal of Telecommunications and High Technology Law*, Vol. 2, 2005, at 145-147.

<sup>64</sup> *Id.*, at 146.

The Internet is too complicated, and evolves too quickly, as Professor Wu argues, to allow any one party to become a force directing its development. In terms of net neutrality, this means that *operators* of the “network of networks” that is the Internet should not be allowed to become the *editors* of Internet content.

## VI. CONCLUSION

While NASUCA recognizes that the Internet delivers packets utilizing many protocols, intended for many different applications, facing a wide range of latency and quality of service requirements, the Commission should enact policies that prevent the prioritizing (or degrading) of packets strictly for strategic business reasons. NASUCA recognizes also that some broadband service providers may be tempted to hide illegitimate prioritization schemes under the guise of legitimate prioritization. NASUCA urges the Commission to consider this possibility in its policy design, and to take steps to prevent such behavior through the threat of serious fines and license withdrawals.

NASUCA recommends that policies and rules be put in place to protect consumers from facing an Internet effectively censored by those few companies that control the basic infrastructure of the Internet. Any party that controls both the transmission infrastructure (e.g., lines, electronic equipment, etc.), and access to content effectively controls all information traveling via the Internet. The Commission’s responsibilities, as given above in Section I of the Act, are “to promote the continued development of the Internet”; “to preserve the vibrant and competitive market that presently exists for the Internet”; and “to encourage the deployment of technologies which maximize user control over what information is received by ... [users] of the

Internet.”<sup>65</sup> These responsibilities can be carried out by adopting NASUCA’s recommendations as described in these comments.

Respectfully submitted,

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<sup>65</sup> *NoI*, ¶¶ 4-7.

# **ATTACHMENT 6**





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# ATTACHMENT 7



## FCC approves AT&T-BellSouth merger

By Marguerite Reardon

[http://www.news.com/FCC-approves-ATT-BellSouth-merger/2100-1036\\_3-6146369.html](http://www.news.com/FCC-approves-ATT-BellSouth-merger/2100-1036_3-6146369.html)

Story last modified Tue Jan 02 05:15:31 PST 2007

**The Federal Communications Commission approved the roughly \$86 billion megamerger between AT&T and BellSouth on Friday, ending a partisan standoff.**

The commission, which had been split between Democrats and Republicans for months on what--if any--conditions should be imposed on the merger, accepted conditions that AT&T had proposed in a formal letter sent to the commission on Thursday. The merger was approved by 4-0 vote.

First announced in March, the merger will create a super-size AT&T that will become the nation's dominant phone company, controlling more than half the telephone and Internet access lines in the U.S.

The merger follows two other major telecommunications mergers. In 2005, Verizon Communications announced the acquisition of MCI, and SBC Communications said it would acquire AT&T. Even though regulators approved

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these mergers only on the basis of certain conditions, the deal between AT&T and BellSouth easily won unconditional approval earlier this year from the antitrust division of the Department of Justice. This infuriated the two FCC Democratic commissioners, Jonathan Adelstein and Michael Copps, who had expected some conditions to be placed on the merger.

Meanwhile, the fifth commissioner, Robert McDowell, a Republican, had recused himself from the vote because before his confirmation to the FCC earlier this year, he had represented an industry group opposed to the merger. This left only four commissioners to decide the fate of the merger.

After it became clear that the Democrats

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## FCC approves AT&T-BellSouth merger

would approve the merger only with certain conditions and that Republicans favored few if any conditions, the FCC's general counsel cleared McDowell to vote to break the tie. But McDowell reaffirmed his decision to stay out of the discussion and not to vote on the merger. Instead, he urged his colleagues to work out a compromise.

Finally, the two sides have come to an agreement. And AT&T's long struggle to further consolidate the communications market in the United States has ended.

"The commission concluded that significant public interest benefits are likely to result from the transaction," according an FCC statement (click for PDF) citing examples such more widespread broadband coverage, increased competition, improved products, and enhanced national security and disaster recovery.

The conditions of the merger proposed by AT&T and agreed to by the FCC included the sale of certain wireless airwaves in the 2.5 gigahertz band, a special \$19.95 per month price tag for stand-alone basic high-speed Internet service and a promise for the next two years to adhere to specific Network neutrality rules.

One of the most important concessions is

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AT&T's commitment to a basic set of principles that establish a practical implementation of Net neutrality. Specifically, it agreed "not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination."

Don't look at the FCC's decision, however, as a ruling on Net neutrality, Republican Commissioners Chairman Kevin Martin and Deborah Taylor Tate warned in a statement.

"Today's order does not mean that the commission has adopted an

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## FCC approves AT&T-BellSouth merger

additional Net neutrality principle. We continue to believe such a requirement is not necessary and may impede infrastructure deployment," they wrote. "Thus, although AT&T may make a voluntary business decision, it cannot dictate or bind government policy. Nor does this order."

Several consumer groups, such as Public Knowledge and the Consumer Federation of America, praised AT&T's concessions. These groups have been strongly opposed to the merger from the beginning and have been working to make sure the FCC imposes some kind of conditions on the merger.

"Everyone who uses the Internet will benefit, at least in the short term, from AT&T's latest concessions in its takeover of BellSouth," Gigi Sohn, president of Public Knowledge, said in a statement. "AT&T has agreed to essential Net neutrality principles."

But not everyone is happy about the deal. Some Net neutrality purists have criticized the fact that AT&T proposed two exceptions to the Net neutrality principles. The first exception allows AT&T to deliver "enterprise managed IP services." These are services that AT&T sells to business customers to connect different offices or provide Internet connections to data centers. AT&T charges its customers a premium for

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guaranteed levels of service, which requires the company to manage or prioritize traffic when it runs over its network.

The second exemption is for AT&T's IPTV service, U-verse, which is currently rolling out in 11 markets. Because AT&T's IPTV service doesn't run over the public Internet, this should not be a big issue, said Tim Wu, a professor at Columbia Law School specializing in telecommunications law and a charter member of the SavetheInternet.com coalition.

"These services are IP in name only," he wrote in a blog posted on SavetheInternet.com on Friday. "These services use only the private infrastructure built by AT&T, and do not

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## FCC approves AT&T-BellSouth merger

rely on the public Internet as described by IP addresses. Hence the exclusion of private IPTV services should be considered less controversial. In fact, were the Network neutrality rules to apply to IPTV, it is doubtful that AT&T could offer its competing cable television services, leaving the cable market with even less competition."

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Mark Cooper, director of research for the Consumer Federation of America, said that some compromise between Net neutrality supporters and AT&T was necessary. His group was asked by the FCC to participate in the negotiations with AT&T over the weekend.

"I don't believe the exclusions swallow the definition of Net neutrality that AT&T has agreed to," he said. "People can hypothesize different ways that AT&T will try to define services as IPTV to get around the rules, but if you look at the language, it's pretty clear what is and is not included."

AT&T has agreed to adhere to specific rules for a period of two years. But consumer groups are hopeful that if the

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rules prove to be effective, Congress can use AT&T's own definition of Net neutrality to craft legislation for all carriers.

"The two-year term of the agreement should give policymakers in Congress and the FCC enough time to come up with a permanent Net neutrality policy that reflects the significant agreements AT&T has set out," Sohn said.

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# ATTACHMENT 8



## **Federal Trade Commission Protecting America's Consumers**

For Release: June 27, 2007

### **FTC Issues Staff Report on Broadband Connectivity Competition Policy Report Urges Caution on Network Neutrality Regulation**

The Federal Trade Commission's Internet Access Task Force today issued a report, "Broadband Connectivity Competition Policy," which summarizes the Task Force's findings in the area of broadband Internet connectivity and, in particular, so-called network neutrality regulation. Based on these findings, and FTC staff's experience with the operation of myriad markets throughout the economy, the report identifies guiding principles that policy makers should consider in evaluating proposed regulations or legislation relating to broadband Internet access and network neutrality.

According to Chairman Deborah Platt Majoras, "This report recommends that policy makers proceed with caution in the evolving, dynamic industry of broadband Internet access, which generally is moving toward more – not less – competition. In the absence of significant market failure or demonstrated consumer harm, policy makers should be particularly hesitant to enact new regulation in this area."

As the report notes, certain conduct and business arrangements that broadband providers may pursue, including data prioritization, exclusive deals, and vertical integration into online content and applications, can benefit consumers. "The primary reason for caution is simply that we do not know what the net effects of potential conduct by broadband providers will be on all consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace."

Noting that three federal agencies – the Federal Communications Commission, the Department of Justice, and the FTC – have jurisdiction to address broadband Internet access, the report explains that the FTC, for its part, will continue to devote substantial resources to maintaining competition and protecting consumers in the broadband area. In addition to vigorously enforcing the antitrust and consumer protection laws, the FTC will expend considerable efforts on consumer education, industry guidance, and competition advocacy in the area of broadband Internet access.

In addition to proposing guiding principles for policy makers, the report includes background information on the technical functioning of the Internet and the legal and regulatory developments that have led to the current debate over network neutrality regulation; provides an overview of the arguments for and against such regulation; analyzes the consumer welfare effects of certain potential conduct by broadband providers, including data discrimination and prioritization; explores the application of the antitrust and consumer protection laws to such conduct; and identifies various proposals for broadband Internet access that have been put forth to date.

The report is the second publicly released work from the Task Force, which was convened by Chairman Majoras in August 2006 and is headed by Maureen K. Ohlhausen, Director of the FTC's Office of Policy Planning. With members from throughout the agency, the Task Force seeks to enhance the FTC's expertise in the increasingly important area of Internet access.

The Commission vote to approve the report was 5-0, with Commissioner Jon Leibowitz issuing a separate concurring statement. In his statement, Commissioner Leibowitz said, "The Report also soberly reminds us that regulation often has unintended side-effects. That is surely true. But it seems to me equally clear that this Report shows that doing nothing may have its costs as well."

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**Related Documents:**

**Broadband Connectivity Competition Policy: A Federal Trade Commission Staff Report**

- Concurring Statement of Commissioner Leibowitz

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Last Modified: Wednesday, 28-Nov-2007 16:50:53 EST

**Concurring Statement of Commissioner Jon Leibowitz  
Regarding the Staff Report:  
“Broadband Connectivity Competition Policy”**

Let me begin by commending the staff for this Report, which continues the process of identifying guiding principles for our growing Internet consumer protection and competition missions that was begun last October with our Municipal Broadband study. Critically, today’s Report forms a type of a preview of how the FTC will view conduct by broadband providers in the absence of a net neutrality rule. The Report notes that consumers strongly prefer the current open state of the Internet,<sup>1</sup> and provides a commendably unvarnished view of the extent to which the consumer protection and antitrust laws will satisfy those preferences. In my view, the Report demonstrates that while our consumer protection authority may be adequate to the task, the same may not be true with respect to antitrust law.

When then FCC Chairman Michael Powell spoke about what he called the four “Internet Freedoms” in 2004, one of his principal concerns was with protecting consumers from having to choose Internet service plans without sufficient information about those plans from broadband providers.<sup>1</sup> Of course, that Freedom is particularly important to us at the FTC. It implicates some of the most important issues regarding consumer rights on the Internet – transparency and disclosure. Will carriers slow down or interfere with applications or services? If so, will consumers be told about this before they sign up? How fast will a consumer’s Internet connection actually be? Will they get adequate information about it? To my mind, failure to disclose such material terms could be considered “unfair or deceptive” in violation of the FTC Act. I have no doubt that the FTC will move aggressively to protect consumers using our existing authority.

What is in doubt is whether, without adequate protection for the other three “Internet Freedoms” mentioned by Chairman Powell, consumers will continue to truly experience the promise of the Internet. The other three Internet Freedoms mentioned by Chairman Powell are: (1) consumers’ freedom to access content; (2) their freedom to use Internet applications; and (3) their freedom to attach personal devices to the Internet in their homes.<sup>2</sup> These Freedoms are a start toward ensuring consumers’ rights on the Internet but, as the Report demonstrates, while antitrust may be a good way of *thinking* about these Freedoms, it is not necessarily well-suited to *protecting* them.

There is a real reason to fear that, without additional protections, some broadband companies may have strong financial incentives to restrict access to content and applications. One way this might happen is by now well understood by almost everyone – a broadband provider with monopoly power in a local market might use that power to block or degrade some applications or content that compete with applications or content

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<sup>1</sup> Michael Powell, Chairman, FCC, Keynote Address at the Silicon Flatirons Symposium: Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004) *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

<sup>2</sup> *Id.*

the broadband company itself provides.<sup>3</sup> As the Report notes, many, including many of those who oppose net neutrality regulations, view this sort of “*Madison River*”<sup>4</sup> conduct as inappropriate.<sup>5</sup> I certainly do. And it is possible that responsible broadband providers won’t engage in this conduct; after all, the Report identifies strong countervailing incentives not to do so. But as I read the Report there is little chance that antitrust would prevent such a scheme except after a “rule of reason” analysis, which – at least in these types of cases – is likely to be drawn out, uncertain and expensive.<sup>6</sup>

A somewhat more exotic and perhaps even more serious concern is also identified by the Report. If broadband providers begin to sell, to application and content providers, the right to access their customers, then the broadband market will become what some economists call a “two-sided market.”<sup>7</sup> The concern arises because the broadband provider’s market power when it sells its service to the application and content providers dwarfs its market power on the other “side” of the market (where they sell that service to consumers). Once a consumer chooses a broadband provider, then that provider has monopoly power over access to that consumer for any application or content provider that wants to reach that customer. If a large national broadband provider were to begin charging Internet application and content providers to reach its customers, it would have monopoly power over access to potentially millions of customers nationwide.

This problem, which the Report identifies as a “terminating access monopoly,” is not new.<sup>8</sup> In fact, this issue has bedeviled public policy in the telecommunications industry for years.<sup>9</sup> As the Report notes, the dangers from this monopoly power include increased prices being charged by Internet content and applications providers to

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<sup>3</sup> And, make no mistake, nearly all broadband providers in this country have market power. As of 2006, 95.5% of all broadband in this country is provided by either a cable company or a telephone company. FCC, High-Speed Services for Internet Access as of June 30, 2006 at 7, tbl. 3 (2007). In other words, nearly all local broadband markets are duopolies at best. To be sure, the cable and telephone companies have been competing aggressively against each other in many local markets. However, while the Report repeatedly notes the “considerable debate” regarding the extent of competition from alternative sources, the fact remains that in nearly all local broadband markets, no such third pipe to the home yet exists.

<sup>4</sup> *In re Madison River Commc’ns*, 20 F.C.C.R. 4295 (2005) (consent decree resolving FCC’s investigation of a telephone company that provided broadband service and blocked its customers from accessing VoIP services that competed with its own telephone services).

<sup>5</sup> See *Report* at 110, fn. 351.

<sup>6</sup> Of course, it is possible that the FCC would consider this conduct illegal under its residual “public interest” authority.

<sup>7</sup> In a two-sided market, broadband providers sell access for its customers to use applications and content on the Internet and, to the same extent, sell the providers of applications and content access to those consumers. As the Report notes, such arrangements are often good for consumers – they allow the seller to charge a lower price to the “side” of the market that is more price sensitive and make up for it by charging more to the other side. Such arrangements are not uncommon in our economy, for example, in the newspaper and credit card industries.

<sup>8</sup> See generally *Report* at 113-116.

<sup>9</sup> See generally Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 310-313 (MIT Press 2007).

consumers (to cover those providers' new costs of paying for access to those same consumers) and a reduction in the long run incentives for those application and content providers to develop new products, as the broadband firms would be able to expropriate the value of those new products. While these scenarios may not be certain, as I read the Report it is not clear they could be addressed by antitrust.

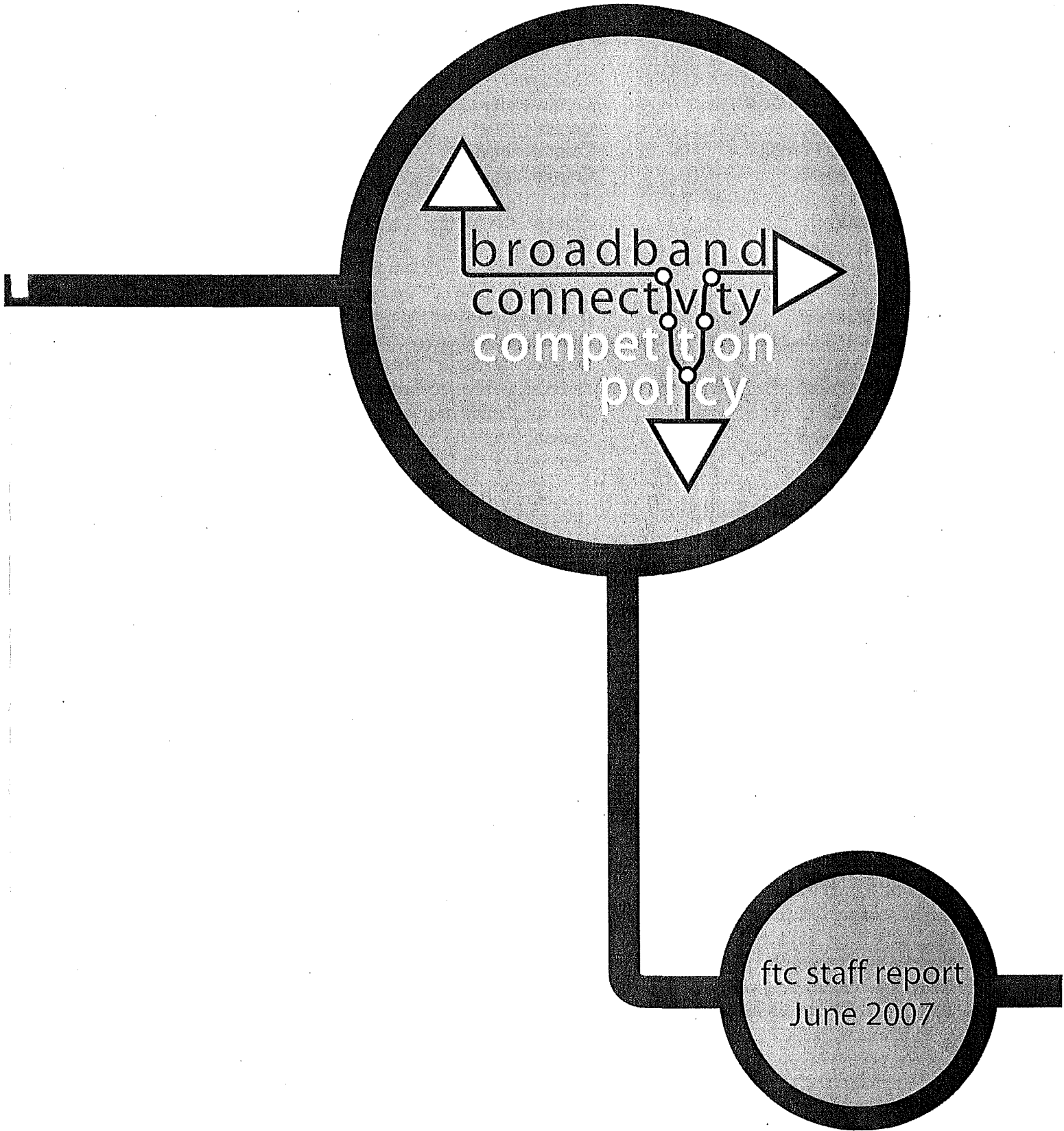
The Report notes that in many ways antitrust law is generally well suited as a tool to analyze the impact of potentially problematic conduct on consumers. However, as the Report also notes, there is little agreement over whether antitrust, with its requirements for *ex post* case by case analysis, is capable of fully and in a timely fashion *resolving* many of the concerns that have animated the net neutrality debate.<sup>10</sup> And the Report makes no promises regarding whether enforcement might end up being too little or too late.<sup>11</sup>

The Report also soberly reminds us that regulation often has unintended side-effects. That is surely true. But it seems to me equally clear that this Report shows that doing nothing may have its costs as well.

---

<sup>10</sup> It is possible that the FTC could approach some of these problems – including interference by a broadband provider with competing Internet content or applications – as “unfair methods of competition” under Section 5 of the FTC act, which prohibits conduct that violates the spirit of the antitrust laws even if it does not violate the letter of the laws. Remedies for such violations are usually limited to cease and desist orders, and there is far less risk of follow-on private litigation than with violations of the Sherman Act.

<sup>11</sup> See Report at 235-236 (policy makers should consider whether it will be possible to undo the effects of having no net neutrality regime “if it is later determined that enforcement under current law has been inadequate...”).



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June 2007

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This Report represents the views of the FTC staff and does not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has voted to authorize the staff to issue this Report.



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## INTRODUCTION AND EXECUTIVE SUMMARY

### *Background*

The Internet<sup>1</sup> has profoundly impacted numerous aspects of daily life for many people in the United States and is increasingly vital to the American economy. In response to recent debate relating to Internet access issues, Federal Trade Commission (“FTC” or “Commission”) Chairman Deborah Platt Majoras announced the formation of the Internet Access Task Force (“Task Force”) in August 2006 and invited interested parties to meet with the Task Force to discuss issues relating to Internet access generally and net neutrality<sup>2</sup> in particular.<sup>3</sup> The Task Force held a two-day public workshop on broadband connectivity competition policy in February 2007 (“Workshop”) to bring together consumer advocates and experts from business, government, academia, and the technology sector to explore competition and consumer protection issues relating to broadband Internet access.<sup>4</sup> The purpose of this Report is to summarize the Task Force’s learning on broadband Internet connectivity in general and network neutrality in particular, as developed from the Workshop, meetings between the Task Force and various interested parties, and the FTC staff’s independent research.

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<sup>1</sup> As discussed in more detail in Chapter I of this Report, the term “Internet” is commonly used to refer to the decentralized, interconnected network of computer networks that allows computers to communicate with each other. Individual networks are owned and administered by a variety of organizations, such as private companies, universities, research labs, government agencies, and municipalities.

<sup>2</sup> The terms “net neutrality” and “network neutrality” have been used to identify various policy concerns and prescriptions raised by diverse parties to the larger social discussion of broadband Internet connectivity. Typically, such terms are identified with positions that recommend, at least, some legal or regulatory restrictions on broadband Internet access services that include non-discrimination requirements above and beyond any that may be implied by existing antitrust law or Federal Communications Commission (“FCC”) regulations. Particular concerns and positions are explored in some detail throughout the Report, but the terms “net neutrality” and “network neutrality” are used here, interchangeably, to refer to this larger family of views. Unless otherwise clarified, our terminological choice is not meant to endorse any particular policy position.

<sup>3</sup> See Deborah Platt Majoras, Chairman, FTC, Luncheon Address, The Progress & Freedom Foundation’s Aspen Summit, The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers (Aug. 21, 2006), *available at* <http://ftc.gov/speeches/majoras/060821pffaspenfinal.pdf>.

<sup>4</sup> The agenda, transcript, public comments, and other information relating to the Workshop are available on the FTC’s Web site at <http://www.ftc.gov/opp/workshops/broadband/index.shtm>. In addition, Appendix I to this Report provides the identity and affiliation of the Workshop participants.

Throughout this Report, citations to “Public Comments” refer to comments submitted to the FTC in response to its request for public comments on the topics addressed at the Workshop. In addition, citations to “Tr.” refer to the Workshop transcript, which is comprised of two volumes. Volume I corresponds to the proceedings on February 13, 2007; Volume II corresponds to the proceedings on February 14, 2007. Speakers are identified by last name. Finally, citations to “Participant Presentations” refer to presentations, including slide presentations and commentary, provided by Workshop participants.

Originally, the Internet developed out of efforts by researchers at American universities and the U.S. Department of Defense Research Projects Agency (“DARPA”)<sup>5</sup> in the 1960s and 1970s to create and test interconnected computer networks that would communicate via data packet switching rather than traditional circuits. Today, the Internet – which enables applications such as e-mail and browsers that search the World Wide Web (the “Web”) – connects many millions of end users (and more than one hundred million Web sites worldwide) to content, applications, and each other. End users include the initial government and academic centers, corporate entities across all sectors of the economy, and individuals and associations.

Individual end users (and networks of end users) arrange for Internet access via a “last mile” connection to an Internet service provider (“ISP”),<sup>6</sup> which provides, in turn, routing and connections from the ISP’s own network to the Internet. Content and applications providers offer their products and services to end users via network operators, which enable connectivity and transport into the middle, or “core,” of the Internet. Before the turn of the century, most computer users connected to the Internet using “narrowband,” dial-up telephone connections and modems to transmit data over the telephone system’s traditional copper wirelines. Much faster “broadband” connections recently have been deployed using various technologies, including coaxial cable wirelines, upgraded copper digital subscriber lines (“DSL”), and to a lesser extent fiber-optic wirelines, wireless, satellite, and broadband over powerlines (“BPL”).

Traditionally, data traffic has traversed the Internet on a “first-in-first-out” and “best-efforts” basis. This protocol for data transmission was established principally as a result of DARPA’s original priority, which was to develop an effective technique for communications among existing interconnected networks, and which placed network survivability – or the potential for robust network operation in the face of disruption or infrastructure destruction – as the top goal in designing the overall architecture of this network of networks. Since the Internet’s earliest days, however, computer scientists have recognized that network resources are scarce and that traffic congestion can lead to reduced performance. Although different data transmission protocols and the viability of usage-based pricing mechanisms were explored throughout the 1980s and 1990s, the debate over broadband connectivity policy did not reach critical mass until recently. Technical, business, legal, and regulatory developments all appear to have contributed to the acceleration of the discussion.

Regulatory jurisdiction over broadband services generally is subject to the shared jurisdiction of the FCC, the FTC, and the Department of Justice (“DOJ”).<sup>7</sup> FCC jurisdiction comes chiefly from the Communications Act of 1934, as amended (“Communications Act”).<sup>8</sup> FTC jurisdiction over broadband arises chiefly under its

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<sup>5</sup> Appendix 2 to this Report provides a glossary of acronyms that are frequently used herein.

<sup>6</sup> In this Report, we also refer to broadband ISPs as “broadband providers” and “access providers.”

<sup>7</sup> See *infra* Chapters II and IX.A for discussion of various jurisdictional issues.

<sup>8</sup> 47 U.S.C. §§ 151 *et seq.*

statutory mandate to prevent “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce” under the FTC Act.<sup>9</sup> The FTC’s authority to enforce the federal antitrust laws generally is shared with DOJ’s Antitrust Division. The FCC, FTC, and DOJ have exercised their existing authority in various ways. All three agencies have scrutinized proposed mergers in Internet-related markets and have negotiated significant conditions on certain mergers allowed to go forward.<sup>10</sup> In addition, the FTC has enforced the consumer protection laws, bringing a variety of cases against Internet service providers that have engaged in allegedly deceptive marketing and billing practices.<sup>11</sup>

Certain judicial and regulatory decisions in recent years have clarified the scope of broadband regulation in two fundamental regards. First, since about 2000, the FCC has undertaken a substantial and systematic deregulation of broadband services and facilities, concluding that cable, wireline, powerline, and wireless broadband Internet access services are “information services” that are not subject to common carrier requirements.<sup>12</sup> The first of these decisions was sustained by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>13</sup>

Second, these decisions have served to reinforce and expand FTC jurisdiction over broadband Internet access services. That jurisdiction had once been regarded as limited to the extent that the FTC’s general enforcement authority under the FTC Act did not extend to entities that were “common carriers” under the Communications Act. The regulatory and judicial decisions at issue, however, confirmed that the larger categories of broadband Internet access services, as information services, are not exempt from FTC enforcement of the FTC Act.

In recent years, changes in both user demand and technology have prompted some broadband providers openly to consider prioritizing certain data traffic to improve network management and provide premium services. The demand for bandwidth has increased dramatically, as a growing number of users seek access to increasingly data-rich Internet content, such as streaming video, which often requires considerable bandwidth or has particular quality-of-service requirements. That demand has prompted

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<sup>9</sup> 15 U.S.C. §§ 41 *et seq.*

<sup>10</sup> See, e.g., Am. Online, Inc. & Time Warner, Inc., FTC Dkt. No. C-3989 (Dec. 17, 2000) (complaint), available at <http://www.ftc.gov/os/2000/12/aolcomplaint.pdf>. See *infra* Chapters II and IX for discussion of FCC, FTC, and DOJ scrutiny of mergers in the area of broadband Internet access.

<sup>11</sup> See, e.g., Am. Online, Inc. & CompuServe Interactive Servs., Inc., FTC Dkt. No. C-4105 (Jan. 28, 2004) (decision and order), available at <http://www.ftc.gov/os/caselist/0023000/040203aolcsdo.pdf>; Juno Online Servs., Inc., FTC Dkt. No. C-4016 (June 29, 2001) (decision and order), available at <http://www.ftc.gov/os/2001/06/junodo.pdf>.

<sup>12</sup> Particular rulemaking and other administrative decisions along these lines are discussed in more detail in Chapters II and IX, *infra*.

<sup>13</sup> 545 U.S. 967 (2005).

concern about present and future congestion and about the need for further infrastructure investment and development. At the same time, technological developments have made feasible differentiation in delivery of data of various types, or from various sources, based on payment to or affiliation with a network operator.

In response, various interested parties, including some content and applications providers and commentators, have expressed concern about network operators' use of these technologies in an environment that is not subject to common carrier regulations. Some of these providers and commentators, therefore, have proposed that the transmission of data on the Internet be subject to some type of "net neutrality" regulation that forbids or places restraints on some types of data or price discrimination by network operators. Opponents of net neutrality regulation assert that it is not just unnecessary, but potentially harmful, and that allowing network operators to innovate freely across technical and business contexts, and to differentiate their networks, will lead to enhanced service offerings for both end users and content and applications providers.

Before turning to the policy discussion that follows, it is worth clarifying that this Report reflects the views of the staff of an agency that enforces the federal antitrust and consumer protection laws. The statutory mission of the FTC is to protect both competition and consumers by safeguarding and encouraging the proper operation of the free market. In carrying out that mission, the FTC primarily is focused on maximizing consumer welfare, as that term is defined in an economic sense in modern antitrust and consumer protection jurisprudence. We recognize that preserving the diversity of views expressed on the Internet is one of the animating principles of many of the most ardent proponents of network neutrality. In this Report, however, we do not attempt to balance consumer welfare (as we use it, in the economic sense) and free expression.<sup>14</sup> Instead, the Report focuses on the consumer welfare implications of enacting some form of net neutrality regulation.

Further, although the goal of increasing competition in broadband Internet access is fundamental to the FTC staff's interest and may be widely shared, how best to achieve that goal is a point of sharp disagreement. What the FTC can offer in this debate is an explanation of which behavior the antitrust and consumer protection laws already proscribe and a framework for analyzing which conduct may foster or impede competition in particular circumstances.

The Report is organized as follows. Chapter I provides technical information on the functioning of the Internet, and Chapter II provides background information on the

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<sup>14</sup> See, e.g., Mercatus Center, Public Comment 27, at 10 ("If the desired outcome is that anyone willing to pay the monthly price for Internet access can communicate with others at some minimum speed, then a policy that promotes 'neutral' treatment of everyone on the network may be appropriate. But if the desired outcome is to have as many people as possible connected to the Internet so they can speak if they so choose, then a different policy, aimed at reducing the consumer's total cost of Internet access as well as usage, may be most effective, even if it does not mandate 'neutrality.'"); Feld, Tr. II at 75 ("It is a question about balancing. . . . I can say that something does introduce a certain amount of economic inefficiency and it is still extraordinarily valuable for the contribution that it gives to us as a society, as a democracy . . . . I would argue that is something we should be willing to consider.").

legal and regulatory developments that have fueled the debate over net neutrality regulation. The purpose of these Chapters is to inform the subsequent policy discussion. Chapter III identifies and briefly describes the various arguments for and against net neutrality regulation that have been put forth to date. Chapter IV analyzes potential conduct by ISPs and other network operators, including vertical integration into content and applications and discrimination against non-affiliated providers of content and applications. Chapter V analyzes the potential use of data prioritization technologies by network operators. Chapter VI considers the current and future state of competition in the area of broadband Internet access. Chapter VII explores the application of the antitrust laws to certain potential conduct and business arrangements involving ISPs and other network operators. Chapter VIII addresses consumer protection issues relating to broadband Internet access. Chapter IX identifies regulatory, legislative, and other proposals for broadband Internet access that have been put forth to date. Finally, Chapter X identifies guiding principles for policy makers to consider prior to enacting any new laws or regulations in this area.

### *The Contours of the Debate*

Proponents of network neutrality regulation include, among others, some content and applications providers, non-facilities-based ISPs, and various commentators. They generally argue that “non-neutral” practices will cause significant and wide-ranging harms and that the existing jurisdiction of the FCC, FTC, and DOJ, coupled with Congressional oversight, are insufficient to prevent or remedy those harms. Proponents suggest that, with deregulation of broadband services, providers of certain broadband Internet services have the legal ability, as well as economic incentives, to act as gatekeepers of content and applications on their networks.

Principally, these advocates express concern about the following issues: (1) blockage, degradation, and prioritization of content and applications; (2) vertical integration by ISPs and other network operators into content and applications; (3) effects on innovation at the “edges” of the network (that is, by content and applications providers); (4) lack of competition in “last-mile” broadband Internet access markets; (5) remaining legal and regulatory uncertainty in the area of Internet access; and (6) the diminution of political and other expression on the Internet. Not all proponents of net neutrality regulation oppose all forms of prioritization, however. For example, some believe that prioritization should be permitted if access to the priority service is open to all content and applications providers on equal terms; that is, without regard to the identity of the content or application provider.

Opponents of network neutrality regulation include, among others, some facilities-based wireline and wireless network operators and other commentators. They maintain that net neutrality regulation will impede investment in the facilities necessary to upgrade Internet access and may hamper technical innovation. They also argue that the sorts of blocking conduct described by net neutrality proponents are mainly hypothetical thus far and are unlikely to be widespread and thus are insufficient to justify a new, *ex ante* regulatory regime.

Principally, opponents of net neutrality regulation argue that: (1) neutrality regulations would set in stone the status quo, precluding further technical and business-model innovation; (2) effective network management practices require some data prioritization and may require certain content, applications, or attached devices to be blocked altogether; (3) new content and applications are likely to require prioritization and other forms of network intelligence; (4) allowing network operators to innovate freely and differentiate their networks permits competition that is likely to promote enhanced service offerings; (5) prohibiting price differentiation would reduce incentives for network investment generally and may prevent pricing and service models more advantageous to marginal consumers; (6) vertical integration by network operators into content and applications and certain bundling practices may benefit consumers; and (7) there is insufficient evidence of either the likelihood or severity of potential harms to justify an entirely new regulatory regime, especially given that competition is robust and intensifying and the market generally is characterized by rapid technological change.

### *Competing Concerns about Integration and Differentiation*

Proponents of net neutrality regulation have raised various concerns about the effects of data or price differentiation in broadband markets.<sup>15</sup> Certain of these concerns are tied to vertical integration (broadly construed), as broadband Internet access providers have begun to offer online content and applications in addition to their primary access services. Other concerns are independent of such integration.

In particular, proponents are concerned that vertical integration by Internet access providers into content and applications markets could prompt them to block, degrade, or charge higher prices to competing content or applications. New information technologies, such as deep packet inspection, may allow network operators to identify the source and content of much of the data traffic they handle. Hence, a broadband provider with significant market power in a given access market, which has an interest in content or applications generally, could have an incentive to block or degrade competing content or applications.

Independent of market power considerations, some net neutrality proponents have raised concerns about the so-called “terminating access monopoly problem,” which could result from broadband Internet access providers charging content or applications providers terminating fees for delivery to end users over the last mile. Some proponents also have expressed concern that if broadband providers are allowed to sign exclusive deals with content or applications providers, end users may be unable to access much of the content they desire, thus “balkanizing” the Internet.

On the other hand, because vertical integration may offer efficiencies that are procompetitive and pro-consumer, not all vertical integration is problematic. More particularly, opponents of net neutrality regulation maintain that some degree of vertical

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<sup>15</sup> See *infra* Chapters IV and V for more detailed discussion of data differentiation and price differentiation, respectively.



integration by Internet access providers into content and applications may facilitate investment in infrastructure, investment in content or applications, optimization of fit between content and delivery systems, and pricing benefits for consumers. They assert that such vertical integration also may facilitate entry and thereby increase competition in broadband Internet access markets. Further, the incentives of broadband providers may cut both ways: for example, despite potentially having an incentive to favor affiliated content and applications, access providers have argued that they have an interest in providing access to a wide range of content and applications, which are essential complements to the services they sell.

As is the case with data discrimination, it is impossible to determine in the abstract whether allowing content and applications providers (or even end users) to pay broadband providers for prioritized data transmission will be beneficial or harmful to consumer welfare.<sup>16</sup> Such prioritization may provide benefits, such as increased investment and innovation in networks and improved quality of certain content and applications that require higher-quality data transmission, as net neutrality opponents claim. Network neutrality proponents have raised concerns, however, regarding potential adverse effects of data prioritization, including, among others: (1) a diminution in innovation by content and applications providers – particularly those unable to pay for prioritization; (2) the intentional or passive degradation of non-prioritized data delivery; and (3) increased transaction costs resulting from negotiations between broadband providers and content and applications providers over prioritization.

The balance between competing incentives on the part of broadband providers to engage in, and the potential benefits and harms from, discrimination and differentiation in the broadband area raise complex empirical questions and may call for substantial additional study of the market generally, of local markets, or of particular transactions. Again, further evidence of particular conduct would be useful for assessing both the likelihood and severity of any potential harm from such conduct.

### ***Present and Future Broadband Competition***<sup>17</sup>

Proponents and opponents of net neutrality regulation have fundamentally different views on the present (and likely future) state of competition in the broadband industry. Proponents argue either that a national market for broadband Internet access is, in effect, a cable-telephone duopoly or that there are significant failures of competition in many local markets. Opponents characterize the market as highly competitive. Broadband Internet access generally is a relatively new industry characterized by high levels of demand growth from consumers, high market shares held by incumbent cable and telephone providers, and many new entrants trying to capture some share of the market.

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<sup>16</sup> See *infra* Chapter V.

<sup>17</sup> Broadband competition issues are discussed throughout this Report, particularly in Chapters VI and VII.

FTC staff did not conduct independent empirical research regarding competition in local broadband Internet access markets for the purposes of this Report. We note that opponents of net neutrality regulation have pointed to evidence on a national scale that (1) access speeds are increasing, (2) prices (particularly speed-adjusted or quality-adjusted prices) are falling, and (3) new entrants, including wireless and other competitors, are poised to challenge the incumbent cable and telephone companies. We note, too, that statistical research conducted by the FCC has tended to confirm these general trends.<sup>18</sup> For example, broadband deployment and penetration have increased dramatically since 2000. The FCC estimated that by 2006, broadband DSL service was available to 79 percent of the households that were served by a telephone company, and cable modem service was available to 93 percent of the households to which cable companies could provide cable television service.<sup>19</sup>

### *Jurisdiction and the Application of Antitrust Law*

The competitive issues raised in the debate over network neutrality regulation are not new to antitrust law, which is well-equipped to analyze potential conduct and business arrangements involving broadband Internet access. The antitrust laws are grounded in the principle that competition serves to protect consumer welfare. In conducting an antitrust analysis, then, the ultimate issue would be whether broadband providers engage in unilateral or joint conduct that is likely to harm competition and consumers in a relevant market.

Many proponents of net neutrality regulation are concerned that broadband Internet access suppliers have market power in the last-mile access market and that they will leverage that power into adjacent content and applications markets in a way that will harm competition in those markets and, ultimately, consumers. Such leveraging may take the form of exclusive dealing arrangements, refusals to deal, vertical integration, or certain unilateral conduct. All of these types of conduct can be anticompetitive and harmful to consumers under certain conditions. They also, however, can be procompetitive, capable of improving efficiency and consumer welfare, which involves, among other things, the prices that consumers pay, the quality of goods and services offered, and the choices that are available in the marketplace. Accordingly, such conduct would be analyzed under the antitrust laws to determine the net effect of such conduct on consumer welfare.

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<sup>18</sup> See, e.g., FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2006 (2007) [hereinafter FCC, HIGH-SPEED SERVICES], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270128A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.doc). Although some have questioned whether the methodology used in compiling this data allows the FCC to provide a reliable analysis of competition in particular markets, the FCC data does provide an overall picture of the significant growth in broadband penetration over the past few years.

<sup>19</sup> See, e.g., *id.* at 2-4, 5 tbl.1, 6 tbl.2, 7 tbl.3, 19 tbl.14.

There nonetheless remains significant disagreement with respect to the adequacy of existing agency oversight. Some proponents of net neutrality regulation have argued that existing laws, regulations, and agency oversight are inadequate to safeguard competition in broadband Internet access markets. Those opposed to net neutrality regulation, however, have argued that current competition law is adequate, that careful rule-of-reason application of the law is critical to the preservation of competition, and that additional regulations likely would be over-intrusive and, on balance, a burden to vibrant competition in broadband markets.

### ***Consumer Protection Issues***

Effective consumer protection in the broadband marketplace is essential to robust competition in that market – regardless of the outcome of the current broadband connectivity debate. The FTC has been active in enforcing relevant consumer protection law, bringing a variety of cases against ISPs that have engaged in allegedly deceptive marketing and billing practices. The Workshop highlighted various consumer protection concerns. Several Workshop participants argued that such concerns were best addressed under FTC jurisdiction, given the FTC’s statutory mandate, its interest and experience in consumer protection issues generally, and its interest and experience in consumer protection aspects of various Internet services in particular.

Internet access implicates two broad areas of consumer protection: (1) clear and conspicuous disclosure of material terms of Internet access services; and (2) security and privacy issues created by broadband Internet access services. Current federal consumer protection law can address both sets of concerns, although consumer protection issues in the broadband marketplace may present unique technical and jurisdictional challenges, both to consumers and law enforcement agencies. Commentators within and without the Workshop have suggested that federal law enforcement fruitfully could be augmented by industry self-regulation and expanded federal guidance on pertinent issues.

### ***Suggested Guiding Principles***

The FTC’s Internet Access Task Force has conducted a broad examination of the technical, legal, and economic issues underpinning the debate surrounding broadband connectivity competition policy. Based on this examination, as well as our experience with the operation of myriad markets throughout the economy, we identify guiding principles that policy makers should consider in evaluating options in the area of broadband Internet access.<sup>20</sup> We have provided an explanation of the conduct that the antitrust and consumer protection laws already proscribe and a framework for analyzing which conduct may foster or impede competition in particular circumstances. In evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, *ex ante* restrictions in an unsettled, dynamic environment.

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<sup>20</sup> See *infra* Chapter X.

There is evidence that the broadband Internet access industry is moving in the direction of more, not less, competition, including fast growth, declining prices for higher-quality service, and the current market-leading technology (*i.e.*, cable modem) losing share to the more recently deregulated major alternative (*i.e.*, DSL). We nonetheless recognize that not every local broadband market in the United States may enjoy vigorous competition.<sup>21</sup> This Report does not reflect a case-by-case analysis of the state of competition in each of the localities that may represent relevant antitrust markets.

There also appears to be substantial agreement on the part of both proponents and opponents of net neutrality regulation that greater competition in the area of broadband Internet access would benefit consumers. Thus, to the extent that policy makers are not content to wait for the market to increase competition, they should consider pursuing various ways of increasing competition in the provision of broadband Internet access.

Based on what we have learned through our examination of broadband connectivity issues and our experience with antitrust and consumer protection issues more generally, we recommend that policy makers proceed with caution in evaluating proposals to enact regulation in the area of broadband Internet access. The primary reason for caution is simply that we do not know what the net effects of potential conduct by broadband providers will be on all consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace.

With respect to data discrimination, broadband providers have conflicting incentives relating to blockage of and discrimination against data from non-affiliated providers of content and applications.<sup>22</sup> In the abstract, it is impossible to know which of these incentives would prove stronger for each broadband provider. Further, even assuming such discrimination were to take place, it is unknown whether the net effect on consumer welfare would be adverse. Likewise, it is not possible to know in the abstract whether allowing content and applications providers to pay broadband providers for prioritized data transmission will be beneficial or harmful to consumers.<sup>23</sup>

Several open questions that likely will be answered by either the operation of the current marketplace or technological developments provide additional reasons for caution. These questions include, among others: (1) How much demand will there be from content and applications providers for data prioritization?; (2) Will effective data prioritization, throughout the many networks comprising the Internet, be feasible?; (3) Would allowing broadband providers to practice data prioritization necessarily result in the degradation of non-prioritized data delivery?; (4) When will the capacity limitations of the networks comprising the Internet result in unmanageable or unacceptable levels of

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<sup>21</sup> See *infra* Chapter VI.B.

<sup>22</sup> See *infra* Chapter IV.

<sup>23</sup> See *infra* Chapter V.

congestion?; and (5) If that point is reached, what will be the most efficient response thereto: data prioritization, capacity increases, a combination of these, or some as yet unknown technological innovation? The eventual answers to these questions may give policy makers key information about the net effects on consumer welfare arising from the conduct and business arrangements that network neutrality regulation would prohibit or limit.

Policy makers also should carefully consider the potentially adverse and unintended effects of regulation in the area of broadband Internet access before enacting any such regulation. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare-reducing in the long term, particularly in terms of product and service innovation. Further, such regulatory schemes inevitably will have unintended consequences, some of which may not be known until far into the future. Once a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.

Two aspects of the broadband Internet access industry heighten the concerns raised by regulation generally. First, the broadband industry is relatively young and dynamic, and, as noted above, there are indications that it is moving in the direction of more competition. Second, to date we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers. Policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects that potential conduct by broadband providers may have on such welfare.

The federal antitrust agencies, the FTC and the DOJ, and the FCC share jurisdiction over broadband Internet access, with each playing an important role in protecting competition and consumers in this area. Further, as a byproduct of the ongoing debate over network neutrality regulation, the agencies have a heightened awareness of the potential consumer harms from certain conduct by, and business arrangements involving, broadband providers. Perhaps equally important, many consumers are now aware of such issues. Consumers – particularly online consumers – have a powerful collective voice. In the area of broadband Internet access, they have revealed a strong preference for the current open access to Internet content and applications.

The FTC has been involved in the Internet access area for over a decade and will continue to be involved in the evolving area of broadband access. The FTC Act is sufficiently flexible to allow the FTC to enforce the antitrust and consumer protection laws in most industries, including those involving new and ever-changing technologies. The fundamental principles of antitrust and consumer protection law and economics that we have applied for years are as relevant to the broadband industry as they are to other industries in our economy.

The FTC will continue to devote substantial resources to maintaining competition and protecting consumers in the area of broadband Internet access, using a variety of tools. The FTC will continue to enforce the antitrust and consumer protection laws in evaluating conduct and business arrangements involving broadband access. Further, the FTC's Broadband Connectivity Competition Policy Workshop and this Report exemplify some of the diverse resources the agency may bring to bear on Internet access issues, in addition to specific law enforcement actions. The Workshop and Report reflect the agency's interest in and commitment to developing competition and consumer protection policy. Finally, the agency will continue to expend considerable efforts at consumer education, industry guidance, and competition advocacy in the important area of Internet access.

## I. THE INTERNET: HISTORICAL AND TECHNICAL BACKGROUND

The Internet is a decentralized network of computer networks that enables millions of private and public computers around the world to communicate with each other. This interconnection of multiple computer networks, which otherwise would function only as a series of independent and isolated islands, gives rise to the term “Internet” as we know it today.<sup>24</sup> This Chapter is organized as follows. Section A summarizes the historical development of the Internet and describes how data is routed over it; Section B discusses the relationship between “last-mile” Internet service providers, Internet “backbone” networks, and content and applications providers; and Section C explores the technical aspects of network management, data prioritization, and other forms of data “discrimination.”

### A. Historical Development

The Internet developed out of research efforts funded by the U.S. Department of Defense Advanced Research Projects Agency in the 1960s and 1970s to create and test interconnected computer networks.<sup>25</sup> The fundamental aim of computer scientists working on this “ARPANET” was to develop an overall Internet architecture that could connect and make use of existing computer networks that might, themselves, be different

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<sup>24</sup> The Federal Networking Council, a group of U.S. federal agency representatives involved in the early development of federal networking, for example, adopted this definition of the term “Internet” in 1995:

“Internet” refers to the global information system that—

- (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons;
- (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and
- (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.

U.S. Federal Networking Council, *Resolution dated October 24, 1995*, in Robert E. Kahn & Vinton G. Cerf, *What Is the Internet (and What Makes It Work)* n.xv (1999), available at [http://www.cnri.reston.va.us/what\\_is\\_internet.html](http://www.cnri.reston.va.us/what_is_internet.html).

The convention of writing “internet” in lower case letters typically refers to interconnected networks generally, while writing “Internet” with an uppercase “I” is generally used to refer to the original or current version of the Internet. DOUGLAS E. COMER, *THE INTERNET BOOK* 60 (4th ed. 2007). Sometimes, though, individual networks are also referred to as being alternative “Internets.” E.g., INTERNET2, ABOUT US (2007), available at <http://www.internet2.edu/about>.

<sup>25</sup> See generally David D. Clark, *The Design Philosophy of the DARPA Internet Protocols*, COMPUTER COMM. REV., Aug. 1988, at 106, available at <http://nms.csail.mit.edu/6829-papers/darpa-internet.pdf>; BARRY M. LEINER ET AL., A BRIEF HISTORY OF THE INTERNET, <http://www.isoc.org/internet/history/brief.shtml> (last visited June 18, 2007); COMER, *supra* note 24, at 62.

both architecturally and technologically.<sup>26</sup> The secondary aims of the ARPANET project were, in order of priority: (1) Internet communication must continue despite the loss of networks or gateways between them; (2) the Internet architecture must support multiple types of communications services; (3) the architecture must accommodate a variety of networks; (4) it must permit distributed, decentralized management of its resources; (5) the architecture must be cost-effective; (6) the architecture must permit attachment by computer devices with a low level of effort; and (7) the resources used in the Internet architecture must be accountable.<sup>27</sup> That is to say, ARPANET's first priority was network survivability in a potentially hostile environment, and its last priority was providing a system for allocating charges for passing data packets from network to network.<sup>28</sup>

By the late 1960s, computer scientists were experimenting with non-linear "packet-switched" techniques to enable computers to communicate with each other.<sup>29</sup> Using this method, computers disassemble information into variable-size pieces of data called "packets" and forward them through a connecting medium to a recipient computer that then reassembles them into their original form. Each packet is a stand-alone entity, like an individual piece of postal mail, and contains source, destination, and reassembly information. Unlike traditional circuit-switched telephone networks, packet-switched networks do not require a dedicated line of communication to be allocated exclusively for the duration of each communication. Instead, individual data packets comprising a larger piece of information, such as an e-mail message, may be dispersed and sent across

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<sup>26</sup> Clark, *supra* note 25, at 106 ("The top level goal for the DARPA Internet Architecture was to develop an effective technique for multiplexed utilization of existing interconnected networks.").

<sup>27</sup> *Id.* at 107.

<sup>28</sup> *Id.* Besides survivability, "[t]here were also other concerns, such as implementation efficiency, internetwork performance, but these were secondary considerations at first." LEINER ET AL., *supra* note 25. David D. Clark, who served as chief Protocol Architect for TCP/IP from 1981-89, has noted that the ARPANET's original goals differ from what an architecture designed for commercial purposes might have looked like:

This set of goals might seem to be nothing more than a checklist of all the desirable network features. It is important to understand that these goals are in order of importance, and an entirely different network architecture would result if the order were changed. For example, since this network was designed to operate in a military context, which implied the possibility of a hostile environment, survivability was put as a first goal, and accountability as a last goal. During wartime, one is less concerned with detailed accounting of resources used than with mustering whatever resources are available and rapidly deploying them in an operational manner. While the architects of the Internet were mindful of [resource] accountability, the problem received very little attention during the early stages of the design, and is only now being considered. An architecture primarily for commercial deployment would clearly place these goals at the opposite end of the list.

Clark, *supra* note 25, at 107.

<sup>29</sup> See generally LEINER ET AL., *supra* note 25.



multiple paths before reaching their destination and then being reassembled.<sup>30</sup> This process is analogous to the way that the individual, numbered pages of a book might be separated from each other, addressed to the same location, forwarded through different post offices, and yet all still reach the same specified destination, where they could be reassembled into their original form.<sup>31</sup>

By the mid-1970s, computer scientists had developed several software communications standards, or protocols, for connecting computers within the same network. At about the same time, ARPANET scientists developed a protocol for connecting different networks to each other, called the Transmission Control Protocol/Internet Protocol ("TCP/IP") software suite.<sup>32</sup> The TCP component of the suite controls the disassembly and reassembly of data packets sent from a computer server, where the data resides.<sup>33</sup> The IP component specifies the formatting and addressing scheme for transmitting data between sender and recipient computers.<sup>34</sup>

This approach requires that individual networks be connected together by gateway interface devices, called switches or routers.<sup>35</sup> Thus, interconnected networks are, in

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<sup>30</sup> See generally JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 39-45 (paperback ed., 2007) (comparing circuit-switched and packet-switched networks).

<sup>31</sup> See *id.* at 42.

<sup>32</sup> Vinton G. Cerf & Robert E. Kahn, *A Protocol for Packet Network Intercommunication*, 22 IEEE TRANSACTIONS ON COMM. 637 (1974), available at <http://www.cs.princeton.edu/courses/archive/fall06/cos561/papers/cerf74.pdf>.

<sup>33</sup> In the original paper describing the TCP/IP protocol, Cerf and Kahn explain:

Processes that want to communicate present messages to the TCP for transmission, and TCP's deliver incoming messages to the appropriate destination processes. We allow the TCP to break up messages into segments because the destination may restrict the amount of data that may arrive, because the local network may limit the maximum transmission size, or because the TCP may need to share its resources among many processes concurrently. . . .

From this sequence of arriving packets (generally from different HOSTS [computers]), the TCP must be able to reconstruct and deliver messages to the proper destination processes.

*Id.* at 640.

<sup>34</sup> "Since the GATEWAY [(router)] must understand the address of the source and destination HOSTS, this information must be available in a standard format in every packet which arrives at the GATEWAY. This information is contained in an *internetwork header* prefixed to the packet by the source HOST." *Id.* at 638. "If the TCP is to determine for which process an arriving packet is intended, every packet must contain a *process header* (distinct from the internetwork header) that completely identifies the destination process." *Id.* at 640.

<sup>35</sup> See *id.* at 638.

effect, a series of routers connected by transmission links. Packets of data are passed from one router to another, via the transmission links. Typically, each router has several incoming transmission links through which packets arrive and several outgoing links through which the router can send packets. When a packet arrives at an incoming link, the router will use a software algorithm to determine the outgoing link through which the packet should be routed. If that outgoing link is free, the packet is sent out immediately. If the relevant outgoing link is busy transmitting other packets, however, the newly arrived packet must wait. Usually, the packet will be temporarily held, or “buffered,” in the router’s memory, waiting its turn until the relevant outgoing link is free. Thus, buffering is a method of dealing with temporary surges in Internet traffic, which can be variable or “bursty.” If too many packets are buffered during a period of congestion, however, the router may have no choice but to reroute or drop altogether some of those packets.<sup>36</sup> Because no transmission mechanism can be completely reliable, computer scientists also developed methods of retransmitting data to deal with dropped or otherwise incorrectly transmitted packets.<sup>37</sup>

Two of the resulting features of this TCP/IP protocol are that it transmits data between networks on a “first-in-first-out” and “best-efforts” basis.<sup>38</sup> Therefore, although the resulting interconnected networks are generally able to transmit data successfully

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<sup>36</sup> See generally Edward W. Felten, *Nuts and Bolts of Network Neutrality* 1-2 (AEI-Brookings Joint Center, Working Paper No. RP-06-23, 2006), available at <http://www.aei-brookings.org/publications/abstract.php?pid=1106>. See also Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality and the Quest for a Balanced Policy*, 34th Research Conference on Communication, Information, & Internet Policy 5-6 (2006), available at [http://web.si.umich.edu/tprc/papers/2006/574/Peha\\_balanced\\_net\\_neutrality\\_policy.pdf](http://web.si.umich.edu/tprc/papers/2006/574/Peha_balanced_net_neutrality_policy.pdf) (describing the use of algorithms to manage traffic flows across a network).

<sup>37</sup> As Cerf and Kahn explained:

No transmission can be 100 percent reliable. We propose a timeout and positive acknowledgement mechanism which will allow TCP’s to recover from packet losses from one HOST to another. . . . [T]he inclusion of a HOST retransmission capability makes it possible to recover from occasional network problems and allows a wide range of HOST protocol strategies to be incorporated. We envision it will occasionally be invoked to allow HOST accommodation to infrequent overdemand for limited buffer resources, and otherwise not used much.

Cerf & Kahn, *supra* note 32, at 643.

<sup>38</sup> See generally DAVID CLARK ET AL., *NEW ARCH: FUTURE GENERATION INTERNET ARCHITECTURE: FINAL TECHNICAL REPORT* (2003), available at <http://www.isi.edu/newarch/iDOCS/final.finalreport.pdf> (sponsored by DARPA Information Technology Office). “The original Internet provided a very simple and minimally specified packet transfer service, sometimes called ‘best effort’. Crudely, what ‘best effort’ means is that the network makes no specific commitments about transfer characteristics, such as speed, delays, jitter, or loss.” *Id.* at 7.

between senders and receivers using TCP/IP, congestion or other technical issues can affect transmission and, as a result, no particular quality-of-service level is guaranteed.<sup>39</sup>

Also, during the Internet's early years, network architectures generally were based on what has been called the "end-to-end argument."<sup>40</sup> This argument states that computer application functions typically cannot, and should not, be built into the routers and links that make up a network's middle or "core." Instead, according to this argument, these functions generally should be placed at the "edges" of the network at a sending or receiving computer.<sup>41</sup> This argument also recognizes, however, that there might be certain functions that can be placed only in the core of a network. Sometimes, this argument is described as placing "intelligence" at or near the edges of the network, while leaving the core's routers and links mainly "dumb" to minimize the potential for transmission and interoperability problems that might arise from placing additional complexity into the middle of the network.<sup>42</sup>

Throughout the 1970s and 1980s, the interconnection of computer networks using TCP/IP continued to grow, spurred by uses such as e-mail.<sup>43</sup> In the mid-1980s, the National Science Foundation ("NSF") recognized that computer networks were having an important impact on scientific research by facilitating communications between researchers working in different locations. NSF and DARPA had been jointly funding a network to connect computer science researchers ("CSNET") since the late 1970s. In 1985, NSF announced a plan to connect one hundred universities to the Internet, in addition to five already-existing supercomputer centers located around the country.<sup>44</sup>

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<sup>39</sup> In the original paper describing the TCP/IP protocol, Cerf and Kahn recognized that because individual networks have differing characteristics, "[t]he transmit time for this data is usually dependent upon internal network parameters such as communications media data rates, buffering and signaling strategies, routing, propagation delays, etc." Cerf & Kahn, *supra* note 32, at 637. "The success or failure of a transmission and its performance in each network is governed by different time delays in accepting, delivering, and transporting the data." *Id.* "TCP may need to share its resources among many processes concurrently." *Id.* at 640. Likewise, resources needed to buffer high volumes of incoming packets may also be "limited." *Id.* at 643. Thus, "[c]ongestion at the TCP level is flexibly handled owing to the robust retransmission and duplicate detection strategy." *Id.* at 645.

<sup>40</sup> See, e.g., J.H. Saltzer et al., *End-to-End Arguments in System Design*, 2 ACM TRANSACTIONS ON COMPUTER SYS. 277 (1984).

<sup>41</sup> *Id.* at 277 ("The argument appeals to application requirements, and provides a rationale for moving function upward in a layered system, closer to the application that uses that function.").

<sup>42</sup> See, e.g., Adam Thierer, *Are "Dumb Pipe" Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, in NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED? 73, 79 (Thomas M. Lenard & Randolph J. May, eds., 2006).

<sup>43</sup> LEINER ET AL., *supra* note 25 ("Thus, by 1985, Internet was already well established as a technology supporting a broad community of researchers and developers, and was beginning to be used by other communities for daily computer communications. Electronic mail was being used broadly across several communities . . .").

<sup>44</sup> COMER, *supra* note 24, at 72-76.

Recognizing the increasing importance of this interconnected network to U.S. competitiveness in the sciences, however, NSF embarked on a new program with the goal of extending Internet access to every science and engineering researcher in the country. In 1988, NSF, in conjunction with a consortium of private-sector organizations, completed a new long-distance, wide-area network, dubbed the "NSFNET" backbone.

Although private entities were now involved in extending the Internet, its design still reflected ARPANET's original goals. Although the original ARPANET was decommissioned in 1990, its influence continued because TCP/IP had supplanted or marginalized most other wide-area computer network protocols in existence at that time,<sup>45</sup> and because its design, which provided for generality and flexibility, proved to be durable in a number of contexts.<sup>46</sup> At the same time, its successful growth made clear that these design priorities no longer matched the needs of users in certain situations, particularly regarding accounting and resource management.<sup>47</sup>

By 1992, the volume of traffic on NSFNET was approaching capacity, and NSF realized it did not have the resources to keep pace with the increasing usage. Consequently, the members of the consortium formed a private, non-profit organization called Advanced Networks and Services ("ANS") to build a new backbone with transmission lines having thirty times more capacity.<sup>48</sup> For the first time, a private organization – not the government – principally owned the transmission lines and computers of a backbone.

At the same time that privately owned networks started appearing, general commercial activity on the NSFNET was still prohibited by an Acceptable Use Policy.<sup>49</sup> Thus, the expanding number of privately owned networks were effectively precluded from exchanging commercial data traffic with each other using the NSFNET backbone. Several commercial backbone operators circumvented this limitation in 1991, when they established the Commercial Internet Exchange ("CIX") to interconnect their own backbones and exchange traffic directly. Recognizing that the Internet was outpacing its ability to manage it, NSF decided in 1993 to leave the management of the backbone to the competing commercial backbone operators. By 1995, this expanding network of

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<sup>45</sup> LEINER ET AL., *supra* note 25.

<sup>46</sup> "In the context of its priorities, the Internet architecture has been very successful. The protocols are widely used in the commercial and military environment, and have spawned a number of similar architectures." Clark, *supra* note 25, at 113.

<sup>47</sup> *Id.*

<sup>48</sup> COMER, *supra* note 24, at 75-76.

<sup>49</sup> "On the NSFNET Backbone – the national-scale segment of the NSFNET – NSF enforced an 'Acceptable Use Policy' (AUP) which prohibited Backbone usage for purposes 'not in support of Research and Education.'" LEINER ET AL., *supra* note 25.

commercial backbones had permanently replaced NSFNET, effectively privatizing the Internet.<sup>50</sup>

The growth of the Internet has been fueled in large part by the popularity of the World Wide Web, created in 1989.<sup>51</sup> The number of Web sites on the Internet has grown from one in 1989, to 18,000 in 1995, to fifty million in 2004, and to more than one hundred million in 2006.<sup>52</sup> This incredible growth has been due to several factors, including the realization by businesses that they could use the Internet for commercial purposes, the decreasing cost and increasing power of personal computers, the diminishing complexity of creating Web sites, and the expanding use of the Web for personal and social purposes.

From its creation to its early commercialization, most computer users connected to the Internet using a “narrowband” dial-up telephone connection and a special modem to transmit data over the telephone system’s traditional copper wirelines, typically at a rate of up to 56 kilobits per second (“Kbps”).<sup>53</sup> Much faster “broadband” connections have subsequently been deployed using a variety of technologies.<sup>54</sup> These faster technologies include coaxial cable wirelines, upgraded copper digital subscriber lines, fiber-optic wirelines, and wireless, satellite, and broadband-over-powerline technologies.<sup>55</sup>

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<sup>50</sup> Michael Kende, *The Digital Handshake: Connecting Internet Backbones 5* (FCC Office of Plans and Policy, Working Paper No. 32, 2000), available at [http://www.fcc.gov/Bureaus/OPP/working\\_papers/oppwp32.pdf](http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp32.pdf).

<sup>51</sup> See generally WORLD WIDE WEB CONSORTIUM, ABOUT THE WORLD WIDE WEB CONSORTIUM (W3C), <http://www.w3.org/Consortium> (last visited June 22, 2007). Other popular uses of the Internet include: the transfer of data files from one computer to another through a File Transfer Protocol (“FTP”); electronic mail using Simple Mail Transfer Protocol (“SMTP”); and the use of TEletype NETwork (“TELNET”) to use one computer to access a different computer at another location. See generally NUECHTERLEIN & WEISER, *supra* note 30, at 130. The Internet is often described as being comprised of multiple “layers,” including: a physical layer consisting of the hardware infrastructure used to link computers to each other; a logical layer of protocols, such as TCP/IP, that control the routing of data packets; an applications layer consisting of the various programs and functions run by end users, such as a Web browser that enables Web-based e-mail; and a content layer, such as a Web page or streaming video transmission. See *id.* at 118-21.

<sup>52</sup> Marsha Walton, *Web Reaches New Milestone: 100 Million Sites*, CNN, Nov. 1, 2006, <http://www.cnn.com/2006/TECH/internet/11/01/100millionwebsites/index.html> (last visited June 15, 2007).

<sup>53</sup> See NUECHTERLEIN & WEISER, *supra* note 30, at 134-35.

<sup>54</sup> See *id.* at 134-47. Broadband has been defined by the FCC as services that provide transmission speeds of 200 Kbps or higher in at least one direction. E.g., FCC, HIGH-SPEED SERVICES, *supra* note 18, at 5 tbl.1. Some critics, however, believe this definition is outdated. See, e.g., G. Sohn, Tr. I at 97 (“[I]t defines broadband at a ridiculously slow speed, 200 kilobits per second.”).

<sup>55</sup> See *infra* Chapter VI for a discussion of various broadband technologies.

The thousands of individual networks that make up the global Internet are owned and administered by a variety of organizations, such as private companies, universities, research labs, government agencies, and municipalities. Data packets may potentially travel from their originating computer server across dozens of networks and through dozens of routers before they reach a “last-mile” Internet service provider<sup>56</sup> and arrive at a destination computer. This process of disassembly, transmission, and reassembly of data packets may take as little as a fraction of a second for a simple piece of information like a text e-mail traveling along a high-speed network, or it may take several hours for a larger piece of information like a high-resolution video traveling a long distance along a low-speed network.<sup>57</sup>

This network of networks connects millions of individuals and organizations in a way that allows almost instantaneous communications using computers, computerized mobile devices, and other network attachments. End users interact with each other through an ever-expanding universe of content and applications, such as: e-mail, instant messaging, chat rooms, commercial Web sites for purchasing goods and services, social networking sites, Web logs (“blogs”), music and video downloads, political forums, voice over IP (“VoIP”) telephony services, streaming video applications, and multi-player network video games. Internet users include individuals of virtually all ages and walks of life, established businesses, fledgling entrepreneurs, non-profit groups, academic and government institutions, and political organizations.

The TCP/IP protocol suite has been updated periodically since its introduction.<sup>58</sup> In recent years, however, some computer experts and other interested parties have questioned the TCP/IP suite’s thirty-year-old first-in-first-out and best-efforts characteristics.<sup>59</sup> Likewise, in light of the increasing deployment of applications that may

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<sup>56</sup> See *infra* Chapter I.B.1 for a discussion of last-mile ISPs.

<sup>57</sup> See, e.g., NUECHTERLEIN & WEISER, *supra* note 30, at 136.

<sup>58</sup> Kahn & Cerf, *supra* note 24 (“Refinement and extension of these protocols and many others associated with them continues to this day by way of the Internet Engineering Task Force.”). See also INTERNET ENGINEERING TASK FORCE, OVERVIEW OF THE IETF, <http://www.ietf.org/overview.html> (last visited May 16, 2007) (“The Internet Engineering Task Force (IETF) is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet.”). IETF activities take place under the umbrella of the Internet Society. See generally INTERNET SOCIETY, ABOUT THE INTERNET SOCIETY, <http://www.isoc.org/isoc> (last visited May 16, 2007) (The Internet Society “is the organization home for the groups responsible for Internet infrastructure standards, including the Internet Engineering Task Force (IETF) and the Internet Architecture Board (IAB).”).

<sup>59</sup> E.g., David Farber & Michael Katz, Op-Ed., *Hold Off On Net Neutrality*, WASH. POST, Jan. 19, 2007, at A19 (“The current Internet supports many popular and valuable services. But experts agree that an updated Internet could offer a wide range of new and improved services, including better security against viruses, worms, denial-of-service attacks and zombie computers; services that require high levels of reliability, such as medical monitoring; and those that cannot tolerate network delays, such as voice and streaming video. To provide these services, both the architecture of the Internet and the business models through which services are delivered will probably have to change.”); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1863 & n.74 (2006) (noting the opinion of computer scientist David Farber that the current Internet architecture is “getting old”).

operate better in a non-end-to-end environment, some have reexamined the end-to-end design argument.<sup>60</sup> Some also have explored what a next generation Internet architecture might look like, with the goal of managing the emerging tension between the Internet's open characteristics and more technologically demanding new applications.<sup>61</sup> In addition, some observers have suggested that the Internet's continued exponential growth and the proliferation of resource-intensive content and applications like video file sharing and the prospect of Internet Protocol television ("IPTV") may outstrip the Internet's current capacity and cause it to become significantly congested or crash altogether.<sup>62</sup>

The problem of network congestion, in particular, was recognized in the original paper describing the TCP/IP suite and, although it received less attention than ARPANET's other original design priorities, computer scientists continued to be mindful of the issue. Some, therefore, continued to explore different transmission protocols and the viability of market-based pricing mechanisms through the 1980s and 1990s.<sup>63</sup> Further, as data-routing technologies have advanced in recent years, some network operators have begun openly to consider using prioritization and other active management practices to improve network management and provide certain premium

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<sup>60</sup> See, e.g., Marjory S. Blumenthal & David D. Clark, *Rethinking the Design of the Internet: The End-to-End Arguments vs. the Brave New World*, 1 ACM TRANSACTIONS INTERNET TECH. 70 (2001) (concluding that the open, general nature of the Internet historically associated with the end-to-end argument should be preserved); ROBERT E. KAHN, CORPORATION FOR NATIONAL RESEARCH INITIATIVES, INTERNET EVOLUTION, GOVERNANCE AND THE DIGITAL OBJECT ARCHITECTURE: WORKSHOP ON SCORM SEQUENCING AND NAVIGATION 8 (Feb. 23, 2005), available at [http://www.handle.net/presentations\\_plugfest9/PlugFest9\\_Plcenary\\_kahn.ppt](http://www.handle.net/presentations_plugfest9/PlugFest9_Plcenary_kahn.ppt) (discussing whether the Federal Network Council's 1995 Internet definition, see *supra* note 24, should be updated to also include services "integrated with" communications and related infrastructures); Press Release, Stanford Center for Internet and Society, The Policy Implications of End-to-End (Dec. 1, 2000), available at <http://cyberlaw.stanford.edu/e2e> (workshop chaired by Professor Lawrence Lessig) ("In an increasing range of contexts . . . e2e [(end-to-end)] is being questioned. Technologies that undermine e2e are increasingly being deployed; other essential services, such as quality of service, are being developed in ways that are inconsistent with e2e design.").

<sup>61</sup> E.g., CLARK ET AL., *supra* note 38, at 4 ("The goal of this project was to consider the following question: if we could now design the Internet from scratch, knowing what we know today, how would we make the basic design decisions?").

<sup>62</sup> E.g., DELOITTE TOUCHE TOHMATSU, TELECOMMUNICATIONS PREDICTIONS: TMT TRENDS 2007 (2007), available at [http://www.deloitte.com/dtt/cda/doc/content/us\\_tmt\\_%202007\\_Telecom\\_Predictions\\_011606.pdf](http://www.deloitte.com/dtt/cda/doc/content/us_tmt_%202007_Telecom_Predictions_011606.pdf). According to this report, "[o]ne of the key possibilities for 2007 is that the Internet could be approaching its capacity. The twin trends causing this are an explosion in demand, largely fueled by the growth in video traffic and the lack of investment in new, functioning capacity." *Id.* at 4.

<sup>63</sup> E.g., Jeffrey K. MacKie-Mason & Hal R. Varian, *Pricing the Internet*, in PUBLIC ACCESS TO THE INTERNET 269 (Brian Kahin & James Keller eds., 1995). According to MacKie-Mason and Varian: "Congestion is likely to be a serious problem in the future Internet, and past proposals to control it are unsatisfactory. We think an economic approach to allocating scarce Internet resources is warranted." *Id.* at 284. "Our objective is not to raise profits above a normal rate of return by pricing backbone usage. Rather, our goal is to find a pricing mechanism that will lead to the most efficient use of existing resources, and will guide investment decisions appropriately." *Id.*

services for a fee.<sup>64</sup> As a result, computer scientists, network operators, content and applications providers, and other interested parties have increasingly debated the significance of the Internet's historical and current architecture and its implications for the Internet's future development.<sup>65</sup>

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<sup>64</sup> See, e.g., *At SBC, It's All About "Scale and Scope,"* BUS. WK., Nov. 7, 2005, [http://www.businessweek.com/@n34h\\*1UQu7KtOwgA/magazine/content/05\\_45/b3958092.htm](http://www.businessweek.com/@n34h*1UQu7KtOwgA/magazine/content/05_45/b3958092.htm) (interview with SBC Telecommunications' CEO Edward Whitacre). According to Whitacre:

[T]here's going to have to be some mechanism for these people who use these pipes to pay for the portion they're using. Why should they be allowed to use my pipes?

The Internet can't be free in that sense, because we and the cable companies have made an investment and for a Google or Yahoo! or Vonage or anybody to expect to use these pipes [for] free is nuts!

*Id.* See also Marguerite Reardon, *Qwest CEO Supports Tiered Internet*, ZDNET NEWS, Mar. 15, 2006, [http://articles.techrepublic.com.com/2100-1035\\_11-6050109.html](http://articles.techrepublic.com.com/2100-1035_11-6050109.html). Qwest CEO Richard Notebaert has stated his company would like to offer prioritized data transmission in the same way that express parcel service may be purchased from Federal Express or UPS. In his view, "[i]t's possible that (these companies) would like to have differentiated service. . . . And if you have enough money, we can make a lot of things happen." *Id.* "Would this give some content providers an advantage over others? . . . Well, yeah. We're all trying to provide a bit of differentiation for a competitive edge. That's what business is about." *Id.*

<sup>65</sup> For example, some of the Internet's early designers have offered the following account:

One should not conclude that the Internet has now finished changing. The Internet, although a network in name and geography, is a creature of the computer, not the traditional network of the telephone or television industry. It will, indeed it must, continue to change and evolve at the speed of the computer industry if it is to remain relevant. It is now changing to provide such new services as real time transport, in order to support, for example, audio and video streams. The availability of pervasive networking (i.e., the Internet) along with powerful affordable computing and communications in portable form (i.e., laptop computers, two-way pagers, PDAs, cellular phones), is making possible a new paradigm of nomadic computing and communications.

This evolution will bring us new applications – Internet telephone and, slightly further out, Internet television. It is evolving to permit more sophisticated forms of pricing and cost recovery, a perhaps painful requirement in this commercial world. It is changing to accommodate yet another generation of underlying network technologies with different characteristics and requirements, from broadband residential access to satellites. New modes of access and new forms of service will spawn new applications, which in turn will drive further evolution of the net itself.

The most pressing question for the future of the Internet is not how the technology will change, but how the process of change and evolution itself will be managed. As this paper describes, the architecture of the Internet has always been driven by a core group of designers, but the form of that group has changed as the number of interested parties has grown. With the success of the Internet has come a proliferation of stakeholders – stakeholders now with an economic as well as an intellectual investment in the network. We now see, in the debates over control of the domain name space and the form of the next generation IP addresses, a struggle to find the next social structure that will guide the Internet in the future. The form of that structure will be harder to find, given the large number of concerned stake-holders. At the same time, the industry



## B. Major Internet Components

### 1. “Last-Mile” Internet Service Providers

“Last-mile”<sup>66</sup> Internet service providers offer the network connections that link end users to the wider Internet.<sup>67</sup> By connecting its end-user customers to the many networks comprising the Internet backbone, an ISP provides its customers access to the end-user computers of any other ISP in the world connected to that backbone. Computer users in the United States have had nearly ubiquitous last-mile access to dial-up Internet connections of 56 to 280 Kbps since the late 1990s through telephone modems.<sup>68</sup> In recent years, faster broadband connections have supplanted dial-up service for a rapidly growing number of computer users who demand faster access to the increasingly sophisticated and data-rich content and applications available on the Internet.<sup>69</sup> Principally, end users receive last-mile broadband Internet service through coaxial cable wireline or upgraded copper digital subscriber wireline connections; other platforms, such as fiber-optic wirelines, wireless, satellite, and broadband over powerlines, are also increasingly available to connect end users to the Internet.<sup>70</sup>

Basic residential service packages are typically available on a flat-rate basis to home computer users.<sup>71</sup> ISPs may require that end users with more demanding needs, like a medium or large business, purchase a business-class or other type of premium

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struggles to find the economic rationale for the large investment needed for future growth, for example to upgrade residential access to more suitable technology. If the Internet stumbles, it will not be because we lack for technology, visions, or motivation. It will be because we cannot set a direction and march collectively into the future.

LEINER ET AL., *supra* note 25.

<sup>66</sup> Networks that connect end users to the broader Internet are generally referred to as “last-mile” ISPs. Networks that transmit data from a content or applications provider’s computer server(s) to the broader Internet are sometimes referred to as “first-mile” ISPs.

<sup>67</sup> Today, major last-mile wireline broadband ISPs include: AT&T, Comcast, Covad, Cox Communications, and Verizon. Major wireless broadband ISPs include: AT&T, Sprint Nextel, T-Mobile, and Verizon Wireless.

<sup>68</sup> See NUECHTERLEIN & WEISER, *supra* note 30, at 134-35.

<sup>69</sup> See *id.* at 134-47.

<sup>70</sup> According to the most recent data available from the FCC, most broadband consumers access the Internet today by cable modem or DSL. Of the 64.6 million high-speed lines in the United States as of June 30, 2006, 44.1% were cable modem, 36.4% DSL or other high-speed telephone line, 17.0% mobile wireless, 1.1% fiber-to-the-premise, 0.8% satellite, 0.5% fixed wireless, and 0.01% broadband over powerlines (and other lines). FCC, HIGH-SPEED SERVICES, *supra* note 18, at 5 tbl.1.

<sup>71</sup> See generally Lehr, Tr. I at 37 (discussing “the market’s current attraction to . . . flat-rate pricing”); Brenner, Tr. II at 96. See also, e.g., VERIZON, VERIZON HIGH SPEED INTERNET, <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm> (last visited May 17, 2007).

service package.<sup>72</sup> In addition, end users can purchase for a premium fee access to a specialized virtual private network (“VPN”) offering a defined quality-of-service level over a reserved portion of an ISP’s network.<sup>73</sup>

Last-mile broadband wireline architecture can take various forms. A last-mile ISP can extend a fiber-optic wireline from a backbone connection to either a neighborhood node, to the curb of a premise, or all the way to the end user’s premise. If the fiber runs only to the node or curb, the ISP can then use a cable or DSL connection for the remaining distance to the end user’s premise.<sup>74</sup> DSL wirelines provide a dedicated amount of bandwidth to each end user, but can transmit data up to only about three miles without the use of a repeater. Accordingly, transmission speeds can vary depending on an end user’s distance from a repeater.<sup>75</sup> Cable wirelines offer shared bandwidth among many customers. Thus, the transmission speed for an individual cable modem customer can vary with the number of customers who are using the network simultaneously.<sup>76</sup>

Last-mile wireless networks using wireless fidelity (“Wi-Fi”) or worldwide interoperability for microwave access (“Wi MAX”) technologies can be set up by deploying multiple antennas on street lights, traffic signals, and buildings, so that multiple wireless hotspots overlap each other to form a continuous “mesh” network of wireless signals. An initial connection to a backbone network also must be made in order to provide access to the wider Internet.<sup>77</sup> Several major telecommunications companies also offer mobile wireless Internet services over their wireless phone networks.<sup>78</sup> Three satellite providers offer broadband Internet service via satellite.<sup>79</sup> An end user must have a computer or other device that is configured for wireless Internet use to access these

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<sup>72</sup> E.g., COMCAST, COMCAST WORKPLACE, <http://www.comcast.com/wa-business/internet.html> (last visited May 14, 2007). Last-mile access for large enterprise customers, particularly those with multiple locations, typically involves the use of dedicated, high-capacity facilities often referred to as special access or dedicated access services. See *In re Special Access Rates for Price Cap Local Exch. Carriers*, 20 FCC Red 1994, 1995-96 (2005) (order and notice of proposed rulemaking) [hereinafter *Special Access NPRM*].

<sup>73</sup> See, e.g., CHARLES B. GOLDFARB, ACCESS TO BROADBAND NETWORKS: CONGRESSIONAL RESEARCH SERVICE REPORT TO CONGRESS 10-11 (2006), available at [http://www.ipmall.info/hosted\\_resources/crs/RL33496\\_060629.pdf](http://www.ipmall.info/hosted_resources/crs/RL33496_060629.pdf).

<sup>74</sup> *Id.* at 9-11.

<sup>75</sup> See generally FCC, FCC CONSUMER FACTS: BROADBAND ACCESS FOR CONSUMERS, <http://www.fcc.gov/cgb/consumerfacts/dsl2.html> (last visited June 22, 2007).

<sup>76</sup> See generally *id.*

<sup>77</sup> Wireless broadband providers that do not have their own facilities connecting their transmitters (e.g., cell towers) to their switches typically purchase special access services from an incumbent local exchange carrier or other provider of such services. See *Special Access NPRM*, 20 FCC Red at 1995-96.

<sup>78</sup> GOLDFARB, *supra* note 73, at 10.

<sup>79</sup> *Id.* at 10-11.

networks. In addition, there are now over forty deployments of broadband-over-powerline technologies in the U.S., most of which are in trial stages.<sup>80</sup>

Today's last-mile networks generally are partitioned asymmetrically to provide more bandwidth for data traveling from an ISP's facilities to the end user's computer ("downstream") than in the other direction ("upstream"). Typically, this is done because end users request much more data from other server computers than they, themselves, send out.<sup>81</sup> As a result, asymmetric architecture may constrain content and applications that require the end user simultaneously to send and receive content at the same speeds and volumes, such as two-way video transmissions.<sup>82</sup> Also, ISPs have the technical capability to reserve portions of last-mile bandwidth for specific applications.<sup>83</sup>

## 2. Internet Backbone Operators

Since 1995, when the expanding number of commercial backbone networks permanently replaced NSFNET, commercial backbones have generally interconnected with each other through voluntary, market-negotiated agreements.<sup>84</sup> To this day, there are no general, industry-specific regulations that govern backbone interconnection in the U.S.<sup>85</sup> Instead, commercial backbone operators independently make decisions about interconnection by weighing the benefits and costs on a case-by-case basis.<sup>86</sup> Typically,

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<sup>80</sup> *Id.* at 11-12.

<sup>81</sup> *Id.* at 4, 9.

<sup>82</sup> *Id.* at 9.

<sup>83</sup> For example, Verizon reserves one fiber of its downstream fiber-to-the-home service specifically for the company's video service, while a separate fiber carries all other incoming traffic. *Id.* at 10. AT&T reserves 19 of 25 megabits of downstream end-user bandwidth specifically for the company's video service. *Id.* at 11. AT&T customers can purchase between 1.5 and 6 Mbps of the remaining downstream bandwidth for Internet access and voice services. *Id.*

<sup>84</sup> Observers have noted that:

Particularly in the Internet's early days, many backbone providers exchanged traffic at government-sponsored Network Access Points (NAPs)—the Internet's equivalent to public airports, where the routes of many different carriers converge. (When the government privatized the Internet, it transferred control of these points to commercial providers.) Internet backbone providers now increasingly rely on privately arranged points of interconnection, largely because of congestion at the NAPs.

NUECHTERLEIN & WEISER, *supra* note 30, at 132.

<sup>85</sup> See generally *id.* at 133 ("These peering and transit agreements are completely unregulated. Neither the FCC nor any other governmental authority regulates the prices that a larger backbone network may charge a smaller one for transit services or mandates that backbone providers interconnect at all.").

<sup>86</sup> As one commentator notes:

Currently, there are no domestic or international industry-specific regulations that govern how Internet backbone providers interconnect to exchange traffic, unlike other network

backbones connect to each other under one of two types of arrangements. In a “peering” arrangement, backbones of similar size engage in a barter arrangement in which backbone A carries traffic for backbone B in exchange for backbone B carrying a similar amount of traffic for backbone A. In this arrangement, exchanged traffic generally is destined only for the other backbone’s end users. In a “transit” arrangement, a smaller backbone pays a larger backbone to carry its customers’ traffic to all end users on the Internet.<sup>87</sup> To date, market forces have encouraged interconnection among backbones and between backbones and last-mile ISPs.<sup>88</sup>

Today, these backbones make up the core or “middle” of the Internet. Generally, individual backbone networks are made up of a multiplicity of redundant, high-speed, high-capacity, long-haul, fiber-optic transmission lines that join at hubs or points of interconnection across the globe.<sup>89</sup> Transmission over the backbone is generally reliable even when one component fails because there are multiple different routes of transmission from one computer to another.<sup>90</sup> A backbone’s customers include ISPs providing last-mile connectivity to end users, providers of content and applications that wish to connect their computer servers directly to a backbone, and specialized companies that lease space on shared or dedicated computer servers to smaller content and applications providers.

### 3. Providers of Content and Applications

Millions of organizations and individuals connected to the Internet’s edges provide an ever-expanding universe of content and applications to end users. Commercial entities and other organizations provide a large portion of such content and applications, but individuals are increasingly contributing content and applications to the Internet for personal, social, and creative purposes.<sup>91</sup>

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services, such as long distance voice services, for which interconnection is regulated. Rather, Internet backbone providers adopt and pursue their own interconnection policies, governed only by ordinary laws of contract and property, overseen by antitrust rules.

Kende, *supra* note 50, at 2.

<sup>87</sup> See generally NUECHTERLEIN & WEISER, *supra* note 30, at 132-33.

<sup>88</sup> Cf. Ryan, Tr. I at 237.

<sup>89</sup> NUECHTERLEIN & WEISER, *supra* note 30, at 131-38. See also Li Yuan & Gregory Zuckerman, *Level 3 Regains Luster Amid Web-Video Boom*, WALL ST. J., Dec. 21, 2006, at C1 (providing a map of Level 3’s fiber-optic backbone). Today, major U.S. backbone operators include: Verizon, AT&T, Global Crossing, Level 3, Qwest, SAVVIS, and Sprint-Nextel.

<sup>90</sup> COMER, *supra* note 24, at 137-42.

<sup>91</sup> Popular examples include: Blogger.com (Web logs); flickr.com (photo sharing); YouTube.com (audio and video files); and MySpace.com (social networking pages, Web logs, photo sharing, audio and video files). See also Lev Grossman, *Time’s Person of the Year: You*, TIME, Dec. 25, 2006, at 38, available at <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

Content and applications providers use various methods to distribute their offerings over the Internet. Smaller organizations and individuals typically lease space on a shared or dedicated computer server from a specialized company that provides a connection to the wider Internet, typically through a negotiated agreement with a backbone operator.<sup>92</sup> Large companies may build their own server farms with direct access to an Internet backbone.<sup>93</sup> Some companies also provide Web sites where users can post self-generated content, such as photos, blogs, social networking pages, and audio and video files, while the companies themselves manage the site's underlying technical aspects.<sup>94</sup> Increasingly, content and applications providers are also copying their content and applications to multiple computer servers distributed around the world, a technique called local caching.<sup>95</sup> This practice allows data to be transmitted to end users more quickly, over a shorter physical distance, and using fewer routers. This strategy, in turn, generally decreases the potential for transmission problems such as the delay or dropping of data packets.<sup>96</sup>

Today, many applications can be delivered from a provider's computer server via the Internet to a customer's computer and installed automatically. This ability to transmit applications cheaply and directly to end users allows applications providers to update their programs frequently and to deliver new versions to customers quickly. Likewise, the Internet allows content providers to transmit cheaply an expanding array of content, such as music and video downloads.

Originally, most Web content consisted of static text and graphics files that could be viewed graphically using a basic Web browser and a narrowband connection. Some of the newest content and applications, however, are time-sensitive, bandwidth-intensive, or both. VoIP, for example, is sensitive to both "latency" – the amount of time it takes a packet of data to travel from source to destination – and "jitter" – on-again, off-again

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<sup>92</sup> See, e.g., TheHostingChart, <http://www.thehostingchart.com> (last visited June 22, 2007).

<sup>93</sup> See, e.g., Pepper, Tr. I at 93. Pepper notes that "a lot of these large providers made enormous investments in big server farms to bring content closer to consumers with their caching servers. Bringing content closer to consumers reduces the need to go across multiple hops [between networks]." *Id.* See also Yoo, *supra* note 59, at 1881-83; John Markoff & Saul Hansell, *Hiding in Plain Sight, Google Seeks More Power*, N.Y. TIMES, June 14, 2006, at A1, available at <http://www.nytimes.com/2006/06/14/technology/14search.html?ei=5090&en=d96a72b3c5f91c47&ex=1307937600>.

<sup>94</sup> See *supra* note 91.

<sup>95</sup> Content and applications providers may construct multiple server farms in various locations. See *supra* note 93. Alternatively, they can contract with a third party to manage this function. See, e.g., Misener, Tr. II at 191 ("Essentially, you have a company that has set up edge serving facilities. That is to say server farms outside major metropolitan areas."). See also Yoo, *supra* note 59, at 1881-83; William C. Symonds, *Traffic Cops of the Net*, BUS. WK., Sept. 25, 2006, at 88, available at [http://www.businessweek.com/magazine/content/06\\_39/b4002094.htm](http://www.businessweek.com/magazine/content/06_39/b4002094.htm) (profiling third-party content distribution company Akamai Technologies).

<sup>96</sup> See Pepper, Tr. I at 93; Yoo, *supra* note 59, at 1882.

delay associated with bursts of data traffic.<sup>97</sup> High-resolution video files and streaming video applications are examples of bandwidth-intensive content and applications that some observers suggest are already challenging the Internet's capacity.<sup>98</sup>

### **C. Network Management, Data Prioritization, and Other Forms of Data "Discrimination"**

The differential treatment of certain data packets by network operators, such as prioritizing some packets over others, is often referred to as data "discrimination."<sup>99</sup> This Section addresses Internet congestion (one of the primary reasons cited for engaging in such data discrimination), the various types and uses of data discrimination, and the feasibility of end users detecting and avoiding certain types of data discrimination.

#### **1. Internet Congestion**

As explained above, the problem of network congestion has been recognized since the Internet's earliest days. Network resources such as computer processing power, transmission media, and router buffer memory are finite, like other resources. Congestion, therefore, can occur at any point on the Internet. Of course, end users can purchase more powerful computers and network operators can expand the capacity of their networks, but the computers, physical transmission media, and routers that comprise the Internet can still transport and process only a certain amount of data at any given time. Although it happens rarely, if too many computers send bursts of packets at the same time, a network may become temporarily overloaded.

The TCP/IP protocol generally has enabled the Internet to function at a workable level, even as Internet use has undergone tremendous growth during the last decade.<sup>100</sup> Nonetheless, Internet transmissions are still subject to variable performance and periods of congestion. Some observers suggest that the use of bandwidth-intensive applications like certain peer-to-peer file-sharing protocols by even a small minority of users is already consuming so many network resources as to be worrisome. This situation is of particular concern to some experts, who believe that the use of such applications by even a small portion of Internet users may effectively degrade service for the remaining

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<sup>97</sup> See, e.g., Blumenthal & Clark, *supra* note 60, at 72-73; GOLDFARB, *supra* note 73, at 2-3 & n.4.

<sup>98</sup> See, e.g., GOLDFARB, *supra* note 73, at 3-4.

<sup>99</sup> "Unfortunately, engineers, economists, and lawyers have different definitions for discrimination." Peha, *supra* note 36, at 3. Some technology experts distinguish between so-called "minimal" or "needs-based" discrimination, where packets are discarded or otherwise treated differently only when absolutely necessary (as in the case of congestion), and "non-minimal" or "active" discrimination, where packets are treated differently for some other, discretionary reason. See, e.g., Felten, *supra* note 36, at 4. The introduction to Chapter IV below includes a discussion of how we use the term "discrimination" in analyzing the potential effects on consumer welfare of various conduct by ISPs and other network operators.

<sup>100</sup> COMER, *supra* note 24, at 165-69.

majority of end users.<sup>101</sup> Some observers suggest that such applications are already testing the Internet's existing capacity and may even potentially crash the Internet, or parts of it.<sup>102</sup>

## 2. Alleviating Internet Congestion

Several techniques have been used to alleviate short-term Internet congestion. Non-linear packet switching enables data to be dispersed and, in turn, allows networks to reroute individual data packets around points of congestion and avert delays. The TCP component of the TCP/IP suite also monitors delays and slows the packet-transmission rates accordingly.<sup>103</sup> Some applications, however, such as certain peer-to-peer file-sharing protocols, operate in a different manner. When congestion occurs, these applications do not slow their rates of data transmission. Rather, they aggressively take advantage of TCP's built-in reduction mechanism and, instead, send data as fast as they can.<sup>104</sup> Therefore, some networks have actively restricted or blocked altogether these kinds of applications, on the grounds that the networks need to preserve an equitable level of service for the majority of their end users.

Networks may also use "hot potato" routing policies that hand off to other networks at the earliest possible point data that is not destined for termination on their own networks, thus reducing the use of network resources.<sup>105</sup> Local caching of data by content and applications providers further helps to alleviate congestion by reducing the

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<sup>101</sup> According to Peha, "[t]raffic from a very small number of users can dominate the network and starve everybody else out. Peer-to-peer, in particular, is a problem today, and other applications might come along." Peha, Tr. I at 22. See also SANDVINE, INC., NETWORK NEUTRALITY: A BROADBAND WILD WEST? 4 (2005), available at <http://www.sandvine.com/general/getfile.asp?FILEID=37> (reporting that it is common for less than 20% of users/applications/content to consume 80% of a network's resources); ANDREW PARKER, CACHELOGIC, P2P IN 2005 (2005), available at [http://www.cachelogic.com/home/pages/studies/2005\\_01.php](http://www.cachelogic.com/home/pages/studies/2005_01.php) (reporting that in 2004 peer-to-peer traffic constituted 60% of overall Internet data traffic and 80% of upstream data traffic); Press Release, Sandvine, Inc., EDonkey – Still King of P2P in France and Germany (Sept. 13, 2005), available at [http://www.sandvine.com/news/pr\\_detail.asp?ID=88](http://www.sandvine.com/news/pr_detail.asp?ID=88) (reporting that P2P file-sharing traffic in the UK and North America represents up to 48% of all downstream bandwidth and 76% of all upstream traffic).

<sup>102</sup> See, e.g., Brenner, Tr. II at 99 (recounting that "[w]e all know the famous story of downloading the Victoria's Secret streaming video when so much demand was placed on it, nobody could get a download"). Beyond this oft-cited example, however, staff has not been presented with any specific evidence of an instance where a significant portion of the Internet has substantially crashed, apart from general examples of temporary network congestion. See also DELOITTE TOUCHE TOHMATSU, *supra* note 62, at 4.

<sup>103</sup> TCP sends and receives acknowledgements each time a packet is sent to and received from a computer. Also, TCP automatically starts a timer whenever a computer sends a packet. The timed period depends on the distance to the recipient computer and delays on the Internet. If the timer runs out before the sending computer receives an acknowledgement, TCP retransmits the packet and lengthens the timed period to accommodate the network delay, effectively slowing the transmission rate. Once enough computers in the network slow down, the congestion clears. See COMER, *supra* note 24, at 140-41.

<sup>104</sup> Peha, *supra* note 36, at 7.

<sup>105</sup> NUECHTERLEIN & WEISER, *supra* note 30, at 132.

distance over which data must travel and the number of routers that might potentially delay or drop packets. In addition, as discussed below, some networks have proposed prioritizing data and providing other new types of quality-of-service assurances to alleviate the effects of congestion.

### 3. Packet-inspection and Flow-control Technologies

To treat some data packets differently than others, as opposed to simply using a first-in-first-out and best-efforts approach, a network operator must be able to identify certain relevant characteristics of those packets.<sup>106</sup> One source of identifying information is the packet's header, which contains the IP address of its source and destination. The packet header also contains several types of information that suggest the type of application required to open the data file, such as the source and destination port numbers, the transport protocol, the differentiated service code point or traffic class, and the packet's length.<sup>107</sup> Additionally, the header contains the Media Access Control ("MAC") address of the packet's source and destination, which provides information about the manufacturer of the device attached to the network.<sup>108</sup>

In recent years, router manufacturers have refined packet-inspection technologies to provide network operators with a wide range of information about the data traffic on their networks, including information not provided in packet headers.<sup>109</sup> These technologies were developed in part to help local area networks direct traffic more efficiently and to thwart security risks.<sup>110</sup> Deep packet inspection may also be implemented on the Internet to examine the content of packet streams – even search for keywords in text – and to take action based on content- or application-specific policies.<sup>111</sup> Such actions could involve tracking, filtering, or blocking certain types of packet streams. Further, deep packet inspection can map the information it accumulates to databases containing, for instance, demographic or billing information.<sup>112</sup>

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<sup>106</sup> Peha, *supra* note 36, at 3 (discussing the criteria that networks can consider when deciding how to prioritize packets).

<sup>107</sup> *Id.* at 4. Some computer scientists believe that port numbers have become an unreliable tool for determining a packet's associated application. According to Peha, "[o]nce upon a time, you could learn who the application was, through something called a port number, but that hasn't been reliable or meaningful for a number of years." Peha, Tr. I at 18:

<sup>108</sup> Peha, *supra* note 36, at 4.

<sup>109</sup> See, e.g., Pepper, Tr. I at 83-87.

<sup>110</sup> E.g., Tim Greene, *The Evolution of Application Layer Firewalls*, NETWORK WORLD, Feb. 2, 2004, available at <http://www.networkworld.com/news/2004/0202specialfocus.html> ("Now the latest Internet defense technology – deep packet inspection firewalls – is being touted as the best line of defense against worms that can sneak past earlier technology to wreck havoc in corporate networks.").

<sup>111</sup> Peha, *supra* note 36, at 4-5.

<sup>112</sup> *Id.*



Another relatively new technology that may be implemented to reveal information about packet streams is flow classification. This technology monitors the size of packets in a data stream, the time elapsed between consecutive packets, and the time elapsed since the stream began, with the goal of making reasonable determinations about the nature of the packets in the stream. Thus, flow classification may reveal information about a packet stream even if the individual packets themselves are encrypted against packet inspection.<sup>113</sup> With the development of these two technologies, it is now cost-effective for a network operator to gain extensive knowledge about the nature of the data traveling across its network.<sup>114</sup>

#### 4. Data Prioritization and Other Forms of Data Discrimination

Recently, some network operators have suggested that they would like to use these new technologies to prioritize certain data traffic or to provide other types of quality-of-service assurances to content and applications providers and/or end users in exchange for a premium fee.<sup>115</sup> In contrast to the practice of transmitting data on a first-in-first-out and best-efforts basis, network operators could use a router algorithm to favor the transmission of certain packets based on characteristics such as their source, destination, application type, or related network attachment. One or more of these strategies could be employed to manage network traffic generally. Or, they might be used by a network operator to actively degrade certain non-favored traffic.

Packets going to or from certain favored addresses could be given priority transmission. Likewise, network operators could give priority to packets for latency-sensitive applications such as VoIP or network video games. In the alternative, routers could be programmed to reroute, delay, or drop certain packets.<sup>116</sup> For example, a network operator could block packets considered to be a security threat.<sup>117</sup> It could drop or otherwise delay packets associated with unaffiliated or otherwise disfavored users, content, or applications.<sup>118</sup> A network could apply such treatment only in certain

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<sup>113</sup> *Id.* at 4. For example, if a network operator detects a steady stream of packets flowing at 30 Kbps across its network for a period of time, it might conclude those packets are part of a VoIP telephony transmission. *Id.*

<sup>114</sup> *Id.* at 5.

<sup>115</sup> See *supra* note 64. Quality of service “typically involves the amount of time it takes a packet to traverse the network, the rate at which packets can be sent, and the fraction of packets lost along the way.” Peha, *supra* note 36, at 5.

<sup>116</sup> E.g., Peha, *supra* note 36, at 4-6.

<sup>117</sup> E.g., Craig McTaggart, *Was the Internet Ever Neutral?*, 34th Research Conference on Communication, Information, & Internet Policy 9 (2006), available at <http://web.si.umich.edu/tprc/papers/2006/593/metaggart-tprc06rev.pdf> (discussing blocking as a tool to control network abuse).

<sup>118</sup> E.g., Peha, *supra* note 36, at 12-13 (describing scenarios in which network operators might block rival services, specific content, or software).

circumstances, such as during periods of congestion, after a quota of packets has been met, or, until certain usage fees are paid.<sup>119</sup> Some observers, however, question whether implementing wide-scale prioritization or similar schemes across multiple networks having differing technical characteristics is, in fact, even technically possible.<sup>120</sup>

Network operators also could provide separate physical or logical channels for different classes of traffic.<sup>121</sup> Another method for favoring certain Internet traffic is to reserve capacity on last-mile bandwidth for certain packet streams to provide a minimum level of quality.<sup>122</sup> Similarly, a network operator could limit the amount of bandwidth available to an end user, thereby degrading or effectively blocking altogether the use of

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<sup>119</sup> See, e.g., *id.* at 5-6.

<sup>120</sup> See, e.g., Alcatel-Lucent, Public Comment 1. According to Alcatel-Lucent, an opponent of network neutrality regulation:

[I]ndustry standards would have to be adopted that put in place common policies for the labeling and prioritization of data packets. . . . The vast majority of Internet traffic must traverse the networks of numerous broadband service providers. This means that in order to favor the traffic of Service A over Service B during its entire trip through the Internet, each service provider and backbone network would have to prioritize and label packets in exactly the same way – a scenario that does not exist today. The idea that a service provider could maintain priority routing for its “preferred data packets” between a user in Washington, DC and Los Angeles, CA is not possible absent a comprehensive agreement between all network service providers to treat and identify data packets based on a common standard not currently in existence. Absent such developments, the data would almost certainly change hands at least once, likely stripping it of any prioritization it might have enjoyed inside the network of a sole provider.

*Id.* at 5. Likewise, a representative of Google, a network neutrality proponent, states that:

[L]ast mile providers who want to give some sort of priority service, you know, only have control over their own network. It’s not obvious to us how you can offer this kind of end-to-end service. It’s not obvious to us how you identify the traffic in order to segregate it, that you’re going to give priority to. And how do you do this segregation without degrading other traffic?

Davidson, Tr. I at 230-31.

<sup>121</sup> For example, a network operator could physically send favored data traffic over a lightly used connection, while sending other data traffic over a more heavily used connection. Or, the network could use logical separation to send traffic on the same physical connection, but use different service flows, as in the case of a virtual local network (“VLN”). Peha, *supra* note 36, at 6.

<sup>122</sup> For example, AT&T’s Project Lightspeed and Verizon’s FiOS services reserve portions of last-mile bandwidth for their proprietary video services. GOLDFARB, *supra* note 73, at 10-11, 17-18. These network operators also could sell reserved capacity to content or applications providers in return for a quality-of-service guarantee. Verizon, for example, has such plans for its FiOS service. *Id.* at 10.

bandwidth-intensive content or applications.<sup>123</sup> A network operator also could treat data packets differently by providing preferential access to services, such as local caching.<sup>124</sup>

Data also can be treated differently through the use of pricing structures, such as service tiers, to provide a certain quality-of-service level in exchange for payment.<sup>125</sup> In a fee-for-priority system, content and applications providers and/or end users paying higher fees would receive quicker, more reliable data transmissions. Sometimes, such an arrangement is referred to as a “fast lane.” Other data might simply be provided on a best-efforts basis. Similarly, a network operator might assess fees to end users based on their behavior patterns, a practice sometimes referred to as “content billing” or “content charging.”<sup>126</sup>

## 5. Detecting Data Discrimination<sup>127</sup>

Although differential data treatment may be easy to detect in some instances, like outright blocking, in many instances it may be more difficult for an end user to distinguish between performance problems resulting from deliberate discrimination and problems resulting from other, more general causes.<sup>128</sup> For example, an end user whose Internet traffic is treated differently than other traffic might experience poor performance in one or more aspects, such as delays in transmitting data, delays in using applications, or sporadic jitter. Such effects, however, can also result from general network

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<sup>123</sup> See *Network Neutrality: Competition, Innovation, and Nondiscriminatory Access: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 13 (2006) (testimony of Earl W. Comstock, President and CEO, COMPTTEL), available at <http://www.digmedia.org/docs/comstock-020706.pdf>.

<sup>124</sup> *Id.* at 14.

<sup>125</sup> Peha, *supra* note 36, at 6.

<sup>126</sup> *Id.*

<sup>127</sup> The difficulties associated with end-user detection of data discrimination discussed in this Section would appear to be equally applicable to enforcement of any network neutrality regulation that prohibited data discrimination by ISPs and other network operators.

<sup>128</sup> See, e.g., Pepper, Tr. I at 93. According to Pepper:

[T]here are techniques that consumers actually have readily available to them to test their own bandwidth and performance latency between . . . the home, or the office, and the first POP [(point of presence)], right?

And so, those techniques are actually relatively available. The problem is that, depending on the service you’re trying to download, the application that you’re using, it may – you may be going through two or three hops [between networks], or as many as a dozen hops across the Internet. When you go across multiple hops across multiple networks, it’s more difficult for a consumer to know.

*Id.* See also Brenner, Tr. II at 98 (“[T]here are many points between the key strokes of the customer and the download in which the speed can be affected.”).

congestion.<sup>129</sup> Distinguishing the two may be particularly difficult for end users not possessing a technical background. Researchers, however, are working to develop diagnostic tools to detect the differential treatment of data.<sup>130</sup>

## 6. Potential End-user Responses to Data Discrimination

### a. Bypassing Discriminatory Networks

Some computer experts have suggested that the prospect of networks treating some data differently than others might give rise to a kind of arms race between network operators seeking to employ technical measures to manage their networks and end users seeking to employ countermeasures to avoid them.<sup>131</sup> They suggest, for example, that end users can bypass networks to a limited degree through cooperative access sharing.<sup>132</sup> On a small scale, a group of neighbors with access to multiple, distinct broadband Internet service providers might each set up an open-access Wi-Fi router, giving everyone in the group access to each other's service provider. If one provider engages in data discrimination, members of the cooperative could bypass it by accessing the Internet through another provider in the pool. Such a strategy, however, depends on a last-mile network operator allowing the use of open-access Wi-Fi access points in the first place.<sup>133</sup> To the extent that last-mile networks allow the resale of their services through open-access wireless networks, competition from resellers might have a similar effect.<sup>134</sup> Alternatively, a municipality might set up its own wireline or wireless network if its residents are not satisfied with the service provided by private providers. It is conceivable, however, that a municipal network could also engage in certain practices that some of its residents consider to be discriminatory.<sup>135</sup>

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<sup>129</sup> See, e.g., Felten, *supra* note 36, at 4.

<sup>130</sup> Robert McMillan, *Black Hat: Researcher Creates Net Neutrality Test*, COMPUTERWORLD, Aug. 2, 2006, available at <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9002154>.

<sup>131</sup> See generally William H. Lehr et al., *Scenarios for the Network Neutrality Arms Race*, 34th Research Conference on Communication, Information, & Internet Policy (2006), available at [http://web.si.umich.edu/tprc/papers/2006/561/TPRC2006\\_Lehr%20Sirbu%20Peha%20Gillett%20Net%20Neutrality%20Arms%20Race.pdf](http://web.si.umich.edu/tprc/papers/2006/561/TPRC2006_Lehr%20Sirbu%20Peha%20Gillett%20Net%20Neutrality%20Arms%20Race.pdf). See also Lehr, Tr. I at 52.

<sup>132</sup> Lehr et al., *supra* note 131, at 10-13. See also Lehr, Tr. I at 41-43.

<sup>133</sup> Lehr et al., *supra* note 131, at 10-13.

<sup>134</sup> *Id.* at 13-14 (describing the Wi-Fi resale business model of FON); Lehr, Tr. I at 42-43. See also FON, What's FON, <http://www.fon.com/en/info/whatsFon> (last visited May 14, 2007).

<sup>135</sup> Lehr et al., *supra* note 131, at 15; Lehr, Tr. I at 43.

## **b. Technical Measures to Counter Data Discrimination**

Countering data discrimination, like detecting it in the first place, may be difficult, especially for end users without technical backgrounds. Several technical measures to counter data discrimination do exist, however, at least to a limited degree. Several potential methods for circumventing applications-based degradation or blocking involve the computer port numbers that typically indicate which software application a computer should use to open a packet. Computer users and applications developers can prevent networks from identifying the application associated with a packet by employing port numbers not commonly associated with a particular application or by assigning and reassigning port numbers dynamically.<sup>136</sup> Alternatively, applications developers can use TCP port 80, the number used by most hypertext transfer protocol ("HTTP") traffic and, thus, potentially make an application's traffic indistinguishable from most other Web browser-based traffic.<sup>137</sup>

To evade differential treatment based on a sender or receiver's IP address, an end user could access information from the Internet through a proxy that reroutes data through another server, camouflaging its source and destination.<sup>138</sup> Likewise, packets might be encrypted so that a network cannot use packet inspection to identify their contents or related application.<sup>139</sup> Such encrypted packets could also be transmitted through a VPN to a gateway computer outside the ISP's network, where the packets could be decrypted and forwarded to their recipient.<sup>140</sup> In such a scenario, the last-mile ISP would see only streams of encrypted packets traveling from the end user through the VPN, thus preventing the ISP from identifying the computers with which the sender is communicating.<sup>141</sup> Some ISPs have responded to these measures by banning the use of VPNs and encryption protocols or charging a fee for their use.<sup>142</sup> Alternatively, a network might simply relegate or drop altogether encrypted packets when it cannot identify their contents.

An alternate encryption system called "onion routing" conceals packets' content, source, and destination without the use of a VPN. A packet is enveloped in several layers of encryption and then sent through a special network of links and unique routers called

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<sup>136</sup> Lehr et al., *supra* note 131, at 19-20. See also Lehr, Tr. I at 45-46.

<sup>137</sup> Lehr et al., *supra* note 131, at 20-21.

<sup>138</sup> *Id.*

<sup>139</sup> For example, some P2P software has been rewritten using the Internet IP Security protocol ("IPSec") to encrypt everything in the packets except the IP header. *Id.*

<sup>140</sup> Felten, *supra* note 36, at 8-9.

<sup>141</sup> *Id.*

<sup>142</sup> Lehr et al., *supra* note 131, at 22.

“routing anonymizers” or “onion routers.”<sup>143</sup> A layer of encryption is removed at each router until the packet is stripped of encryption and delivered to its destination. Onion routing prevents network operators from knowing who is communicating with whom, and the content of the communication is encrypted up to the point where the traffic leaves the onion-routing network.<sup>144</sup>

Even with encryption, however, a network might be able to infer the type of packet through flow classification and continue to target certain packets for discrimination.<sup>145</sup> An end user might try to evade flow classification by altering the size and timing of packets, adding blank packets to the flow, or mixing packets from multiple flows.<sup>146</sup> A network might respond, however, by degrading or blocking all of the user’s traffic or by manipulating that traffic in a way that affects one type of application much more than it does other types of traffic.<sup>147</sup>

Alternatively, end users might be able to offset the effects of certain kinds of discrimination to some extent by using buffering techniques to preload data streams into a computer’s memory and then accessing them after a period of time, thereby alleviating problems with latency or jitter. Such techniques, however, may not be useful for real-time applications like VoIP and streaming video.<sup>148</sup> In some circumstances, caching content closer to end users might also effectively circumvent discriminatory practices that are implemented further into the core of the Internet.<sup>149</sup>

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The text above provides historical and technical background regarding the Internet to help inform the policy discussion in this Report. In the next Chapter, we address the jurisdiction of the relevant federal agencies in the area of broadband Internet access, as well as the legal and regulatory developments that have prompted the current debate over network neutrality.

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* See also generally U.S. Navy, Onion Routing: Executive Summary, <http://www.onion-router.net/Summary.html> (last visited June 15, 2007).

<sup>145</sup> Felten, *supra* note 36, at 8-9; Lehr et al., *supra* note 131, at 23; see Peha, *supra* note 36, at 4.

<sup>146</sup> Lehr et al., *supra* note 131, at 23.

<sup>147</sup> Felten, *supra* note 36, at 9.

<sup>148</sup> Lehr, Tr. I at 48-49.

<sup>149</sup> *Id.* at 49.

## II. LEGAL AND REGULATORY BACKGROUND AND DEVELOPMENTS

If recent years have seen considerable change in the development and deployment of platforms for broadband Internet access, they also have seen considerable flux in the field of broadband regulation. A comprehensive review of federal and state law issues pertinent to the provision of broadband Internet access would go well beyond the scope of this Report.<sup>150</sup> This Chapter, however, provides a basic legal and regulatory framework for the policy discussion to follow in the remainder of the Report. To that end, it sketches the central elements of FTC (in Section A) and FCC (in Section B) jurisdiction over broadband services, including the statutory bases of that jurisdiction. This Chapter also reviews (in Section C) certain decisions of the courts and the agencies, including recent enforcement activity, rulemaking, and policy statements that have served to clarify both jurisdictional and substantive questions about broadband Internet access.

In brief, federal regulatory jurisdiction over broadband services generally is subject to the shared jurisdiction of the FCC, the FTC, and the DOJ. FCC jurisdiction comes chiefly from the Communications Act,<sup>151</sup> which established the FCC and provides for the regulation of “interstate and foreign commerce in communication by wire and radio.”<sup>152</sup> FTC jurisdiction over broadband services comes chiefly from its statutory mandate to prevent “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting commerce” under the FTC’s enabling legislation, the FTC Act.<sup>153</sup> The FTC’s authority to enforce the federal antitrust laws generally is shared with DOJ’s Antitrust Division.<sup>154</sup>

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<sup>150</sup> For a more detailed treatment of the pertinent legal background, see, e.g., PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* (2d ed. 1999) (especially Chapters 3, 10-12, Supp. (2005), and Supp. (2006)). See also NUECHTERLEIN & WEISER, *supra* note 30 (discussing Internet commerce, policy, and law).

<sup>151</sup> 47 U.S.C. §§ 151 *et seq.* Significant amendments to the Communications Act of 1934, 48 Stat. 1064 (1934), were imposed by the Telecommunications Act of 1996. See Pub. L. No. 104-104, 110 Stat. 56 (1996). Although broad in scope, the Telecommunications Act of 1996 did not replace the Communications Act, but amended it.

<sup>152</sup> 47 U.S.C. § 151.

<sup>153</sup> 15 U.S.C. §§ 41 *et seq.* Although the FTC Act is central to the FTC’s jurisdiction over broadband Internet access, and competition and consumer protection issues generally, it is not the only statutory basis of FTC authority pertinent to the larger Internet debate. With regard to competition concerns, the FTC is also charged under, for example, the Clayton Act (15 U.S.C. §§ 12-27); the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a) (amending the Clayton Act); and the International Antitrust Enforcement Assistance Act of 1994 (15 U.S.C. §§ 46, 57b-1, 1311, 1312, 6201, 6201 note, 6202-6212).

<sup>154</sup> The FTC and DOJ share antitrust authority with regard to most areas of the economy. The two antitrust agencies have long-standing arrangements, first established in 1948, that allow them to avoid inconsistent or duplicative efforts. See *infra* notes 218-19 for a discussion of various DOJ merger reviews in the area of Internet broadband access.

## A. FTC Jurisdiction under the FTC Act

The FTC Act gives the FTC broad authority with regard to both competition and consumer protection matters in most sectors of the economy.<sup>155</sup> Under the FTC Act, “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” are prohibited,<sup>156</sup> and the FTC has a general statutory mandate “to prevent persons, partnerships, or corporations,” from engaging in such prohibited methods, acts, and practices.<sup>157</sup>

At the same time, the FTC Act cabins this general grant of statutory authority with regard to certain activities. In particular, the FTC’s enforcement authority under the FTC Act does not reach “common carriers subject to the Communications Act of 1934,” as amended.<sup>158</sup> An entity is a common carrier, however, only with respect to services that it provides on a common carrier basis.<sup>159</sup> As discussed below in Chapter II.C, because most broadband Internet access services are not provided on a common carrier basis, they are part of the larger economy subject to the FTC’s general competition and consumer protection authority with regard to methods, acts, or practices in or affecting commerce.

Exercising its statutory authority over competition matters, the FTC has, where appropriate, investigated and brought enforcement actions in matters involving access to content via broadband and other Internet access services. For example, the FTC challenged the proposed merger between America Online (“AOL”) and Time Warner, on the basis that the merger threatened to harm competition and injure consumers in several markets, including those for broadband Internet access and residential Internet transport services (*i.e.*, “last mile” access).<sup>160</sup> The consent order resolving the agency challenge required the merged entity to open its cable system to competitor Internet service

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<sup>155</sup> The FTC’s authority is defined broadly to deal with “methods . . . acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(2). But for certain limited market sectors that are expressly excluded from the FTC’s enforcement authority, and for the areas in which FTC jurisdiction over various market sectors is shared, the FTC’s authority ranges broadly over “commerce,” without restriction to particular segments of the economy. *See id.* (FTC authority generally; express exclusion for, e.g., common carriers); *supra* note 154 and accompanying text (shared FTC/DOJ antitrust authority).

<sup>156</sup> 15 U.S.C. § 45(a)(1). In 1994, Congress defined an “unfair” act or practice over which the FTC has authority as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.* § 45(n).

<sup>157</sup> *Id.* § 45(a)(2).

<sup>158</sup> *Id.*

<sup>159</sup> 47 U.S.C. § 153(44) (provider of telecommunications services deemed a common carrier under the Communications Act “only to the extent that it is engaged in providing telecommunications services”).

<sup>160</sup> Am. Online, Inc. & Time Warner, Inc., FTC Dkt. No. C-3989 (Dec. 17, 2000) (complaint), *available at* <http://www.ftc.gov/os/2000/12/aolcomplaint.pdf>.



providers on a non-discriminatory basis, for all content.<sup>161</sup> The order also prevented the company from interfering with the content of non-affiliated ISPs or with the ability of non-affiliated providers of interactive TV services to access the AOL/Time Warner system.<sup>162</sup> Moreover, the order required the company, in areas where it provided cable broadband service, to offer AOL's DSL service in the same manner and at the same retail pricing as in areas where it did not provide cable broadband service.<sup>163</sup>

The FTC has addressed Internet access and related issues in a number of other merger investigations as well.<sup>164</sup> For example, the FTC investigated the acquisition by Comcast and Time Warner of the cable assets of Adelphia Communications and, in a related matter, the exchange of various cable systems between Comcast and Time Warner. In the course of that investigation, the FTC examined, among other things, the likely effects of the transactions on access to and pricing of content. The investigation eventually was closed because a majority of the Commission concluded that the acquisitions were unlikely to foreclose competition or result in increased prices.<sup>165</sup>

In addition to such competition issues are various consumer protection issues that have been raised in the larger Internet access context. Over the past decade, the FTC has brought a variety of cases against Internet service providers that have engaged in allegedly deceptive marketing and billing practices.<sup>166</sup> For example, in 1997, the FTC separately sued America Online, CompuServe, and Prodigy, alleging that each company had offered "free" trial periods that resulted in unexpected charges to consumers.<sup>167</sup> One Prodigy advertisement, for example, touted a "Free Trial" and "FREE 1<sup>ST</sup> MONTH'S MEMBERSHIP" conspicuously, while a fine print statement at the bottom of the back panel of the advertisement stipulated: "Usage beyond the trial offer will result in extra

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<sup>161</sup> *Id.* (Apr. 17, 2001) (consent order), available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *See, e.g.*, Cablevision Sys. Corp., 125 F.T.C. 813 (1998) (consent order); Summit Commun. Group, 120 F.T.C. 846 (1995) (consent order).

<sup>165</sup> *See* Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (Jan. 31, 2006) (FTC File No. 051-0151); *see also* Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part), Time Warner/Comcast/Adelphia (Jan. 31, 2006) (FTC File No. 051-0151). Both statements are available at <http://www.ftc.gov/opa/2006/01/fyi0609.htm>.

<sup>166</sup> *See, e.g.*, Am. Online, Inc. & CompuServe Interactive Servs., Inc., FTC Dkt. No. C-4105 (Jan. 28, 2004) (consent order), available at <http://www.ftc.gov/os/caselist/0023000/0023000aol.shtm>; Juno Online Servs., Inc., FTC Dkt. No. C-4016 (June 25, 2001) (consent order), available at <http://www.ftc.gov/os/caselist/c4016.shtm>.

<sup>167</sup> *See* Am. Online, Inc., FTC Dkt. No. C-3787 (Mar. 16, 1998) (consent order), available at <http://www.ftc.gov/os/1997/05/ameronli.pdf>; CompuServe, Inc., 125 F.T.C. 451 (1998) (consent order); Prodigy, Inc., 125 F.T.C. 430 (1998) (consent order).

fees, even during the first month.”<sup>168</sup> Other alleged misrepresentations included AOL’s failure to inform consumers that fifteen seconds of connect time was added to each online session (in addition to the practice of rounding chargeable portions of a minute up to the next whole minute),<sup>169</sup> as well as its misrepresentation that it would not debit customers’ bank accounts before receiving authorization.<sup>170</sup> The settlement orders in these matters prohibited the companies from, among other things, misrepresenting the terms or conditions of any trial offer of online service. Although all three matters involved dial-up, or narrowband, Internet access, the orders are not limited by their terms to narrowband services.

More recently, in the matter of *FTC v. Cyberspace.com*,<sup>171</sup> the federal district court for the Western District of Washington granted summary judgment in favor of the FTC, finding, among other things, that the defendants had violated the FTC Act by mailing false or misleading purported rebate or refund checks to millions of consumers and businesses without disclosing, clearly and conspicuously, that cashing the checks would prompt monthly charges for Internet access services on the consumers’ and businesses’ telephone bills. Following a trial on the issue of consumer injury, the court ordered the defendants to pay more than \$17 million to remedy the injury caused by their fraudulent conduct. The Court of Appeals for the Ninth Circuit affirmed the trial court’s liability finding last year.<sup>172</sup>

In addition, the FTC has brought numerous cases involving the hijacking of consumers’ modems.<sup>173</sup> For example, in *FTC v. Verity International Ltd.*,<sup>174</sup> the Commission alleged that the defendants orchestrated a scheme whereby consumers seeking online entertainment were disconnected from their regular ISPs and reconnected to a Madagascar phone number. The consumers were then charged between \$3.99 and

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<sup>168</sup> *Prodigy*, 125 F.T.C. at 430 exhibit A (complaint). Similar complaints were lodged against America Online and CompuServe.

<sup>169</sup> For example, “an online session of 2 minutes and 46 seconds, with the 15 second supplement, totals 3 minutes and 1 second and is billed as 4 minutes.” *Am. Online*, FTC Dkt. No. C-3787 at 4 exhibit E (complaint).

<sup>170</sup> *See id.* at 5-6 exhibit F.

<sup>171</sup> No. C00-1806L, 2002 U.S. Dist. LEXIS 25565 (W.D. Wash. July 10, 2002), *aff’d*, 453 F.3d 1196 (9th Cir. 2006).

<sup>172</sup> *Cyberspace.com*, 453 F.3d at 1196.

<sup>173</sup> A list of FTC enforcement actions involving the Internet and online services generally, and modem hijacking allegations in particular, can be found at <http://www.ftc.gov/bcp/internet/cases-internet.pdf>. These actions include the following: *FTC v. Sheinkin*, No. 2-00-3636-18 (D.S.C. 2001); *FTC v. RJB Telecom, Inc.*, No. CV 00-2017 PHX SRB (D. Ariz. 2000); *FTC v. Ty Anderson*, No. C 00-1843P (W.D. Wash. 2000); *FTC v. Audiotex Connection, Inc.*, No. CV-97-0726 (DRH) (E.D.N.Y. 1997).

<sup>174</sup> 335 F. Supp. 2d 479 (S.D.N.Y. 2004), *aff’d in part, rev’d in part*, 443 F.3d 48 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1868 (2007).

\$7.78 per minute for the duration of each connection. In that case, AT&T and Sprint – which were not parties to the FTC enforcement action – had carried the calls connecting the consumers’ computers to the defendants’ servers. Consumers were billed at AT&T’s and Sprint’s filed rates for calls to Madagascar. The defendants therefore argued that the entertainment service in question was provided on a common carrier basis and thus outside the FTC’s jurisdiction. One defendant also claimed to be a common carrier itself and hence beyond FTC jurisdiction. Although both the District Court and the Court of Appeals rejected those arguments, the FTC had to expend substantial time and resources litigating the question of jurisdiction.<sup>175</sup>

As the *Verity* case demonstrates, enforcement difficulties posed by the common carrier exemption are not merely speculative. The FTC regards the common carrier exemption in the FTC Act as outmoded and, as it creates a jurisdictional gap, an obstacle to sound competition and consumer protection policy. As the FTC has explained before Congress, technological advances have blurred traditional boundaries between telecommunications, entertainment, and high technology.<sup>176</sup> For example, providers routinely include telecommunications services, such as telephone service, and non-telecommunications services, such as Internet access, in bundled offerings. As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC’s efforts to combat unfair or deceptive acts and practices and unfair methods of competition in these interconnected markets.

Finally, based on the above discussion of the FTC’s jurisdiction over broadband services, three general points may be in order. First, as the investigations and enforcement actions described above suggest, the FTC has both authority and experience in the enforcement of competition and consumer protection law provisions pertinent to broadband Internet access. Second, the FTC Act provisions regarding “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” are general and flexible in nature, as demonstrated by judicial and administrative decisions across diverse markets.<sup>177</sup> Third, the FTC’s investigative and enforcement actions have been party- and market-specific; that is, neither the general body of antitrust and consumer protection law nor the FTC’s enforcement and policy record determines any particular broadband connectivity policy or commits the Commission to favoring any particular model of broadband deployment.

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<sup>175</sup> In response to a request from the district court, the FCC filed an amicus brief in support of the FTC’s jurisdiction in this matter. See *Verity*, 443 F.3d at 56, 61.

<sup>176</sup> See *FTC Jurisdiction over Broadband Internet Access Services: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9-11 (2006) (statement of William E. Kovacic, Comm’r, FTC), available at <http://www.ftc.gov/opa/2006/06/broadband.shtm>.

<sup>177</sup> “Congress has deliberately left these phrases undefined so that the parameters of the FTC’s powers and the scope of its administrative and judicial functions could be responsive to a wide variety of business practices.” ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 643 & n.4 (6th ed. 2007) (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972); *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310-12 (1934)).

## B. FCC Jurisdiction under the Communications Act

As noted above, FCC jurisdiction over broadband services arises under the Communications Act.<sup>178</sup> Central to the broadband discussion is a distinction under that Act between “telecommunications services” and “information services.”<sup>179</sup> The former, but not the latter, are subject to substantial mandatory common carrier regulations under Title II of the Communications Act.<sup>180</sup> While not subject to the Title II common carrier regulations, information services are treated by the FCC as subject to its general, ancillary jurisdiction under Title I of the Communications Act.<sup>181</sup>

Under Title II, providers of telecommunications services are bound to, among other things, enable functional physical connections with competing carriers,<sup>182</sup> at “just and reasonable” rates,<sup>183</sup> which the FCC may prescribe,<sup>184</sup> and are prohibited from

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<sup>178</sup> 47 U.S.C. §§ 151 *et seq.*

<sup>179</sup> Under the Communications Act, an “information service . . . means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .” 47 U.S.C. § 153(20). In contrast, “‘telecommunications service’ means the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used,” *id.* § 153(46), and “‘telecommunications’ means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *Id.* § 153(43). In brief, to act simply as a transmitter or transducer of information is to provide a telecommunications service, whereas to act as a transformer of information is to provide an information service.

<sup>180</sup> The Communications Act is divided into seven Titles. *See generally* 47 U.S.C. §§ 151 *et seq.* Under Title I are “General Provisions,” including, for example, the purposes of the Act, definitions, the establishment of the FCC, and the structure and operations of the FCC. Under Title II are the “Common Carriers” provisions, including, among others, common carrier regulations and “Universal Service” requirements. Under Title III are “Provisions Relating to Radio.” Under Title IV are “Procedural and Administrative Provisions.” Under Title V are “Penal Provisions.” Under Title VI are provisions relating to “Cable Communications.” Finally, miscellaneous additional provisions are included under Title VII.

<sup>181</sup> *See, e.g., In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd 14853, 14914 (2005) (report and order and notice of proposed rulemaking) (“We recognize that . . . the predicates for ancillary jurisdiction are likely satisfied for any consumer protection, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers.”). Although the scope of the FCC’s ancillary jurisdiction over broadband services has not been defined by the courts, it should be noted that the Supreme Court, in *dicta*, has recognized the application of the FCC’s ancillary jurisdiction over information service providers. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).

<sup>182</sup> 47 U.S.C. § 201(a).

<sup>183</sup> *Id.* § 201(b).

<sup>184</sup> *Id.* § 205.

making “any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . .”<sup>185</sup>

There are, however, several important qualifications on these Title II common carrier requirements. First, the Communications Act expressly provides for regulatory flexibility to facilitate competition. In particular, with regard to telecommunications carriers or services, the FCC

shall forbear from applying any regulation or any provision of this Act . . . if the Commission determines that—(1) enforcement . . . is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement . . . is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>186</sup>

In addition, in determining such “public interest,” the FCC must “consider whether forbearance from enforcing the provision or regulation promotes competitive market conditions.”<sup>187</sup> Finally, the Communications Act expressly states that “[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public.”<sup>188</sup> As a consequence, any person “(other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.”<sup>189</sup>

### C. Regulatory and Judicial Clarification

As noted above, a series of regulatory and judicial decisions have helped to clarify both the distinction between information and telecommunications services and the status of broadband services as information services. That clarification is, to an extent, in tension with early regulatory and judicial attempts to grapple with the novel technologies that enabled the provision of Internet access. For example, in 1980, the FCC promulgated rules designed to address, among other things, the growing commerce in data-processing services available via telephone wires (the “Computer II Rules”).<sup>190</sup> With reference to those rules, the FCC subsequently applied certain common carrier obligations, such as non-discrimination, to local telephone companies providing early

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<sup>185</sup> *Id.* § 202.

<sup>186</sup> *Id.* § 160(a).

<sup>187</sup> *Id.* § 160(b).

<sup>188</sup> *Id.* § 157(a).

<sup>189</sup> *Id.* § 160(b).

<sup>190</sup> See *In re* Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, 417-23 (1980) [hereinafter *Computer II Rules*].

DSL services.<sup>191</sup> Further, as recently as 2000, the Court of Appeals for the Ninth Circuit held that “the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act.”<sup>192</sup>

Still, the FCC’s current view that broadband services are information services has its roots in earlier decisions by the FCC and the courts. The same Computer II Rules that grounded the early DSL determination distinguished between “basic” and “enhanced” services and did not subject the latter to Title II common carrier regulation.<sup>193</sup> In the following decade, the FCC recognized that ISPs provide not just “a physical connection [to the Internet], but also . . . the ability to translate raw Internet data into information [consumers] may both view on their personal computers and transmit to other computers connected to the Internet.”<sup>194</sup> Moreover, the 1998 Universal Service Report regarded “non-facilities-based” ISPs – those that do not own their own transmission facilities – solely as information service providers.<sup>195</sup> Indeed, even the Ninth Circuit opinion that held that ISPs offering cable broadband were offering telecommunications services recognized that, under the Communications Act and FCC implementing regulations, a significant portion of those services were information services.<sup>196</sup>

In 2000, the FCC issued a Notice of Inquiry to resolve, among other things, the application of the Communications Act’s information/telecommunications distinction to cable broadband ISPs.<sup>197</sup> In its subsequent declaratory ruling in 2002, the FCC concluded that broadband cable Internet access services were information services, not

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<sup>191</sup> In a 1998 order, the FCC found, among other things, that incumbent local exchange carriers are subject to various interconnection obligations under Title II of the Communications Act. *See In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd 24011 (1998) (memorandum opinion and order and notice of proposed rulemaking). The FCC noted that, although DSL and other advanced services could “also be deployed using other technologies over satellite, cable, and wireless systems, [it would] limit the discussion here to wireline services, because none of the petitioners raise issues about these other technologies.” *Id.* at 24016 n.11. *See also* GTE Operating Cos. Tariff No. 1, 13 FCC Rcd 22466 (1998).

<sup>192</sup> *AT&T Corp. v. City of Portland*, 216 F.3d 871, 880 (9th Cir. 2000).

<sup>193</sup> *See Computer II Rules*, 77 F.C.C.2d at 428-32.

<sup>194</sup> *In re Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd 11501, 11531 (1998).

<sup>195</sup> *See id.* at 11530.

<sup>196</sup> *See AT&T*, 216 F.3d at 877-78.

<sup>197</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 15 FCC Rcd 19287 (2000) (notice of inquiry). As noted above, this notice of inquiry had been expressly limited in its application to broadband services provided by local telephone companies over wireline. Prior to 2000, the FCC had not ruled on the application of common carrier obligations to broadband services provided via cable. It sought, in this notice of inquiry, “to instill a measure of regulatory stability in the market,” and to resolve a split in the Circuit courts regarding the regulatory status of “cable modem” broadband services. *See id.* at 19288 & n.3 (*comparing AT&T*, 216 F.3d 871 *with* *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000)).

telecommunications services, and hence not subject to common carrier regulation under Title II.<sup>198</sup> In reaching that conclusion, the FCC emphasized the information coding, storage, and transformation processes that were central to such services, as it had in concluding that non-facilities-based services were information services in its Universal Service Report.<sup>199</sup> Moreover, the FCC concluded that there was no principled or statutory basis for treating facilities-based and non-facilities-based services differently, as both offered “a single, integrated service that enables the subscriber to utilize Internet access service . . . .”<sup>200</sup>

In response, several parties sought judicial review of the FCC’s determination in a dispute eventually heard by the Supreme Court, in *National Cable & Telecommunications Association v. Brand X Internet Services* (“*Brand X*”).<sup>201</sup> In *Brand X*, the Court upheld the FCC’s determination that cable broadband is an information service as a reasonable construction of the Communications Act, reversing a Ninth Circuit decision that had relied on *City of Portland* as precedent.<sup>202</sup>

In the wake of the *Brand X* decision, the FCC has continued to expand, platform by platform, upon the broadband policy defended in that case. In 2005, the FCC released the *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (“Wireline Order”), in which it reclassified wireline broadband Internet access service by facilities-based carriers as an information service.<sup>203</sup> That reclassification pertains to both “wireline broadband Internet access service . . . [and] its transmission component,”<sup>204</sup> and is independent of the underlying technology employed.<sup>205</sup> The

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<sup>198</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, 4821-22 (2002) (declaratory ruling and notice of proposed rulemaking).

<sup>199</sup> *Id.* at 4820-23.

<sup>200</sup> *Id.* at 4823.

<sup>201</sup> 545 U.S. 967 (2005).

<sup>202</sup> *Id.* at 973-74. It should be noted that *Brand X* is fundamentally a *Chevron* decision. That is, the Court did not examine the question of the status of cable broadband services as an abstract or *de novo* issue of statutory construction. Rather, the Court held that the FCC’s ruling was – because based on reasonable policy grounds – a permissible resolution of ambiguous statutory language in the Telecommunications Act of 1996, given the FCC’s authority under the Communications Act, the Administrative Procedures Act, and standards of agency deference the Court had articulated in *Chevron v. NRDC*. See *id.* at 973 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and 5 U.S.C. §§ 551 *et seq.*).

<sup>203</sup> *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (report and order and notice of proposed rulemaking).

<sup>204</sup> *Id.* at 14856.

<sup>205</sup> *Id.* at 14860 n.15 (“We stress that our actions in this Order are limited to wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, a fiber-to-the-curb or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities, and whether that component is provided using circuit-switched, packet-based, or any other technology.”).

Wireline Order does, however, *permit* facilities-based wireline carriers *to elect* to provide broadband transmission service on a common carrier basis.<sup>206</sup>

In 2006, the FCC released an order in which it classified broadband-over-powerline Internet access services as information services.<sup>207</sup> Also in 2006, the FCC granted – by operation of law – Verizon’s petition for forbearance from Title II and Computer Inquiry Rules<sup>208</sup> with respect to its broadband services.<sup>209</sup> Verizon had asked for forbearance “from traditional common-carriage requirements for all broadband services,” seeking relief chiefly with regard to certain commercial broadband services not expressly addressed in the Wireline Order or other rulemaking.<sup>210</sup>

Most recently, the FCC clarified more generally the status of wireless services as information services, issuing in 2007 a declaratory ruling finding: (1) “that wireless broadband Internet access service is an information service”; (2) that while the underlying transmission component of such service is “telecommunications,” offering telecommunications transmission “as a part of a functionally integrated Internet access service is not ‘telecommunications service’ under section 3 of the Act”; and (3) “that

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<sup>206</sup> *Id.*

<sup>207</sup> *In re* United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Serv. as an Info. Serv., 21 FCC Rcd 13281 (2006) (memorandum opinion and order).

<sup>208</sup> *See In re* Regulatory & Policy Problems Presented by the Interdependence of Computer & Commun. Servs. & Facilities, 28 F.C.C.2d 267 (1971) (final decision and order) (“Computer I”); *In re* Amendment of Section 64.702 of the Comm’n’s Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980) (final decision) (“Computer II”); *In re* Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Servs., 14 FCC Rcd 4289 (1999) (report and order). Collectively, these matters are known as the “Computer Inquiry Rules.”

<sup>209</sup> *See* Press Release, FCC, Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law (Mar. 20, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264436A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.pdf) (explaining that a forbearance petition will be deemed granted if the FCC does not deny the petition within one year of receipt, unless one-year period is extended by the FCC). Although the FCC did not explicitly grant such relief, “the effect given to the petition by operation of law grants Verizon’s further broadband relief, continuing our policy to encourage new investment.” *In re* Petition of the Verizon Tel. Cos. for Forbearance under 47 U.S.C. § 160(c) from Title II & Computer Inquiry Rules with Respect to Their Broadband Servs., WC Docket 04-440 (2006), 2006 FCC LEXIS 1333 (Chairman Martin & Comm’r Tate, concurring).

<sup>210</sup> Such services included: (1) packet-switched services capable of 200 Kbps in each direction and (2) certain optical networking, hubbing, and transmission services. *See In re* Petition of the Verizon Tel. Cos. for Forbearance under 47 U.S.C. § 160(c) from Title II & Computer Inquiry Rules with Respect to Their Broadband Servs., WC Docket 04-440 (Feb. 7, 2006) (*ex parte* letter from Verizon Tel. Cos.), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6518324844](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518324844).



mobile wireless broadband Internet access service is not a 'commercial mobile service' under section 332 of the Act."<sup>211</sup>

Thus, over the past few years, the FCC has essentially unified the regulatory status of cable, wireline, powerline, and wireless broadband Internet access services as information services that are not subject to Title II common carrier requirements.<sup>212</sup> In doing so, the FCC has focused on the abstract functional properties of ISPs as they ranged across varying implementations or platforms. Underlying this unification has been a significant degree of deregulation across broadband technologies, in keeping with the statutory interest under the Communications Act in furthering competition and the development of new technologies.<sup>213</sup>

The FCC has nonetheless continued to demonstrate an interest in, and commitment to, broadband Internet access. Certain policy statements have sought to guide industry conduct to avoid both FCC enforcement actions and the "potentially destructive" impact of overbroad and premature regulation of an "emerging market."<sup>214</sup> In 2004, then-FCC Chairman Michael Powell challenged the industry to preserve four "Internet Freedoms" to that end. They were:

- (1) *The "Freedom to Access Content . . . consumers should have access to their choice of legal content" (within "reasonable limits" imposed by legitimate network management needs);*

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<sup>211</sup> *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd 5901, 5901-02 (2007) (declaratory ruling).

<sup>212</sup> *See id.* ("This approach is consistent with the framework that the Commission established for cable modem Internet access service, wireline broadband Internet access service, and Broadband over Power Line (BPL) – enabled Internet access service and it establishes a minimal regulatory environment for wireless broadband Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans.") (citations omitted).

<sup>213</sup> *See, e.g., Assessing the Communications Marketplace: A View from the FCC: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 110th Cong. 2 (2007) (statement of Kevin J. Martin, Chairman, FCC), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270192A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270192A1.pdf) ("In 2005, the Commission created a deregulatory environment that fueled private sector investment. . . . Broadband deployment has been our top priority at the Commission, and we have begun to see some success as a result of our efforts."); *see also, e.g., Thorne, Tr. II* at 34 ("Over the past ten years, the policy of Congress and the Federal Communications Commission has been to encourage investment and innovation in broadband networks. This policy has been wildly successful."). In addition, the FCC had undertaken to expand the supply of broadband access services by, for example, promoting the use of unlicensed spectrum in rural areas. *See In re* Implementation of the Commercial Spectrum Enhancement Act & Modernization of the Comm'n's Competitive Bidding Rules & Procedures, 20 FCC Rcd 11268 (2005) (declaratory ruling and notice of proposed rulemaking) (implementing Enhance 911 Services Act, Pub. L. No. 108-494, 118 Stat. 3986, Title II (2004)). *See infra* Chapter VI.D for a more detailed discussion of federal spectrum policies.

<sup>214</sup> Michael K. Powell, Chairman, FCC, Keynote Address at the Silicon Flatirons Symposium: Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-243556A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf).

- (2) *The “Freedom to Use Applications . . . consumers should be able to run the applications of their choice” (within service plan limits and provided the applications do not “harm the provider’s network”);*
- (3) *The “Freedom to Attach Personal Devices . . . consumers should be permitted to attach any devices they choose to the connection in their homes” (within service plan limits, provided the devices do not “harm the provider’s network or enable theft of service”); and*
- (4) *The “Freedom to Obtain Service Plan Information . . . consumers should receive meaningful information regarding their service plans” (so that “broadband consumers can easily obtain the information they need to make rational choices.”)*<sup>215</sup>

With some modification, those four Internet Freedoms were incorporated into an FCC policy statement (“Broadband Policy Statement”), issued to accompany the Wireline Order in 2005.<sup>216</sup> Recast as FCC principles, they included:

- (1) The ability of consumers to “access the lawful Internet content of their choice”;
- (2) the ability of consumers to “run applications and use services of their choice, subject to the needs of law enforcement”;
- (3) the ability of consumers to “connect their choice of legal devices that do not harm the network”; and
- (4) the existence of “competition among network providers, application and service providers, and content providers.”<sup>217</sup>

In approving the AT&T/SBC and Verizon/MCI mergers in 2005, the FCC required the companies to adhere to connectivity principles set forth in its Broadband Policy Statement for a period of two years.<sup>218</sup> More recently, in approving the

<sup>215</sup> *Id.* (italics included in published version of address).

<sup>216</sup> See *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14986 (2005) (policy statement).

<sup>217</sup> *Id.* Also in 2005 – prior to issuance of the Wireline Order – the FCC took enforcement action against allegedly discriminatory behavior by an ISP. *In re* Madison River Communs., LLC, 20 FCC Rcd 4295, 4297 (2005). The resulting consent decree in that matter required a small North Carolina ISP to “not block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.” *Id.* Because the FCC used its Title II authority in this case, under which it can regulate common carrier services, this case may not be precedent for future enforcement authority over such services now characterized as information services and regulated under the FCC’s Title I ancillary jurisdiction. See also *infra* Chapters VII.B and IX.B for additional discussion of the *Madison River* matter.

<sup>218</sup> See *In re* SBC Communs. Inc. & AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290 (2005) (memorandum opinion and order) (especially appendix F); *In re* Verizon Communs. Inc. & MCI Inc. Applications for Approval of Transfer of Control, 20 FCC Rcd 18433 (2005) (memorandum opinion and order) (especially appendix G).

The DOJ also examined the proposed mergers and successfully sought, under the Tunney Act, the divestiture of certain assets as conditions to such mergers. See *United States v. SBC Communs., Inc.*, Civ.

AT&T/BellSouth merger, the FCC required the combined company to agree not to provide or sell (for a period of thirty months following the merger closing date) “any service that privileges, degrades, or prioritizes any packet transmitted over AT&T/BellSouth’s wireline broadband Internet access services based on its source, ownership, or destination.”<sup>219</sup>

Most recently, the FCC announced an inquiry “to better understand the behavior of participants in the market for broadband services.”<sup>220</sup> Among other things, the FCC is seeking information regarding the following:

- How broadband providers are managing Internet traffic on their networks today;
- Whether providers charge different prices for different speeds or capacities of service;
- Whether our policies should distinguish between content providers that charge end users for access to content and those that do not; and
- How consumers are affected by these practices.<sup>221</sup>

In addition, the FCC has asked for comments “on whether the [Broadband] Policy Statement should incorporate a new principle of nondiscrimination and, if so, how would ‘nondiscrimination’ be defined, and how would such a principle read.”<sup>222</sup>

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Action Nos. 05-2102 (EGS) & 05-2103 (EGS), 2007 WL 1020746 (D.D.C. Mar. 29, 2007). In particular, the merging parties were required to divest themselves of long-term interests in certain local private line, or special access, facilities. *Id.* at \*5 (noting that “[a]part from the difference in geographic scope due to the identities of the parties, the proposed final judgments are practically identical and require the same type of divestitures.”). See *infra* Chapter VI.B for a discussion of special access facilities and their relationship with broadband Internet services.

<sup>219</sup> *In re AT&T Inc. & BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662 (2006) (memorandum opinion and order). Two FCC Commissioners issued a concurring statement expressing their view that “[t]he conditions regarding net-neutrality have very little to do with the merger at hand and very well may cause greater problems than the speculative problems they seek to address.” *Id.* at 5826 (Chairman Martin & Comm’r Tate, concurring).

The DOJ also reviewed the AT&T/BellSouth merger, examining, among other things, the merged firm’s ability or incentive to favor its own Internet content over that of its rivals. See Press Release, DOJ, Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T’s Acquisition of BellSouth 3 (Oct. 11, 2006), available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/218904.pdf](http://www.usdoj.gov/atr/public/press_releases/2006/218904.pdf). The DOJ concluded its investigation last October, finding that “the merger would neither significantly increase concentration in markets for the provision of broadband services to end users nor increase Internet backbone market shares significantly.” *Id.*

<sup>220</sup> Press Release, FCC, FCC Launches Inquiry into Broadband Market Practices (Mar. 22, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-271687A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271687A1.pdf).

<sup>221</sup> *Id.*

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The legal and regulatory developments discussed above have prompted the current debate over network neutrality regulation. In the next Chapter, we provide an overview of the arguments in favor and against such regulation that have been put forth to date.

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<sup>222</sup> *Id.*

### III. OVERVIEW OF ARGUMENTS IN FAVOR OF AND AGAINST NETWORK NEUTRALITY REGULATION

Technology experts have recognized since the Internet's earliest days that network resources are scarce and that traffic congestion may lead to reduced performance.<sup>223</sup> Although such experts continued to explore different data-transmission protocols and the viability of market-based pricing mechanisms through the 1980s and 1990s, the current debate over broadband connectivity policy did not accelerate until more recently.<sup>224</sup> At about the same time that the FCC began its cable broadband rulemaking proceedings in 2000,<sup>225</sup> data routing technologies advanced to the point where some network operators began openly to consider using prioritization and other active management practices to improve network management and provide certain premium services for a fee.<sup>226</sup>

Various interested parties, including some content and applications providers, non-facilities-based providers of Internet services, and third-party commentators, have expressed concern about network operators' use of these routing technologies in an environment that is not subject to common carrier regulation. Some of them, therefore, have proposed that the transmission of data on the Internet be subject to some type of "network neutrality" rules that forbid or place restraints on some types of data or price discrimination by network operators.<sup>227</sup> This Chapter summarizes the major arguments in favor of (in Section A) and against (in Section B) the enactment of some form of network neutrality regulation put forth to date.<sup>228</sup> Arguments involving data discrimination and prioritization, as well as competition and consumer protection issues, are addressed in more detail below in Chapters IV through VIII of this Report.

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<sup>223</sup> See *supra* Chapter I.A.

<sup>224</sup> See generally Vinton G. Cerf & David Farber, The Great Debate: What is Net Neutrality?, Hosted by the Center for American Progress (July 17, 2006), available at <http://www.americanprogress.org/kf/060717%20net%20neutrality.pdf>; Tim Wu & Christopher Yoo, *Keeping the Internet Neutral?: Timothy Wu and Christopher Yoo Debate* (Vand. Pub. Law, Research Paper No. 0-27, 2006), available at <http://ssrn.com/abstract=953989>.

<sup>225</sup> See *supra* Chapter II.C for a discussion of relevant FCC proceedings.

<sup>226</sup> See *supra* Chapter I.A.

<sup>227</sup> See, e.g., Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 151 (2005) ("Over the history of communications regulation, the Government has employed both common carriage requirements (similar to the neutrality regime discussed here) and limits on vertical integration as [a] means of preventing unwanted discrimination."). See also Cohen, Tr. II at 195 (arguing that network neutrality regulation "is really a return to the status quo as where it was [in August 2005 and before Brand X] so it's not . . . a new set of regulations").

<sup>228</sup> This Chapter is not intended to be a comprehensive treatment of the many arguments put forth in favor of and against network neutrality. Instead, this Chapter serves as a general survey of the types of arguments raised by both sides of the network neutrality debate. Nor does this Chapter attribute every single argument or variation thereon to every individual or entity that has made such arguments.

## A. Arguments in Favor of Network Neutrality Regulation

Proponents of network neutrality regulation argue, among other things, that the existing jurisdiction of the FCC, FTC, and DOJ, as well as oversight by Congress, are insufficient to deal with what they predict will be inevitable and far-reaching harms from so-called non-neutral practices. They suggest that after recent legal and regulatory determinations, providers of certain broadband Internet services now have the legal authority to act as gatekeepers of content and applications on their networks.

Principally, these advocates express concern about: (1) blockage, degradation, and prioritization of content and applications; (2) vertical integration by network operators into content and applications; (3) effects on innovation at the “edges” of the network (*i.e.*, by content and applications providers); (4) lack of competition in “last-mile” broadband services; (5) legal and regulatory uncertainty in the area of Internet access; and (6) diminution of political and other expression on the Internet. Net neutrality proponents argue that various harms are likely to occur in the absence of neutrality regulation and that it will be difficult or impossible to return to the status quo if non-neutral practices are allowed to become commonplace. Proponents thus see an immediate need to enact neutrality regulation.<sup>229</sup>

### 1. Concerns about Blockage and Degradation of Non-Favored Content and Applications

Network neutrality advocates suggest that, without neutrality rules, network operators will use packet-inspection technologies to favor the transmission of their own content and applications, or those of their affiliates, over those of other providers instead of offering the unrestricted access generally available to end users today.<sup>230</sup> They frequently suggest that end users’ access to the wider Internet will become balkanized and restricted to what network operators choose to display in their own proprietary “walled gardens.” Proponents believe such walled gardens will look more like the original America Online dial-up service or even an Internet version of cable television, with access to only a limited number of favored sites. Proponents further point to preferential practices in other industries, such as cable television and telephony, as indications of the likelihood that network operators will adopt comparable practices in the absence of net neutrality regulation.<sup>231</sup>

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<sup>229</sup> See, e.g., Cohen, Tr. II at 150 (“I can’t take the view that we should start from the premise of wait until it’s all destroyed before we do anything about it.”).

<sup>230</sup> See, e.g., Wu, *supra* note 227. See also EARL W. COMSTOCK, WHAT IS NET NEUTRALITY? (2006), available at <http://www.comptel.org/content.asp?contentid=658>; G. Sohn, Tr. I at 98; Farrell, Tr. I at 220.

<sup>231</sup> See, e.g., Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, WASH. POST, June 8, 2006, at A23. Lessig and McChesney suggest that “[w]ithout net neutrality, the Internet would start to look like cable TV. A handful of massive companies would control access and distribution of content, deciding what you get to see and how much it costs.” *Id.* See also Tulipane, Tr. I at 259-66. In Tulipane’s view, “prioritization based on source or content will result in a closed network, just like the cable system today.” *Id.* at 266. Similarly, Sohn suggests: “[s]hort of outright blocking, ISPs could engage in various forms of

Advocates of net neutrality point to certain statements by ISP executives as evidence of their intent to treat some content and applications differently than others.<sup>232</sup> They cite to the *Madison River*<sup>233</sup> matter as evidence that network operators do, in fact, have the technological means and incentive to actively degrade or outright block certain content and applications.<sup>234</sup> They also question whether end users will be able to determine readily why certain content and applications might be unavailable or executing more slowly or less reliably than others.<sup>235</sup> Some also suggest that the introduction of specialized, virtual private networks (“VPNs”) that require users to purchase premium service packages foreshadows the advent of a balkanized, non-neutral Internet.<sup>236</sup>

In particular, these proponents warn that network operators might try to disfavor some content and applications by inhibiting or forbidding users from attaching related devices to their networks, such as the VoIP phone equipment of competing Internet telephony providers or VoIP-enabled mobile phones.<sup>237</sup> They also state that cable companies have, in fact, blocked streaming video applications to protect their own cable television businesses and that wireless phone companies have placed limits on the types of content and applications that can be accessed using their wireless Internet services.<sup>238</sup>

Some network neutrality proponents also contend that network operator bans on the use of basic residential packages to operate VPNs, open-access Wi-Fi antennas that support multiple users, home networks, and computer servers all amount to violations of neutrality principles.<sup>239</sup> Some, but not all, proponents, however, believe that such

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discrimination, and the fears [sic] that could have the practical effect of driving innovators to really have now a practical need to seek deals with each recipient’s ISP.” D. Sohn, Tr. II at 227-28.

<sup>232</sup> See *supra* note 64.

<sup>233</sup> In *Madison River*, an ISP allegedly blocked its customers from accessing a competing VoIP provider. The ISP entered into a consent decree with the FCC that prohibited the ISP from blocking ports used for VoIP traffic. The ISP also made a voluntary payment of \$15,000 to the U.S. Treasury. *In re Madison River Communs., LLC*, 20 F.C.C.R. 4295, 4297 (2005).

<sup>234</sup> See, e.g., Davidson, Tr. I at 227-28. For Davidson, “prioritization in the last mile creates real concerns. Particularly, we are concerned that prioritization through router-based discrimination in the last mile degrades computing services, and creates incentives to relegate some of those computing services to a slow lane.” *Id.*

<sup>235</sup> See *supra* Chapter I.C.5.

<sup>236</sup> See, e.g., Yokubaitis, Tr. II at 108.

<sup>237</sup> See, e.g., Libertelli, Tr. I at 73 (“[F]or Skype, network neutrality is about protecting our users’ ability to connect to each other, whenever and wherever they want. We support net neutrality[] because it embodies a policy of decentralized innovation.”).

<sup>238</sup> See, e.g., John Windhausen, Jr., *Good Fences Make Bad Broadband: Preserving an Open Internet Through Net Neutrality* 16-23 (Public Knowledge White Paper, 2006), available at <http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf>.

<sup>239</sup> See, e.g., *id.*

restrictions may be justified because they are meant to solve situations in which a few users generate costs that are imposed on other users.<sup>240</sup>

## **2. Concerns about Charging Content and Applications Providers for Prioritized Data Delivery**

Net neutrality advocates also express concern that, short of outright blockage or active degradation, network operators will present certain content and applications to users in a preferential manner in exchange for payment. They express concern that network operators may, for example, use packet-inspection technology to provide quicker load times for certain providers' Web pages or faster and more consistent connections for favored VoIP or streaming video providers.<sup>241</sup> Some network operators have, in fact, indicated that they would like to offer certain prioritized services or other kinds of quality-of-service guarantees in exchange for a premium fee.<sup>242</sup>

Some neutrality advocates object to the idea of a network offering prioritized data transmission or quality-of-service guarantees in exchange for payment.<sup>243</sup> That is, they object to a deviation from the long-standing first-in-first-out and best-efforts transmission characteristics of the Internet. They are concerned about the potential for prioritization to result in blocking or degradation of non-favored content and applications. These advocates are concerned that content and applications from providers affiliated with the network operator or having a greater ability to pay will be available in a "fast lane," while others will be relegated to a "slow lane," discriminated against, or excluded altogether.<sup>244</sup> Further, creating priority fast lanes, according to some advocates, necessarily would

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<sup>240</sup> See, e.g., Wu, *supra* note 227, at 152.

<sup>241</sup> See, e.g., Editorial, *Open Net*, THE NEW REPUBLIC, June 26, 2006, available at <http://www.tnr.com/doc.mhtml?pt=oy4NRC5%2Bfnu%2Fm585FtGwlc%3D%3D>.

<sup>242</sup> See *infra* Chapter III.B.

<sup>243</sup> See, e.g., Davidson, Tr. I at 228. In his view:

[W]hat we're worried about is in that context, the power to prioritize in the last mile effectively becomes the power to control the applications and content that customers can effectively use.

So, imagine, for example, that a last mile provider with market power might be able to use prioritization to, for example, relegate a competing Voice over IP provider to a lower quality slow lane. It might prevent a competing video provider – prevent a competing video service from accessing a higher tier of priority necessary to provide good service, and preference its own services instead.

*Id.* See also Tulipane, Tr. I at 259-66.

<sup>244</sup> See, e.g., Davidson, Tr. I at 229-30. According to Davidson, "[w]e are concerned about creating a fast lane tier of traffic that is susceptible of exclusive dealings." *Id.* at 229. In his view, "prioritization that provides an incentive to create slow lanes so that you can charge people for the fast lanes is something that we think is problematic." *Id.* at 230.



result in (intentionally or effectively) degraded service in the remainder of the network.<sup>245</sup> Likewise, some advocates object to the creation of private networks that might provide prioritized data transmission or other forms of quality of service to only a limited number of customers, arguing that this will represent the “end” of the Internet as we know it.<sup>246</sup>

Some advocates, therefore, argue that content and applications providers should not be allowed to pay a premium fee for prioritized data transmission, even if they want to do so. They object, for example, to a possible two-sided market model where content and applications providers pay networks for prioritization in the same way that merchants subsidize the purchase price of a newspaper by paying for the placement of advertisements in return for greater consumer exposure to their advertisements.<sup>247</sup> Instead, in this view, networks should be required to derive revenues principally from providing Internet access to residential and business customers.<sup>248</sup> Some advocates who object to prioritized data transmission would, however, allow network operators to charge end users more for the consumption of larger amounts of bandwidth.<sup>249</sup>

Other advocates do not strictly object to prioritization or quality of service for a fee.<sup>250</sup> They argue, however, that different levels of prioritization should be offered on uniform terms to all “similar” content and applications providers and that all end users be

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<sup>245</sup> See, e.g., *id.* at 228-30 (“[P]rioritization . . . in the last mile degrades competing services, and creates incentives to relegate some of those competing services to a slow lane . . . [given] that the only way that you can have a fast lane that you can charge for, that is useful, is if there are also slow lanes that are less useful, and less attractive.”).

<sup>246</sup> See, e.g., Lessig & McChesney, *supra* note 231. Lessig and McChesney predict that, without neutrality rules, network operators will use data prioritization “to sell access to the express lane to deep-pocketed corporations and relegate everyone else to the digital equivalent of a winding dirt road.” In their view, “[n]et neutrality means simply that all like Internet content must be treated alike and moves at the same speed over the network.” *Id.*

<sup>247</sup> See Pepper, Tr. I at 87 (“The last set of questions on net neutrality concern who can be charged for what service on broadband connections. Should the Internet access be funded solely by consumers, or can the cost be shared with content providers and application providers?”).

<sup>248</sup> See, e.g., Editorial, *supra* note 241 (“Net neutrality would prohibit all of this. Telecoms could make money they way they always have – by charging homes and businesses for an Internet connection – but they couldn’t make money from the content providers themselves.”). See also Sidak, Tr. I at 107 (“In other words, they don’t have a problem with network operators and end users contracting for prioritized delivery. The problem they have is . . . with suppliers of content.”).

<sup>249</sup> See, e.g., Davidson, Tr. I at 228 (“Not all network management is anti-competitive prioritization. And there are a lot of things I think many of us agree that are not problematic in this context. So, charging end users, whether it’s businesses or consumers, more for more bandwidth, not a problem here.”). See also COMSTOCK, *supra* note 230.

<sup>250</sup> See, e.g., D. Sohn, Tr. II at 230. In Sohn’s view, network neutrality regulation “wouldn’t need to involve a complete ban on all prioritization, even on the Internet part. I think in particular, an ISP should be free to offer prioritization capability that enables subscribers to choose what services to use it with.” *Id.* See also Cohen, Tr. II at 150 (“There are and should remain many networks on which network providers are free to discriminate based on the source, ownership or destination of data . . .”).

guaranteed a minimum level of access to the entire universe of Internet content.<sup>251</sup> Another advocate suggests that network operators should be free to create specialized service parameters and to provide prioritized data transmission, but with a requirement that networks also maintain a basic level of best-efforts Internet service.<sup>252</sup>

Some network neutrality proponents further suggest that, as the speed of the Internet continues to increase with the deployment of faster technologies like fiber-optic wirelines and improved wireless transmissions, the issue of prioritization may become irrelevant.<sup>253</sup> They suggest that when Internet speeds of upwards of 100 megabits per second (“Mbps”) are widely available, first-in-first-out and best-efforts delivery at these rates should be sufficient to transmit all Internet traffic without any problems, even for advanced and time-sensitive applications. These proponents suggest that all congestion and bandwidth scarcity issues will effectively disappear at these speeds and the issue of prioritization will eventually be moot. A neutrality regime, therefore, can be seen as a temporary remedy for a problem that ultimately will be outgrown and an important measure that will prevent network operators from creating artificial scarcity in their networks in the meantime to derive additional revenues by charging content and applications providers for new types of data transmission.<sup>254</sup> Thus, some of these

<sup>251</sup> See, e.g., Wilkie, Tr. I at 170 (“The caveat might be that you might want to add that tiering and offering higher levels of prioritization are allowable, but they would have to be offered on a non-discriminatory basis, or what economists call ‘second degree price discrimination,’ that is, the prices are functions of the level of functionality offered, not the identity of the customer.”). See also G. Sohn, Tr. I at 128 (advocating that if one content or applications provider negotiates a particular service arrangement with a network operator, a second competing content or applications provider should “absolutely” be provided with an identical arrangement by the operator without having to engage in separate negotiations).

<sup>252</sup> See, e.g., Press Release, USC Annenberg Center, Annenberg Center Releases Principles for Network Neutrality (2006), available at <http://www.annenberg.edu/news/news.php?id=13>. See also D. Sohn, Tr. II at 226 (suggesting that the optimum outcome is “to keep this neutral open Internet at an acceptable level of service, to keep that in existence even as experimentation with other networks . . . proceeds”).

<sup>253</sup> See, e.g., *Network Neutrality: Competition, Innovation, and Nondiscriminatory Access: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. (2006) (testimony of Gary R. Bachula, Vice President, Internet2) [hereinafter Bachula Senate Testimony], available at <http://commerce.senate.gov/pdf/bachula-020706.pdf>; Bachula, Tr. II at 164-74. See also Davidson, Tr. I at 231 (“In most cases, the best way to deal with any concerns about prioritization is to provide better broadband, higher bandwidth offerings to consumers.”).

<sup>254</sup> According to Bachula:

When we first began to deploy our Internet2 network some eight years ago, our engineers started with the assumption that we would have to find technical ways of prioritizing certain bits, such as streaming video or video conferencing, in order to ensure that they arrived without delay.

For a number of years, we seriously explored various quality of service techniques, conducted a number of workshops and even convened an ongoing quality of service working group, but as it developed, all of our research and practical experience supported the conclusion that it was far more cost effective to simply provide more bandwidth. It was cheaper to provide more bandwidth than to install these sophisticated quality of service prioritization techniques.

proponents believe that, instead of allowing network operators to engage in prioritization, policy makers should focus on creating incentives for the deployment of next-generation, high-speed networks.<sup>255</sup>

### 3. Concerns about Vertical Integration

Net neutrality proponents also express concern about the prospect of network operators integrating vertically into the provision of content and applications. Proponents argue that network operators now have the legal and technological ability to control both their own physical networks and the ability of content and applications providers to reach end users. Proponents further suggest that vertically integrated network operators will favor their own content and applications, or those of their affiliates, over others.<sup>256</sup> Some of these proponents, therefore, argue that network operators' ability to vertically integrate should be legally restricted or forbidden altogether.<sup>257</sup>

### 4. Concerns about Innovation at the "Edges" of the Internet

Proponents suggest that if so-called non-neutral practices are allowed to flourish in the core of the networks that comprise the Internet, innovation by content and applications developers that are connected to the Internet's "edges" will suffer. Some proponents, for example, are concerned about the complexity and cost that content and applications providers would experience if they had to negotiate deals with numerous network operators worldwide. They suggest that content and applications providers will need to expend considerable resources to negotiate and enter into prioritization agreements or other preferential arrangements with numerous networks and that many (particularly, small) companies will not be able to pay the fees that operators will demand to reach end users in a competitive manner.<sup>258</sup> Thus, they fear that innovators will be

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With enough bandwidth in the network, there is no congestion, and video bits do not need preferential treatment. All the bits arrive fast enough even if intermingled.

Bachula, Tr. II at 169.

<sup>255</sup> Robert D. Atkinson & Philip J. Weiser, *A "Third Way" on Network Neutrality*, 13 THE NEW ATLANTIS 47, 58-59 (2006), available at <http://www.thenewatlantis.com/archive/13/TNA13-AtkinsonWeiser.pdf>. These commentators suggest that Congress should allow companies investing in broadband networks to expense new broadband investments in the first year and also extend the moratorium on federal, state, and local broadband-specific taxes, but make it contingent upon provision of an open, best-efforts level of Internet service. *Id.* See also generally Lehr, Tr. I at 36 ("[Over time, network] penetration saturates. And so, revenues growth slows. And the question is that if we want the industry to continue to meet the growth in traffic, we have to figure [out] what the incentives are.").

<sup>256</sup> See, e.g., Joseph Farrell, *Open Access Arguments: Why Confidence is Misplaced*, in NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND SERVICES BE REGULATED?, *supra* note 42, at 195.

<sup>257</sup> See, e.g., Christian Hogendorn, *Regulating Vertical Integration in Broadband: Open Access Versus Common Carriage*, 4 REV. NETWORK ECON. 19, 30 (2005).

<sup>258</sup> See, e.g., Davidson, Tr. I at 224-33. According to Davidson, "[a]s our founders have said, two graduate students in a dorm room with a good idea would not have been able to create this service if the first thing that they had to do was to hire an army of lawyers and try to reach carriage agreements with providers all

blocked, actively degraded, or provided with low-priority data transmissions, and the development of the next revolutionary Internet site or application may be inhibited. They predict that spontaneous innovation will be precluded or forced to proceed through established businesses already having significant capital and favored relationships with network operators.<sup>259</sup> Similarly, net neutrality proponents sometimes argue that non-profit and educational entities may be at a disadvantage relative to highly capitalized businesses.<sup>260</sup>

## 5. Concerns about “Last-Mile” Competition in Broadband Service

Net neutrality proponents typically argue that a cable-telephone duopoly exists in most markets for last-mile broadband connections and that competition from only two broadband providers is not sufficient to check the harms that they envision. Net neutrality proponents generally do not believe that one of these competitors will provide users with an acceptable, alternative open service if the other decides to pursue exclusive deals or data prioritization. Proponents also typically express doubt about the potential of newer technologies like wireless Internet and broadband over powerlines to provide in the near future a robust, competitive alternative to the access offered by the cable and telephone companies.<sup>261</sup>

A related concern expressed by some network neutrality proponents is that last-mile ISPs might not disclose to end users the ISPs’ differential treatment of certain data and that they will be able to get away with such non-disclosure due to a lack of viable competitive alternatives in the marketplace or the difficulty of tracing problems to ISPs’ practices. Proponents also suggest that, to the extent that such disclosures are made by ISPs, many end users will not be able to readily understand them, making such

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around the world.” *Id.* at 226. See also Cohen, Tr. II at 152 (“[Historically, Internet start-ups] did not have to negotiate. They did not have to persuade or cajole network providers for special treatment.”); Center for Creative Voices in Media, Public Comment 6, at 2 (“Artists must have the freedom to distribute their works over the broadband Internet, and the American public must have the freedom to choose from among those works, rather than have the cable and telephone broadband providers who overwhelmingly control the market for broadband deny those freedoms and make those choices for them.”).

<sup>259</sup> See, e.g., Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001). Lemley and Lessig suggest that, “[i]f that strategic actor owns the transmission lines itself, it has the power to decide what can and cannot be done on the Internet. The result is effectively to centralize Internet innovation within that company and its licensees.” *Id.* at 932. See also Farrell, Tr. I at 154 (“[T]here is a concern if you allow last mile providers to make charges on content providers, there is a concern about possible expropriation of successful content providers.”).

<sup>260</sup> See, e.g., *Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Jeff C. Kuhns, Senior Director, Consulting and Support Services, Information Technology Services, The Pennsylvania State University), available at [http://judiciary.senate.gov/testimony.cfm?id=1937&wit\\_id=5418](http://judiciary.senate.gov/testimony.cfm?id=1937&wit_id=5418).

<sup>261</sup> See, e.g., Feld, Tr. II at 18-19; Putala, Tr. II at 29 (“The much heralded independent alternatives are still tiny.”); Wu, Tr. II at 255 (“I have been hearing that for ten years. I’ve never met anyone who has a connection, broadband over power line, and it has been used a million times . . .”).

disclosures ineffective in checking potential ISP misconduct.<sup>262</sup> Some network neutrality proponents also argue that the use of data packet inspection and other traffic analysis technologies by network operators may give rise to privacy concerns that end users might not readily recognize.<sup>263</sup>

## 6. Concerns about Legal and Regulatory Uncertainty

Net neutrality advocates suggest that the FCC's recently issued broadband principles, its ancillary jurisdiction over broadband providers under Title I of the Communications Act of 1934, and the antitrust laws are insufficient to prevent or police potentially harmful conduct by broadband providers.<sup>264</sup> In particular, they argue that the FCC's broadband principles are not legally enforceable, that the full scope of its Title I authority has yet to be determined, and that any remedial action is likely to result in years of litigation and appeals, leaving the status of the Internet in doubt.<sup>265</sup> Neutrality advocates argue that more concrete examples of alleged harms, beyond *Madison River*, do not exist primarily because network operators have been on their best behavior in the short time since recent legal and regulatory determinations were handed down, to avoid attracting further scrutiny. Proponents argue that without further regulation, however, network operators will likely engage in such practices in the future and that there will be no practical way to prevent or remedy the resulting harms without a comprehensive, *ex ante* regulatory regime.<sup>266</sup>

## 7. Concerns about Political and Other Expression on the Internet

Advocates suggest that, without a network neutrality rule, operators will likely engage in practices that will reduce the variety and quality of content available to users, generally. In particular, they suggest network operators may degrade or block content that they find to be politically or otherwise objectionable or contrary to their own

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<sup>262</sup> See, e.g., Kenney, Tr. II at 103 ("I think these disclosure issues are important, but I don't think that's the issue here today. In fact, the elephant in the room is whether or not disclosure of prioritization practices is sufficient to remedy the harm.").

<sup>263</sup> See, e.g., *id.* ("I don't think anyone has a full understanding of what sort of security and vulnerability issues are at stake with deep packet inspection technologies.").

<sup>264</sup> See, e.g., Libertelli, Tr. I at 117 ("[W]e're talking about a policy statement [(the FCC principles)]; we're not necessarily talking about a binding rule of decision."); Farrell, Tr. I at 159 ("I am not convinced that anti-trust, as currently enforced, is going to do a good job on those potential problems.").

<sup>265</sup> See, e.g., *Network Neutrality: Competition, Innovation, and Nondiscriminatory Access: Hearing Before the H. Comm. on the Judiciary, Task Force on Telecom & Antitrust*, 109th Cong. 23, 35 (2006) (prepared statement of Earl W. Comstock, President and CEO, COMPTel) [hereinafter Comstock House Testimony], available at <http://judiciary.house.gov/media/pdfs/printers/109th/27225.pdf>.

<sup>266</sup> See, e.g., Misener, Tr. II at 142 ("[W]e really believe that it would be in consumers and industry's best interest for certainty and for a national policy to be set by the Federal Government at the very highest level . . .").

business interests.<sup>267</sup> Neutrality advocates suggest that other types of speech, such as individuals' Web logs, may also be disfavored or blocked as the incidental result of an operator's more general decisions about favoring certain content providers over others.<sup>268</sup> This argument appears to be a variation on the suggestion that, without a neutrality regime, innovation (or, in this case, speech) at the edges of the network will be inhibited.<sup>269</sup>

## **B. Arguments against Network Neutrality Regulation**

Opponents of network neutrality regulation include facilities-based wireline and wireless network operators, certain hardware providers, and other commentators. These parties maintain that imposing network neutrality regulation will impede investment in upgrading Internet access and may actually hamper innovation. They also argue that, apart from the *Madison River* case, the harms projected by net neutrality proponents are merely hypothetical and do not merit a new, *ex ante* regulatory regime.

Principally, these opponents argue that: (1) the Internet is not neutral and never truly has been, and a neutrality rule would effectively set in stone the status quo and preclude further technical innovation; (2) effective network management practices require some data to be prioritized and may also require certain content, applications, and attached devices to be blocked altogether; (3) there are efficiencies and consumer benefits from data prioritization; (4) new content and applications also require this kind of network intelligence; (5) network operators should be allowed to innovate freely and differentiate their networks as a form of competition that will lead to enhanced service offerings for content and applications providers and other end users; (6) prohibiting network operators from charging different prices for prioritized delivery and other types of quality-of-service assurances will reduce incentives for network investment generally

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<sup>267</sup> See, e.g., Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 107, 118 (2007) (submitted to FTC as Public Comment 26) ("A broadband provider should no more be able to stop a customer's email or blog post due to its political content than a telephone company should be permitted to dictate the content of customers' conversations."). See also Peha, Tr. I at 26 ("There could also be content filtering for other reasons. Perhaps for political reasons I will want to limit access to advocacy groups for issues I oppose, or candidates I oppose.").

<sup>268</sup> See, e.g., Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 507 (2006) (submitted to FTC as Public Comment 8) ("If antitrust principles are insufficient to substitute for the functions that common carriage and public utility obligations have served in providing access, then free speech rights of individuals will be sacrificed to serve economic interests of corporate owners of broadband facilities."); Feld, Tr. II at 15 ("Goal number . . . two is the Internet is open and diverse as it exists today or better. . . . The First Amendment cares about this stuff. Our democracy depends on this stuff, and Congress has told us to protect it as part of the policy. Any policy that doesn't protect that, even if it is more economically efficient, is a failed policy."). But compare Thomas B. Leary, *The Significance of Variety in Antitrust Analysis*, 68 ANTITRUST L.J. 1007, 1019 (2001) (raising the question of "whether an increase or decrease in available variety, by itself, merits independent consideration in antitrust analysis").

<sup>269</sup> See, e.g., G. Sohn, Tr. I at 134 ("The Internet actually takes away the gate keepers, so people can engage in democratic discourse, eCommerce, innovation. It's been great. And at a certain point, we have to ask ourselves, do we want it to remain that way?").

and prevent networks from recouping their investments from a broader base of customers, a practice which might, in turn, reduce prices for some end users; (7) vertical integration by network operators into content and applications and certain bundling practices may produce efficiencies that ultimately benefit consumers; and (8) there is insufficient evidence of potential harm to justify an entirely new regulatory regime, especially when competition in broadband services is robust and intensifying and the market is generally characterized by rapid, evolutionary technological change.

## 1. Historical and Existing Non-Neutrality of the Internet

Opponents of network neutrality regulation argue that the Internet is not, and never truly has been, “neutral.”<sup>270</sup> These opponents generally agree that the first-in-first-out and best-efforts characteristics of the TCP/IP data-transmission protocol have played a significant role in the development of the Internet.<sup>271</sup> They point out, however, that since the earliest days of the Internet, computer scientists have recognized that data congestion may lead to reduced network performance and have thus explored different ways of dealing with this problem.<sup>272</sup>

Net neutrality opponents point out that all network routers must make decisions about transmitting data and argue that such decisions invariably have implications that may not be strictly uniform or neutral. In particular, they note that networks have long employed “hot potato” routing policies that hand off to other networks at the earliest possible point data that is not destined for termination on their own networks. A principal goal of hot potato routing is to reduce the usage of network resources.<sup>273</sup> Opponents note that, during periods of congestion, data packets may be rerouted along another path or dropped altogether and that packets may need to be re-sent when transmission errors occur.

Opponents of net neutrality regulation argue that the TCP/IP protocol itself may have differential effects for various content and applications.<sup>274</sup> For example, static Web page content like text and photos and applications like e-mail generally are not sensitive to latency. Thus, users typically can access them via the TCP/IP protocol without

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<sup>270</sup> See, e.g., Ryan, Tr. I at 238 (“IP networks do prioritize. They have from the beginning of time. The prioritization that they had in the network at its inception was basically a first in line prioritization, first in/first out. So it’s prioritization based on time, and time alone.”). See also McTaggart, *supra* note 117.

<sup>271</sup> See *supra* Chapter I.A for a discussion of the TCP/IP protocol.

<sup>272</sup> See generally *supra* Chapter I. See also Peha, Tr. I at 17 (“Actually, the [TCP/IP] protocol for 35 years has allowed priority. But, for the most part, people haven’t used it. Or even implemented it.”).

<sup>273</sup> See, e.g., McTaggart, *supra* note 117, at 10-12.

<sup>274</sup> See, e.g., Yoo, Tr. II at 219. According to Yoo, “every protocol inherently favors some applications over others. TCP/IP, first come, first served, very good at some things, worse at others. In a sense, there is no neutral way to go here, by choosing one protocol over the other, you will actually be choosing winners and losers.” *Id.*

noticeable problems, even during periods of congestion. Applications like streaming video and videoconferencing, however, may be sensitive to latency and jitter.<sup>275</sup> Net neutrality opponents argue, therefore, that while first-in-first-out and best-efforts principles may sound neutral in the abstract, their practical effect may be to disfavor certain latency- and jitter-sensitive content and applications because prioritization cannot be used to deliver the continuous, steady stream of data that users expect even during periods of congestion.<sup>276</sup>

Network neutrality critics also note that content providers increasingly are using local caching techniques to copy their content to multiple computer servers distributed around the world, and argue that this practice effectively bypasses the first-in-first-out and best-efforts characteristics of the TCP/IP protocol.<sup>277</sup> Critics further observe that network operators have preferential partnerships with Internet “portal” sites to provide users with greeting homepages when they log on, as well as customized and exclusive content and applications.<sup>278</sup> Similarly, they note that portals, search engines, and other content providers often give premium placement to advertisers based on their willingness to pay.<sup>279</sup> In their view, these practices all constitute additional indicia of existing non-neutrality.

## **2. Prioritization, Blockage, and Network Management Requirements**

Network neutrality opponents frequently argue that operators should be allowed actively to restrict or block data that they believe may be harmful to the performance of

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<sup>275</sup> See, e.g., Pepper, Tr. I at 85-86 (“The problem with non-discrimination is that it does not recognize that treating different packets differently is necessary for the effective delivery of many services. As more real-time interactive services dominate Internet traffic, it’s going to be more important to differentiate among packets.”). See also McTaggart, *supra* note 117, at 12-14.

<sup>276</sup> Some network neutrality proponents, such as Wu, have concluded that, “[a]s the universe of applications has grown, the original conception of [Internet Protocol] neutrality has [become] dated; for IP was only neutral among *data* applications. Internet networks tend to favor, as a class, applications insensitive to latency (delay) or jitter (signal distortion).” Wu, *supra* note 227, at 149. Expanding on this point, some network neutrality opponents, such as Yoo, have concluded that, because “TCP/IP routes packets anonymously on a ‘first come, first served’ and ‘best efforts’ basis . . . it is poorly suited to applications that are less tolerant of variations in throughput rates, such as streaming media and VoIP, and is biased against network-based security features that protect e-commerce and ward off viruses and spam.” Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 8 (2005). Therefore, in his view, “[c]ontrary to what the nomenclature might suggest, network neutrality is anything but neutral.” *Id.*

<sup>277</sup> See, e.g., McTaggart, *supra* note 117, at 6-7 (discussing Google’s distributed computing network).

<sup>278</sup> See, e.g., *id.* at 4-5 (discussing network partnerships with portals such as Yahoo!, Microsoft MSN, and Lycos). See also Waz, Tr. II at 162 (discussing the premium placement of portals on mobile phones).

<sup>279</sup> See, e.g., McCormick, Tr. I at 273 (“[I]f any of us want to kind of envision what prioritization on the Internet might look like, I mean, I think the clearest understanding of what we know prioritization would be is looking at a Google search page.”).



their networks,<sup>280</sup> citing reports that a relatively small number of users can potentially overwhelm network resources through the use of bandwidth-intensive applications, such as peer-to-peer file-sharing and streaming video.<sup>281</sup> They warn that active network management, prioritization, and other types of quality-of-service assurances are needed to prevent the Internet, or its individual parts, from slowing down or crashing altogether in a high-tech “tragedy of the commons.”<sup>282</sup> In their view, merely expanding network capacity is expensive and may not be the most cost-effective method of network management, and future content and applications may be even more resource-intensive than applications like BitTorrent are today.<sup>283</sup>

### 3. Efficiencies and Consumer Benefits from Prioritization

Network neutrality opponents argue that market transactions for prioritization and other forms of quality of service can, in many cases, allocate scarce network resources in

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<sup>280</sup> Network neutrality proponents generally allow that some active management is necessary to maintain network performance, but typically maintain that it should be limited. *See, e.g.*, PUBLIC KNOWLEDGE, PRINCIPLES FOR AN OPEN BROADBAND FUTURE: A PUBLIC KNOWLEDGE WHITE PAPER (2005), *available at* <http://www.publicknowledge.org/pdf/open-broadband-future.pdf>. According to this group, “[s]ome have maintained that network operators must have the ability to restrict access to the network for legitimate law enforcement purposes, or for network management. While these examples may be valid, this authority can be easily abused and should not be broadly permitted.” *Id.* at 10.

<sup>281</sup> *See supra* Chapter I.C.1.

<sup>282</sup> *See, e.g.*, McCormick, Tr. I at 243. According to McCormick, “[a] better Internet doesn’t simply come by adding capacity. Like road networks, rail networks, electrical networks, and traditional telephone networks, the advanced networks that comprise the Internet cannot function efficiently and cost-effectively without management. No network has ever been built without regard to prioritization of traffic, peak loads, and capacity management.” *Id.* Wireless network operators, in particular, argue that because their networks may not have as much bandwidth as other wireline providers, they must be allowed to limit or block certain content and applications like BitTorrent and to otherwise actively manage the use of their networks’ resources. Network neutrality opponents state that any unintended consequences produced by neutrality rules may have particularly acute consequences for such networks. *See, e.g.*, Altschul, Tr. II at 51 (maintaining that applying network neutrality regulations to wireless broadband networks “would have unique effects and they would be negative effects”).

<sup>283</sup> *See, e.g.*, Thorne, Tr. II at 34-39 (discussing the costs of deploying broadband networks). According to Thorne:

When Verizon puts its fiber down a street, it costs us, in round numbers, \$800 per home. It costs us again, in round numbers, another \$840 to connect the home that actually takes the service. We spend the money to pass the home, but we don’t know whether the customer is going to buy broadband service at all, or buy it from us.

*Id.* at 39. *See also* Schwartz, Tr. I at 255 (“Economically, it doesn’t make sense that the solution is always to build more. That’s going to involve carrying a lot of excess capacity, which is going to be expensive.”); T. Randolph Beard et al., *Why ADCo? Why Now? An Economic Exploration into the Future of Industry Structure for the “Last Mile” in Local Telecommunications Markets*, 54 FED. COMM. L.J. 421, 430 (2002) (estimating the cost of fiber-optic wireline deployment in a metropolitan area at approximately \$3 million per mile).

a manner more consistent with the actual priorities of end users.<sup>284</sup> Opponents further suggest that prioritizing streaming telemedicine video, for example, ahead of e-mail or network gaming transmissions to reduce latency and jitter would be socially beneficial.<sup>285</sup>

Net neutrality opponents thus argue that network operators should be allowed to prioritize the transmission of certain data or provide quality-of-service assurances for a fee in the same way that consumers pay for priority mail service. Some observers note that many other types of paid prioritization arrangements such as first-class airline seating, congestion pricing for automobile traffic and public transportation, and premium advertisement placements are commonplace and generally considered to be socially beneficial.<sup>286</sup> In addition, they dispute the notion that non-prioritized data will be relegated to an unacceptable, antiquated slow lane. Rather, they argue that non-prioritized data traffic will continue to receive an acceptable level of basic service that will continue to improve over time along with more general advances in data transmission methods.<sup>287</sup>

#### **4. New Content and Applications and the Need for Network “Intelligence”**

Network neutrality opponents argue that new types of specialized services and premium content require sophisticated, “intelligent” data-traffic management at both the core and edges of the Internet.<sup>288</sup> Principal examples include VoIP, streaming video for movies and telemedicine, large video download files, interactive network video games, and customized business applications. In their view, “dumb” networks based on the original TCP/IP protocol’s first-in-first-out and best-efforts standards are becoming

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<sup>284</sup> See, e.g., Schwartz, Tr. I at 255-56 (“[I]t makes sense to use the price system as a signal of which things merit priority.”).

<sup>285</sup> See, e.g., McCormick, Tr. I at 244 (“A communication about your health, for example, is clearly more important than how quickly your kid can download a video featuring the antics of someone’s pet hamster.”).

<sup>286</sup> See, e.g., Sidak, Tr. I at 112 (“Obviously, we observe price discrimination in competitive markets all the time.”). See also Farrell, Tr. I at 157 (“Price discrimination, as you have probably all heard many economists say in forums like this, is not necessarily harmful. And that’s correct, given the other alternatives available.”).

<sup>287</sup> See, e.g., J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. COMPETITION L. & ECON. 349, 355 (2006) (“Rather than being forced down Lessig’s ‘digital equivalent of a winding dirt road,’ these content providers would be relegated to something more like a business-class seat on a flight to Paris.”).

<sup>288</sup> See, e.g., Verizon Communications Inc., Public Comment 60, at 6-8. Verizon, for example, suggests that “[n]ew Internet content and applications require innovative new broadband delivery methods” and that networks need to be able to prioritize data “to manage bandwidth and control traffic on their network – for example, to offer different levels of service for content and applications providers to reach their customers.” *Id.* at 7-8.

increasingly outdated for certain content and applications.<sup>289</sup> Opponents argue that many of these newer applications are sensitive to different levels of speed, latency, jitter, symmetry, bursting, and capacity. For example, virtual teleconferencing generally requires high speed, low latency, and symmetry, while some one-time video downloads might require only high speed. By contrast, VoIP does not require significant bandwidth, but is sensitive to latency and jitter. Neutrality critics argue, therefore, that network intelligence will be increasingly necessary to provide the optimal transmission climate for each of these new types of content and applications and that both content and applications providers and other end users should be allowed to purchase services appropriate to their particular needs.

## 5. Network Innovation and Competition

Network neutrality opponents contend that network operators should be allowed to innovate freely and differentiate their networks as a form of competition that will lead to enhanced service offerings for content and applications providers and other end users. This perspective has been described as an argument in favor of “network diversity.”<sup>290</sup> Thus, opponents believe that network operators should be able to experiment with new data-transmission methods and a variety of business plans to better serve the evolving demands of end users. If such experiments turn out to be failures, network operators will learn from their mistakes and improve their offerings or simply return to the status quo, consistent with the normal dynamics of the market process.<sup>291</sup> In their view, a ban on prioritization would effectively restrict new types of competition, hinder innovation, potentially preclude price reductions for consumers, hamper efficiencies, and lock in one kind of business model.<sup>292</sup> They warn that in the nascent and evolving market for broadband services, mandating a single business plan is likely to lead to inefficient and unintended outcomes.<sup>293</sup> They also assert that allowing content and applications

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<sup>289</sup> See, e.g., Adam Thierer, *Are “Dumb Pipe” Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model*, in NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED?, *supra* note 42, at 73. See also Pepper, Tr. I at 81-83.

<sup>290</sup> See, e.g., Yoo, *supra* note 276, at 9 (“In other words, standardization of TCP/IP would have the effect of narrowing the dimensions of competition, forcing networks to compete solely on the basis of price and network size.”).

<sup>291</sup> See, e.g., Yoo, Tr. II at 220 (“If we have four players and one wants to experiment with a different architecture, if they are wrong, they will get hammered and they will come back to the fold. If they are right, it’s precisely the kind of innovation we should tolerate and encourage.”).

<sup>292</sup> See, e.g., American Bar Association Section of Antitrust Law, Public Comment 2, at 8 (“Ultimately, we believe that the competitive process will drive investment and innovation in the Internet. That investment and innovation will inure to the benefit of all consumers. We do not think that imposing non-discrimination statutes, regulations or policies will offer any offsetting benefits economically.”).

<sup>293</sup> See, e.g., Pepper, Tr. I at 88 (“[One] concern is really whether net neutrality regulation designed to prevent anti-competitive conduct could limit, or prohibit consumer welfare-enhancing network functionality and management, as well as discourage innovation. In other words, regulation is not costless.”).

providers to purchase quality-of-service assurances and prioritization may allow new content and applications providers to counteract the competitive advantages typically enjoyed by incumbent providers, such as the ability to pay for large server farms or third-party data caching services.<sup>294</sup>

## 6. Network Investment and Potential Consumer Benefits

Opponents argue that prohibiting network operators from charging different prices for prioritized delivery and other types of specialized services and premium content will make it more difficult to recoup the costs of infrastructure investments and, thereby, reduce incentives for network investment generally.<sup>295</sup> They argue that both end users and content and applications providers should be free to select any level of service provided by network operators under market-negotiated terms.<sup>296</sup>

Network neutrality opponents also stress that, although the Internet began as a research and government communications network, its explosive growth since the mid-1990s has been fueled mainly by private, risk-bearing investment.<sup>297</sup> They emphasize that the individual, decentralized networks that make up the Internet mostly are owned and operated by private companies and, generally speaking, are private property, even though they may be subject to certain legal requirements like rights of way permissions.<sup>298</sup> They point out that deploying and upgrading broadband networks can entail billions of dollars in up-front, sunk costs.<sup>299</sup> Thus, they argue, any regulation that reduces network operators' ability to recoup their investments also effectively increases

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<sup>294</sup> Similarly, some network neutrality opponents argue that efforts by current leading content providers to codify the status quo under the guise of neutrality rules are really nothing more than a veiled strategy to commoditize data transmission and, thereby, preserve their own existing competitive advantages against possible competitive threats based on new data-transmission techniques. *See, e.g.,* Yoo, *supra* note 276, at 9 (“[T]he commodification of bandwidth would foreclose one avenue for mitigating the advantages enjoyed by the largest players.”). *See also* George S. Ford et al., *Network Neutrality and Industry Structure* 1 (Phoenix Center Policy Paper No. 24, 2006) (“[P]olicymakers should avoid Network Neutrality mandates that have the intent or effect of ‘commoditizing’ broadband access services since such a policy approach is likely to deter facilities-based competition, reduce the expansion and deployment of advanced networks, and increase prices.”).

<sup>295</sup> *See, e.g.,* Lenard, Tr. I at 181 (arguing there is a “striking lack of concern about the effect on incentives to invest and innovate”).

<sup>296</sup> *See, e.g.,* Sidak, Tr. I at 107 (“Well, why do you need to have a federal law prohibiting one kind of transaction, when you’re perfectly happy with the other?”).

<sup>297</sup> *See, e.g.,* Waz, Tr. II at 155-61. Waz states that “[a]ll that competitive investment is what makes it possible for a Google and Yahoo! and eBay and Amazon and others to be here today . . . .” *Id.* at 158.

<sup>298</sup> *See, e.g.,* Bruce Owen & Gregory L. Rosston, *Local Broadband Access: Primum Non Nocere or Primum Processi? A Property Rights Approach*, in NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED?, *supra* note 42, at 163.

<sup>299</sup> *See, e.g.,* Thorne, Participant Presentation, at 1 (identifying Verizon Communications capital expenditures of approximately \$45 billion during 2004-06).

their risk profile to investors and, accordingly, would prompt capital markets to demand an adjusted, higher rate of return. They suggest such an increase in the cost of capital, in turn, would decrease the likelihood that projects underway could be completed on their planned scale.<sup>300</sup>

In addition to reducing incentives for network investment generally, opponents argue that banning network operators from selling prioritized data delivery services to content and applications providers will prevent networks from recouping their investments from a broader base of customers.<sup>301</sup> In particular, they suggest that networks should be allowed to experiment with a model in which content and applications providers pay networks for prioritization and other premium services in the same way that merchants pay for the placement of advertisements in newspapers and other publications.<sup>302</sup> They suggest that such a business model might reduce prices for some end users, much as advertising subsidizes the subscription prices of ad-supported publications, thereby allowing marginal customers to afford broadband service.<sup>303</sup> They further suggest that such increased end-user penetration would also increase the effective demand for content and applications, generally, and thereby benefit their providers.<sup>304</sup>

## 7. Economies of Scope from Vertical Integration and Bundling

Net neutrality opponents argue that vertical integration by network operators into content and applications, along with related bundling practices, may produce economies

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<sup>300</sup> Sidak, *supra* note 287, at 357. In addition, some commentators characterize neutrality rules as being a kind of regulatory taking of private property that can no longer be justified under a theory of natural monopoly or other similar grounds. See, e.g., Thomas W. Hazlett, *Neutering the Net*, FIN. TIMES, Mar. 20, 2006; Richard A. Epstein, *What We Need is Regulatory Bed Rest*, FIN. TIMES, Mar. 20, 2006. Both articles are available at <http://www.ft.com/cms/s/392ad708-b837-11d1-bfc5-0000779e2340.html>.

<sup>301</sup> See, e.g., Yoo, Tr. II at 217 (“[W]e need to allow more flexibility on the server side. . . . Part of those costs should also vary based on who, which servers, which content and applications providers need those services.”). See also Sidak, *supra* note 287, at 367-68.

<sup>302</sup> See, e.g., Yoo, Tr. II at 217 (“[W]e have learned in fact, these are two-sided markets. Basically, upgrades to the network have to be paid for either by consumers or by the server content application side.”). See also Schwartz, Tr. I at 258-59 (“[N]obody knows what the right pricing structure is. I don’t claim to know it; nobody does. There is no presumption that the right structure is to recover all of the cost of consumer broadband networks from consumers alone.”). Other examples of two-sided or, more generally, multi-sided markets include credit cards (involving merchants and cardholders); dating services (men and women); video game platforms (developers and players); and telephone networks (callers and receivers). See generally Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report* (Institut d’Économie Industrielle (IDEI), Toulouse, Working Paper No. 275, 2005), available at [http://idei.fr/doc/wp/2005/2sided\\_markets.pdf](http://idei.fr/doc/wp/2005/2sided_markets.pdf).

<sup>303</sup> See, e.g., Schwartz, Tr. I at 259 (“What economics predicts—and it’s independent of a monopoly or—it’s independent of the degree of competition in broadband access—the prediction is if you allow them to charge content providers, in their own interest they will now reduce prices to consumers, and therefore, encourage penetration.”).

<sup>304</sup> See, e.g., *id.*; Sidak, *supra* note 287, at 367-68; Sidak, Tr. I at 114-15.

of scope and price reductions. They point out that many areas of telecommunications are increasingly converging. For example, both cable and traditional telecommunications companies increasingly are offering “triple-” and “quadruple-play” bundles of high-speed data, telephony, television, and wireless services.<sup>305</sup> In addition, they state that the vertical integration of distribution with other types of media content is already commonplace because consumers typically do not want distribution alone, but, instead, want the particular content enabled by that distribution.<sup>306</sup> Some opponents also suggest that the prospect of additional revenue streams derived from vertical integration and bundling could promote additional competition in last-mile broadband services and provide other benefits to end users.<sup>307</sup>

## 8. Insufficient Evidence of Harm to Justify New Regulation

Network neutrality opponents argue that there is insufficient evidence of harm to justify an entirely new *ex ante* regime, particularly when, in their view, competition in broadband services is robust and intensifying due, in large part, to de-regulation. They state that, apart from the *Madison River* case, which was quickly resolved by the FCC, the harms projected by network neutrality proponents are merely hypothetical and, therefore, do not merit new rules.<sup>308</sup> Also, they note that a number of network operators have publicly pledged not to block or degrade end users’ use of their services.<sup>309</sup> They

<sup>305</sup> See generally Marguerite Reardon, *Cable Goes for the Quadruple Play*, CNET NEWS.COM, Nov. 7, 2005, [http://news.com.com/2100-1034\\_3-5933340.html](http://news.com.com/2100-1034_3-5933340.html). See also generally *Your Television is Ringing*, ECONOMIST, Oct. 14, 2006, at 3 (special survey of telecommunications convergence).

<sup>306</sup> See, e.g., Lenard, Tr. I at 177 (“So what may be needed for a successful business model may be a bundled product offering that is sufficiently attractive to attract enough consumers to become subscribers at prices that are going to pay off the costs of these very large investments.”). See also Thomas L. Lenard & David T. Scheffman, *Distribution, Vertical Integration and the Net Neutrality Debate*, in NET NEUTRALITY OR NET NEUTERING: SHOULD BROADBAND INTERNET SERVICES BE REGULATED?, *supra* note 42, at 1, 13.

<sup>307</sup> See, e.g., Rosston, Tr. I at 164-65. According to Rosston, “some of these vertical relationships that people are concerned about that may increase the profits of a new entrant may be the thing that is necessary, in order to get a new entrant, in order to compete.” *Id.* See also Thorne, Tr. II at 57-58. Verizon, for example, suggests that it would be interested in partnering with hospitals to develop specialized medical applications that could be delivered over its fiber-optic wireline networks to allow the remote treatment of patients. *Id.* Likewise, some observers have pointed to Google’s involvement in advertisement-supported municipal wireless Internet systems as an example of how vertical integration may enhance last-mile competition and benefit consumers. See, e.g., Sidak, Tr. I at 108-09; Thorne, Tr. II at 37; Wallsten, Tr. II at 59.

<sup>308</sup> See, e.g., Wolf, Tr. II at 143-44 (“[J]ust as a doctor would not prescribe needless medication for a growing adolescent on the possibility that some day that adolescent might develop a condition, so, too, we think Federal regulators are prudent to refrain from prescribing conditions that may in fact stifle or injure needed growth.”). See also Kahn, Tr. I at 185 (“I think the lesson of history is be very, very careful that you don’t meddle with a process that is clearly characterized by Schumpeterian [dynamic] competition.”).

<sup>309</sup> See, e.g., Thorne, Tr. II at 40 (“[Verizon has] made clear [that] when consumers buy Internet access capacity from us, they should be able to reach any lawful website they want to get to with that capacity, and we do not and will not block, degrade, or interfere with consumers’ access to any website.”); *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 21 (2006) (statement of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Association), *available at*

argue that operators do not have sufficient power over the distribution of content and applications<sup>310</sup> and, in fact, would alienate their end-user customers if they tried to engage in such practices.<sup>311</sup> Furthermore, they question whether it would even be cost-effective for network operators to search for and block specific kinds of content and applications in an ever-expanding Internet universe, given that an increasing number of proxy servers and encryption techniques are available to end users to counter any such blocking.<sup>312</sup> Similarly, some observers suggest that if such practices are detected, end users can quickly publicize them and thereby “embarrass” the relevant network operator engaging in such conduct.<sup>313</sup>

Finally, network neutrality opponents suggest that the existing jurisdiction of the antitrust agencies and the FCC is sufficient to deal with any prospective problems resulting from the use of new data-transmission methods.<sup>314</sup> Generally, network neutrality opponents suggest that any such problems should be handled on a case-by-case basis – not through *ex ante* legislation or regulation.<sup>315</sup> They express concern that any such regime might be manipulated in order to achieve strategic, anticompetitive outcomes or be subject to other forms of rent-seeking behavior and unintended consequences.

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[http://commerce.senate.gov/public\\_files/30115.pdf](http://commerce.senate.gov/public_files/30115.pdf) (“NCTA’s members have not, and will not, block the ability of their high speed Internet service customers to access any lawful content, application, or services available over the public Internet.”).

<sup>310</sup> See, e.g., Thorne, Tr. II at 42 (“Does Verizon have the ability to prevent Google or eBay or these others from reaching end users, when the most we could do is temporarily shut off a couple percent of the end users they can see? . . . There is no single broadband provider that has that kind of power.”).

<sup>311</sup> Opponents argue that a shift away from the America Online-type walled-garden model has taken place and predict, therefore, that customers would vigorously protest any attempt to return to it after becoming accustomed to generally unrestricted Internet access. See, e.g., Pepper, Tr. I at 136-37.

<sup>312</sup> See, e.g., Thorne, Tr. II at 43 (“What we are selling is precisely the capacity to reach all lawful content and applications. Broadband providers are motivated to maximize the content and applications available to our customers because doing that maximizes the value of our network and the sales we can make.”). See also generally *Cat and Mouse, On the Web*, ECONOMIST, Dec. 2, 2006, at 3 (The Economist Technology Quarterly survey) (discussing the ability of networks to block end users’ access to desired content and applications and methods that end users may employ to circumvent such practices).

<sup>313</sup> See, e.g., Lehr, Tr. I at 44 (“So, if there is a particular behavior that a carrier is doing, some sort of quality of service differentiation that really has no justification in cost, and looks really high-handed, it’s very common for this to get, you know, blogged in real time, and for this to embarrass the carrier so that – I mean, the carriers and the operators – and force them to change their behavior.”). See also Weiser, Tr. II at 92 (making the same point).

<sup>314</sup> See, e.g., Muris, Tr. II at 122 (“If problems of the sort imagined by the advocates of regulation emerge, the appropriate law enforcement authorities have the jurisdiction and expertise necessary to address them.”).

<sup>315</sup> See, e.g., Schwartz, Tr. I at 254 (“[I]f foreclosure does rise to the level of a serious competitive problem, the right response is to address it at the time, on a case-by-case basis—at least that’s my view.”).

#### IV. DISCRIMINATION, BLOCKAGE, AND VERTICAL INTEGRATION

As discussed in the preceding Chapter, proponents of network neutrality regulation have raised a variety of concerns about the effects of vertical integration in broadband markets, as broadband Internet access providers have begun to offer online content and applications in addition to their primary access services. In particular, proponents are concerned that providers may block or discriminate against unaffiliated content and applications, to the benefit of affiliated offerings. Because such concerns may stem from diverse vertical arrangements, this Chapter will construe vertical “integration” broadly to include any arrangement under which a broadband Internet access provider may claim income generated by content or applications, such as joint ventures and exclusive dealing arrangements, as well as outright ownership of content or applications.

This is a particularly complicated issue because vertical integration into content and applications provision can create both incentives to engage in procompetitive, socially beneficial behavior and incentives to engage in anticompetitive, socially harmful behavior. Vertical integration generally need not be anticompetitive or otherwise pernicious<sup>316</sup> and is often driven by efficiency considerations.<sup>317</sup> For example, such integration may facilitate further network or content and applications development, and it may spur development of network, content, and applications more optimally suited to each other. Both price and non-price dimensions of broadband Internet service may thus improve. As a result, the notion that vertical integration tends generally to be anticompetitive has been widely rejected in antitrust law and economics for several decades.<sup>318</sup>

Many net neutrality proponents argue that their concerns about vertical integration arise only when there is insufficient competition in the underlying Internet access market. In that case, a vertically integrated last-mile access provider might exercise its market power to block access to competing content or applications, degrade the transmission of competing content or applications, or reduce investment in best-efforts Internet access services in favor of priority services that carry the access provider’s own or affiliated content or applications. Other proponents, however, have concerns that are independent of the degree of market power the access provider enjoys in the access market itself. These include concerns about the so-called terminating access monopoly problem and the potential “balkanization” of the Internet.

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<sup>316</sup> See, e.g., Farrell, Tr. I at 154 (concerns about vertical integration in broadband markets are substantial but contingent, sometimes highly uncertain, and “very hard to observe, and pin down”).

<sup>317</sup> See, e.g., Yoo, Tr. II at 213-14 (citing research by FTC Bureau of Economics Director Michael Salinger regarding efficiencies in vertical integration in the telecommunications industry).

<sup>318</sup> See, e.g., Joseph Farrell & Philip Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 87 (2003).



This Chapter of the Report discusses concerns that net neutrality proponents have raised about vertical integration in broadband Internet services. Section A discusses problems that are most likely to arise when a provider enjoys substantial market power in the provision of last-mile Internet access; Section B discusses certain problems that may arise independent of the degree of market power attributed to an access provider; Section C discusses various benefits that may be derived from increased vertical integration in these markets; and Section D provides a brief summary of the competing arguments and remaining uncertainties.

Because several types of alleged problems with vertical integration are tied in some way to price or data discrimination, and because both definitions and applications of “discrimination” have been contentious in the broadband Internet access discussion,<sup>319</sup> this Chapter first briefly clarifies that the economic meaning of discrimination is that of differentiation and is not intended to have any negative connotation.<sup>320</sup> Thus, this Report – in particular, this Chapter and Chapter V – does not assume that price discrimination or any form of product or service differentiation is necessarily anticompetitive or anti-consumer.<sup>321</sup> Even where demand conditions allow a seller to price above marginal cost, price discrimination can provide a means of increasing overall consumer welfare by, for example, providing access to goods or services for some consumers who otherwise would be priced out of the market.<sup>322</sup>

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<sup>319</sup> See, e.g., Ford, Tr. II at 239 (criticizing imprecise usage of terms like “discrimination” in the broadband policy discussion). Cf. Farrell, Tr. I at 204-05 (noting disagreement in price discrimination terminology within Workshop, but suggesting semantic dispute is unproductive); Lehr, Tr. I at 37-38 (trying to “move away from the loaded term” of “discrimination”); William H. Page & John R. Woodbury, *Paper Trail: Working Papers and Recent Scholarship*, THE ANTITRUST SOURCE, Apr. 2007, at 6, available at <http://www.abanet.org/antitrust/at-source/07/04/Apr07-PTTrail4=27f.pdf> (criticizing Workshop participant Sidak’s discussion of price discrimination and Ramsey pricing).

<sup>320</sup> That is, we generally attach no negative connotation to “discrimination.” Plainly, however, as mentioned above and discussed throughout this Chapter and Chapter V of this Report, concerns have been raised about particular potential forms of discrimination, such as blocking or degradation of competing content and applications.

<sup>321</sup> Classical price discrimination can, depending on its form, involve a combination of differential pricing and product differentiation. See generally ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (Transaction Publishers 2002) (1920) (articulating, among other things, a general theory of price discrimination). The idealized model discussed by Pigou involves monopoly pricing; there is no suggestion here that any particular entities in the broadband Internet access market enjoy monopoly power or its approximation. Cf. William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 ANTITRUST L.J. 661, 662 (2003) (“[I]t is competition, rather than its absence, that in many cases serves to impose discriminatory pricing.”); Alfred E. Kahn, *Telecommunications, the Transition from Regulation to Antitrust*, 5 J. ON TELECOMM. & HIGH TECH. L. 159, 177 (2006) (emphasizing “the difference between price discriminations, such as might be taken to reflect inadequacies of competition, and differentiations on the basis of differences in costs, such as would unequivocally be reflective of effective competition”).

<sup>322</sup> That is, by producing and selling additional units priced between the highest-priced good or service and the marginal-cost good or service. Hal Varian demonstrated generally that an increase in output is necessary for profit-maximizing price discrimination to increase welfare. See Hal R. Varian, *Price Discrimination and Social Welfare*, 75 AM. ECON. REV. 870, 875 (1985); see also generally JEAN TIROLE,

Product differentiation in its simplest form can be a means of offering different versions of a good to different consumers, according to their demands. A common example is airline travel. Although all passengers receive the same basic product (transport from one airport to another), airlines offer different fares based on different levels of service during the flight (first class or coach) and flexibility in making arrangements (leisure travel advance fares or last-minute business fares). By linking price and product differentiation, a seller may be able to capture profits that would have been available under unitary pricing and yet serve segments of the market that otherwise would be excluded.<sup>323</sup>

#### A. Last-mile Access Concerns Contingent on Market Power

Some net neutrality proponents have argued that vertically integrated broadband providers possessing market power in the provision of last-mile access could leverage that power in ways ultimately harmful to consumers. There are two major related concerns. First, such providers could have incentives to discriminate against competing content or applications providers.<sup>324</sup> Second, such providers could have incentives to underinvest in the facilities used to provide common, best-efforts Internet access services.

Because techniques such as deep packet inspection can reveal source or content information, there is some concern that vertically integrated providers with sufficient incentives to discriminate against competing content could do so.<sup>325</sup> Such blocking could take several forms. A broadband provider with an interest in content or applications could block competing content or applications outright. Less extreme forms of discrimination could impose degraded or otherwise inferior transmission on competing

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THE THEORY OF INDUSTRIAL ORGANIZATION 137-39 (1988). Several Workshop participants applied this general point to the broadband competition discussion. *See, e.g.,* Sidak, Tr. I at 114-15. Several others focused on the particular variant of so-called Ramsey price discrimination, observing, for example, that Ramsey pricing is “the most efficient way to recover fixed costs.” *See* Yoo, Tr. II at 217; Lehr, Tr. I at 38. In a seminal paper based on then-current models of monopolist price discrimination, Frank Ramsey considered how a proportionate tax system might be structured to raise a given amount of revenue while imposing a minimum decrease in utility. *See* F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 47 (1927). The most general answer – that, “the taxes should be such as to diminish in the same proportion the production of each commodity taxed” – provided a foundation not just for models of taxation, but for, among others, utility rate structures and constrained price discrimination. *See id.* Ramsey’s model mirrors monopolist price discrimination, but does so subject to a profit constraint.

<sup>323</sup> *See* PIGOU, *supra* note 321, at 279-80.

<sup>324</sup> *See, e.g.,* Farrell, Tr. I at 156.

<sup>325</sup> *See* Michael Geist, *ISP Must Come Clean on Traffic Shaping*, TORONTO STAR, Apr. 16, 2007, at D5, available at <http://www.thestar.com/sciencetech/article/203408>. *See also supra* Chapter I for a discussion of deep packet inspection and other traffic-shaping technologies.

content. For example, such content might be denied access to prioritized routing,<sup>326</sup> relegated instead to best-efforts or otherwise inferior routing.<sup>327</sup>

### 1. Discrimination against Competing Content and Applications

Some net neutrality proponents have argued that, if a broadband provider had a financial stake in particular content or applications, it could have an incentive to block its competitors' content or applications.<sup>328</sup> In broad economic terms, one Workshop participant identified the potential incentives to block competing content or applications as the incentives to "resist substitutes"<sup>329</sup> for complementary goods in which the integrated entity has a stake.<sup>330</sup>

The incentive to block competitors could, for example, be to protect the primary (broadband Internet access) market from future competition, especially from content or applications providers that might themselves seek a presence in the access market,<sup>331</sup> or the access provider could seek to facilitate price discrimination in the primary market.<sup>332</sup>

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<sup>326</sup> In the alternative, the broadband provider could charge a very high price to competing content providers to access priority routing.

<sup>327</sup> See, e.g., CENTER FOR DIGITAL DEMOCRACY, LIFE IN THE SLOW LANE: A GUIDE TO THE UN-NEUTRAL NET (2006), available at <http://www.democraticmedia.org/issues/UNN.html>.

<sup>328</sup> See, e.g., G. Sohn, Tr. I at 116 (regarding "the possibility" that a provider would "favor certain applications, content, and services"); cf. Libertelli, Tr. I at 76 (alleging actual applications discrimination or blocking in wireless broadband 3G markets).

<sup>329</sup> Farrell, Tr. I at 156. Farrell points out that if the broadband provider were allowed to charge competing content providers a price for access equal to profits the broadband provider would lose by customers buying the competing content instead of his own content, then there would be no incentive to block access. However, this would lead to a very high price for the content – even monopoly levels. See also Rosston, Tr. I at 163.

<sup>330</sup> Some cable companies providing broadband service are currently integrated into IP telephony (in addition to cable services, including video on demand). Conversely, some telephone companies providing broadband service are currently integrated into cable-type video services (in addition to telephone services). For example, AT&T through its affiliation with Akimbo Systems will branch out into other Internet content as well. See Laurie Sullivan, *AT&T Aims for Internet Television*, TECHWEB TECH. NEWS, Apr. 18, 2006, <http://www.techweb.com/wire/networking/185303601>. IP telephony faces competition from third-party providers such as Vonage, while video on demand services are now beginning to see competition from third-party sources. See, e.g., Saul Hansell, *Smaller Video Producers Seek Audiences on Net*, N.Y. TIMES, Oct. 6, 2005, at C1, available at <http://www.nytimes.com/2005/10/06/technology/06video.html?ei=5090&en=042ccaad45ac8536&ex=1286251200> (smaller producers trying to bypass traditional TV networks and sell directly to consumers over Internet).

<sup>331</sup> See Farrell & Weiser, *supra* note 318, at 109-10.

<sup>332</sup> See *id.* at 107 ("Participating in, or dominating, the applications market can help a platform monopolist to price discriminate; this objective may make even inefficient vertical leveraging profitable.").

The assumptions underlying these concerns are controversial. First, to the extent that such concerns about vertical integration depend on the vertically integrated entity having significant market power in a relevant broadband Internet access market, there is considerable disagreement as to whether such market power exists.<sup>333</sup> Even if an access provider has sufficient market power to discriminate against competitors in complementary content or applications markets, there remains the question of whether it has sufficient incentive to do so. In an oft-cited article suggesting that there are legitimate concerns about vertical integration in broadband markets, Farrell and Weiser (both of whom participated in the Workshop) observed that an access provider, depending on various contingencies, might or might not have sufficient incentives to block competition in content or applications markets.<sup>334</sup> In that article, Farrell and Weiser argue that “[p]rice discrimination need not in itself be inefficient or anticonsumer, but the platform monopolist’s desire to price discriminate can . . . lead it to exclude efficient competition or price competition in complementary products.”<sup>335</sup> They further argue, however, that “platform monopolists” will balance the fact that the platform business is more valuable when complements are supplied efficiently against the possibility that “competition in the complement can sometimes threaten the primary monopoly.”<sup>336</sup>

Others argue that countervailing incentives are dominant and that discrimination problems are merely hypothetical.<sup>337</sup> Specifically, they assert that a broadband access provider’s chief incentive is to maximize the value of its core business – its network – to present and potential customers.<sup>338</sup> Because that value depends centrally on the content and applications to which the network provides access, several Workshop participants maintained that providers would not have an adequate incentive “to limit their end users’ experience on the public internet.”<sup>339</sup>

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<sup>333</sup> Chapter VI of this Report, *infra*, discusses more fully the present and (likely) future state of competition in broadband access markets.

<sup>334</sup> See Farrell & Weiser, *supra* note 318, at 100-01.

<sup>335</sup> *Id.* at 108.

<sup>336</sup> *Id.* at 109.

<sup>337</sup> See, e.g., Lenard, Tr. I at 195. See also U.S. INTERNET INDUS. ASS’N, NETWORK NEUTRALITY AND TIERED BROADBAND (2006), available at <http://www.usiia.org/pubs/neutrality.doc>.

<sup>338</sup> See Lenard & Scheffman, *supra* note 306, at 18-19 (“[U]nder any market structure, the platform provider has a strong incentive to maximize the value of the platform to consumers . . . . Broadband providers benefit from having applications and content markets that maximize value to their customers. Anything that detracts from user value will also reduce the demand (and hence the price that can be charged) for the platform.”).

<sup>339</sup> Thorne, Tr. II at 42-43; see also Sidak, Tr. I at 104 (“Network operators provide a complementary service to Internet content. They do not have an interest in reducing the supply of a complement.”).

Thus, the degree to which a last-mile broadband access provider has a sufficient incentive to discriminate against competing content and applications is an empirical question. The broadband provider must weigh potential profits from additional revenue from additional sales of its own content, against potential losses stemming from the diminution of content or applications that consumers view as essential complements to the access service. Certain net neutrality proponents have cited the *Madison River* matter as evidence that the incentive to discriminate is, or could be, sufficient to prompt an ISP to block a rival's application.<sup>340</sup> Opponents of net neutrality regulation, noting a dearth of similar controversies, have argued that *Madison River* represents a rare and distinctive case that is unlikely to recur in the marketplace.<sup>341</sup>

There is the further empirical question of whether such discrimination against content or application providers would be harmful, on balance, were it to occur.<sup>342</sup> In the short run, consumers of content or applications could face reduced choice or higher prices, and, in the long run, such discrimination could discourage entry into content or applications markets<sup>343</sup> or innovation in them.<sup>344</sup> On the other hand, certain forms of discrimination might have mixed or even positive implications for certain consumers. For example, when a seller of one good uses a complementary good as a metering device, excluding rivals from selling the complementary good may facilitate price discrimination that is favorable to the marginal consumer.<sup>345</sup> It appears that, thus far, little attention has been paid in the net neutrality debate to the question how possible harms and benefits from such discrimination might be assessed in the broadband Internet access context.

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<sup>340</sup> See, e.g., SAVE THE INTERNET, THE THREAT IS REAL, <http://www.savetheinternet.com/=threat#examples> (last visited June 12, 2007). For an overview of the *Madison River* matter, and diverse views on its significance, see Chapter IX, text accompanying notes 713-18, *infra*.

<sup>341</sup> See, e.g., Pepper, Tr. I at 89-90. As noted in the previous footnote, the possible implications of the *Madison River* matter are discussed more fully in Chapter IX, *infra*. It should be noted that, despite disagreements about the particulars of *Madison River* and its significance as a model case, many opponents of net neutrality view the blocking conduct at issue in *Madison River* as problematic. See, e.g., Kahn, Tr. I at 186.

<sup>342</sup> See Farrell, Tr. I at 156.

<sup>343</sup> See Farrell & Weiser, *supra* note 318, at 110-11 (citing DOJ's challenge to General Electric's licensing policies for medical imaging equipment).

<sup>344</sup> See *id.* at 113-14.

<sup>345</sup> For example, A.B. Dick Co., which had a patent on mimeograph machines technology, required its machine customers to buy ink from A.B. Dick. Heavy users of the machines used more ink, and therefore paid more to A.B. Dick, than light users. Thus, A.B. Dick was able to price discriminate among its customers. Had A.B. Dick been allowed to sell only the machines, it likely would have sought to maximize profit by setting a price for the machine that would have been prohibitory for smaller users. In this example, low-volume users benefit but high-volume users may be worse off. See DENNIS CARLTON & JEFFERY PERLOFF, MODERN INDUSTRIAL ORGANIZATION, 333-35 (4th ed. 2005); see also TIROLE, *supra* note 322, at 148 (1988) ("The important caveat here is, of course, that the prohibition of a tie-in sale makes it more likely that the manufacturer serves only the high-demand consumers.").

## 2. The Quality of Non-prioritized Service<sup>346</sup>

Some net neutrality proponents have suggested that an access provider's ability to charge a premium price for priority service could create an incentive to underinvest in the quality of best-efforts or other non-prioritized services, or even to degrade them. That is, there is a concern that a provider offering prioritization will lower the quality of non-prioritized service in order to make its prioritized service more attractive to consumers of such services. This concern generally follows the recent "damaged goods" literature in economics, which seeks to identify the conditions under which firms intentionally will damage or degrade some units of a good to enable the firms to charge higher prices for others.<sup>347</sup>

Net neutrality opponents have argued that the incentives to degrade the quality of non-prioritized services will be exceeded by countervailing, procompetitive incentives.<sup>348</sup> Just as blocking highly valued competing content would reduce the value of access services, so too would reducing the general quality level of Internet access carrying both competing and non-competing content. Opponents further argue that, because the Internet inevitably will experience some congestion, the possibility of premium or priority services is critical to dealing with such congestion efficiently, thereby allocating resources where consumers value them the most.<sup>349</sup>

As with direct discrimination against competing content or applications, such incentives are subject to "conflicting forces,"<sup>350</sup> and both their likelihood and – should such discrimination occur – severity present empirical questions that cannot be answered in the abstract.

### B. Potential Problems Independent of Last-mile Market Power

Network neutrality proponents also have identified two sorts of harm that could occur as a result of certain contracting practices even in a competitive last-mile access

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<sup>346</sup> See *infra* Chapter V for a more detailed discussion of the issues regarding data prioritization by Internet service providers and other network operators.

<sup>347</sup> See generally Raymond Deneckere & R. Preston McAfee, *Damaged Goods*, 5 J. ECON. & MGMT. STRATEGY 149 (1996).

<sup>348</sup> See, e.g., Lenard, Tr. I at 178 ("Competitors['] content can increase subscribership at very low, or perhaps even zero, marginal cost. So it's not going to be in the provider's interest to block content that consumers want, and thereby lose subscribers that are going to be high-margin subscribers.").

<sup>349</sup> See, e.g., Sidak, *supra* note 287, at 380 ("To achieve a Pareto-efficient usage of the network, a network operator must have the right to prioritize content to maximize economic welfare and minimize the aggregate welfare losses associated with best-efforts delivery."). See also *supra* Chapter I for a discussion of Internet data congestion. Several Workshop participants made the related point that Ramsey price discrimination is an "efficient way to recover fixed costs." See Yoo, Tr. II at 217; Lehr, Tr. I at 38.

<sup>350</sup> Farrell, Tr. I at 205.

market. These are the so-called terminating access monopoly problem and the potential balkanization of the Internet.

### 1. The Terminating Access Monopoly Problem

One concern raised by net neutrality proponents relates to broadband providers' potential interest in charging content providers for carrying their content over the last mile of the Internet. In particular, access providers might seek payments independent of any charges for prioritized content or application delivery. Net neutrality proponents have noted that such a practice would be analogous to a situation in telephony, in which the terminating telephone network charges the calling party's network a termination fee.<sup>351</sup> There, for example, if a wireline customer calls a cell phone, the wireline network pays the cell phone network a termination fee, typically calculated on a per-minute basis. The ability of the terminating network to charge a fee for delivering traffic to its own customers is known as the terminating access monopoly problem because an end user's network is a "monopolist" for anyone who wishes to connect to that end user.<sup>352</sup>

In the context of broadband Internet access, broadband providers might want to charge content or applications providers for delivering content or applications to end users over the last mile. As noted above, such charges could apply to both best-efforts and prioritized routing. Such charges would have the potential to create two different types of consumer harm. First, in the short run, they could raise the price to consumers of content and applications. Specifically, charges to content and applications providers would raise their costs; in the face of higher costs, such providers are likely to try to recoup at least some of those costs via the prices they seek to charge consumers. At the margin, higher prices will tend to reduce usage, lowering consumer welfare.<sup>353</sup>

There have been instances in the telecommunications area in which terminating access charges have resulted in substantial end-user fees. A Workshop participant provided the following example to demonstrate how such fees might increase prices and thus reduce consumer demand for a particular product: Skype (a VoIP provider) customers in Europe are charged no usage-based fees for Skype-to-Skype calls. Skype-to-landline phone calls are charged approximately two cents per minute, however, because European landline terminating access charges are about two cents per minute, and Skype-to-cell phone calls are charged 21 cents per minute because European cell phone termination charges are about 21 cents per minute.<sup>354</sup> In the United Kingdom, where the per-minute price is 21 cents (due to the access charges), the average usage is only 150 minutes per month. In contrast, in the United States, where the average price

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<sup>351</sup> *Id.* at 154.

<sup>352</sup> See, e.g., Patrick DeGraba, *Central Office Bill and Keep as a Unified Inter-Carrier Compensation Regime*, 19 YALE J. ON REG. 37, 47 (2002).

<sup>353</sup> See Farrell, Tr. I at 171. See also Jean-Jacques Laffont, Patrick Rey & Jean Tirole, *Network Competition: I. Overview and Nondiscriminatory Pricing*, 29 RAND J. ECON. 1, 10-11 (1998).

<sup>354</sup> Wilkie, Tr. I at 171.

for the marginal minute of cell phone use is about seven cents, the average user talks on a cell phone for about 680 minutes per month.<sup>355</sup>

A countervailing effect could mitigate the potential harm from termination charges in the context of Internet access. To the extent that broadband providers collect termination charges on a per-customer basis (or on a usage basis that depends on the number of customers), the broadband provider has an incentive to lower the subscription price to increase the number of subscribers from which it can collect access revenues.<sup>356</sup> Also, some content providers whose business model is based chiefly on advertising revenue may choose to retain that model if they are charged termination fees that are sufficiently small. Here, again, the ability to collect such access fees creates an incentive for the broadband provider to lower subscription rates. However, it may also cause certain marginal, advertiser-supported content to become unprofitable and thus to exit the market.

The second type of potential harm from termination charges is a long-run harm. Broadband providers that can charge content and applications providers terminating access fees might be able to expropriate some of the value of content or applications from their providers.<sup>357</sup> If so, the incentives to generate such content and applications will be reduced; in the long run, consumer choice of content or applications could be reduced as well. One Workshop participant suggested that the greater ubiquity of Internet content – relative to cell phone content – might arise from the fact that, historically, the networks over which Internet content is downloaded have operated under regulations limiting terminating charges, whereas cell phone networks have not.<sup>358</sup>

Some net neutrality opponents argue, however, that termination and related fees may be the most efficient way to deal with what they see as inevitable Internet congestion, routing time-sensitive and time-insensitive traffic during periods of congestion according to the relative demand for content and applications.<sup>359</sup> Moreover, they argue that broadband providers must be able to charge directly and explicitly for desired routing to have the proper incentives to invest efficiently in the necessary infrastructure.<sup>360</sup> Without delivery charges, they argue, content providers whose revenues come chiefly through advertising would have an incentive to free-ride on

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<sup>355</sup> *Id.* at 172.

<sup>356</sup> *Cf.* Sidak, *supra* note 287, at 361 (ISP acts as intermediary and needs end users to demand content).

<sup>357</sup> Farrell, Tr. I at 155.

<sup>358</sup> Wilkie, Tr. I at 199.

<sup>359</sup> *See, e.g.,* Lenard, Tr. I at 179.

<sup>360</sup> *See id.*



infrastructure investments. That could distort both the magnitude and distribution of infrastructure investments, as well as pricing elsewhere in the market.<sup>361</sup>

These issues, as discussed above, also raise difficult empirical questions about the relative magnitudes of countervailing incentives in particular present and future market contexts. Also relevant are the relative costs of providing for certain possible infrastructure investments and the marginal costs of making various improvements available to different consumers. Although systematic, empirically-based answers to these questions have not yet been forthcoming, it is clear that ongoing infrastructure investment is substantial and that desired applications will require further investment still.<sup>362</sup>

## 2. Exclusive Content and Balkanization of the Internet

Commentators also have expressed concern about the potential balkanization of the Internet.<sup>363</sup> The concern is that if broadband providers are allowed to sign exclusive deals with content and applications providers, end users may be unable to access much of the content and applications they desire through any single Internet service provider.

Net neutrality proponents have suggested that the experience of other markets with exclusive content arrangements is instructive. They have cited, for example, Australia's experience with cable television. Australian regulatory authorities franchised two competing cable companies, but did not impose any program access rules.<sup>364</sup> Thus, each cable company was able to develop proprietary content or sign existing program

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<sup>361</sup> Several commentators have raised concerns about distributing the costs of infrastructure improvements required only for certain services across large groups of consumers who may not demand such services. One Workshop participant suggested that, in addition to demand for very basic broadband services, there appears to be continuing demand for narrowband, or dial-up, Internet access: "Most people who have dial up say they have no interest in broadband connections, according to the Pew Internet American Trust Foundation in a recent survey they did." Wallsten, Tr. II at 47.

<sup>362</sup> See, e.g., *id.* at 46 (regarding ongoing investment).

<sup>363</sup> See, e.g., Bachula, Tr. II at 174 ("To compete in this global economy, we need a simple, inexpensive and open network, not a balkanized one.").

<sup>364</sup> The program access rules promulgated by the FCC require any program owned by a cable company that is sent to any distributor via satellite to be made available to all program distributors. See *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Red 3359 (1993) (first report and order) (implementing the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §628(c)(2)(D), 106 Stat. 1460, 1494-95 (1992)). Any program owned by a cable company that is sent to distributors over terrestrial wire can be limited to any distributor that the owner desires. This is known as the "terrestrial loophole" because Section 628(c)(2)(D) only addresses satellite delivered programming. A rationale behind the loophole is that typically only local programming is distributed terrestrially, and this rule gives extra incentives to invest in local programming by allowing the developer to sell exclusive rights to distribute the programming. See NAT'L CABLE & TELECOMMS. ASS'N, THE EXISTING PROGRAM ACCESS RULES ARE WORKING AS INTENDED (2007), available at <http://www.ncta.com/DocumentBinary.aspx?id=564>.

networks to exclusive contracts. According to a Workshop participant, the result of this regulatory regime in Australia has been that virtually all available programming is carried on either one cable system or the other, but not both. Despite facing demographics in many regards similar to those of the United States, Australia's cable industry is reported as having only a 22% penetration rate.<sup>365</sup>

Opponents of net neutrality have argued that certain exclusive arrangements may be necessary in some cases. One Workshop participant argued that "the ability to bundle, make exclusive deals, [and] otherwise have non-neutral business models, may be the key to facilitating entry."<sup>366</sup> The participant elaborated: "there are three pretty salient facts about the broadband business. One is that is a very young business[,] . . . the second is that it is a distribution business, and the third [is] that it is a business with very large fixed costs."<sup>367</sup> He also stated that "[n]on-neutral business models may very well be essential to provide sufficient revenues to cover the cost of investments"<sup>368</sup> and that "exclusive deals . . . may be key to facilitating entry."<sup>369</sup>

In addition, net neutrality opponents have noted that there may be significant market pressures against exclusive dealing arrangements, as consumers accustomed to a broad range of content and application offerings may be unsatisfied with narrower ones. As one Workshop participant argued, "we have attempts at service providers putting together walled gardens. And they uniformly failed, right? AOL was a walled garden. People didn't want it."<sup>370</sup>

### C. Potential Benefits of Vertical Integration

The potential costs of vertical integration by broadband providers into content or applications must be weighed against the potential benefits offered by vertical integration. The most-cited benefit is that the potential to earn additional profits from

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<sup>365</sup> See Wilkie, Tr. I at 175.

<sup>366</sup> Lenard, Tr. I at 178. Lenard noted that "a possible example is the Clearwire / Bell Canada deal in which Clearwire entered into some sort of an exclusive deal with Bell Canada to provide services in exchange for a \$100 million investment." *Id.* Clearwire is a provider of wireless non-line-of-sight broadband access. It signed a deal with Bell Canada to make Bell Canada the exclusive provider of VoIP capabilities for Clearwire's VoIP offering to its customers. As part of the deal, Bell Canada invested \$100 million in Clearwire. See Press Release, Bell Canada Enters., Bell Canada and Clearwire Corporation Form Alliance (Mar. 8, 2005), available at <http://www.bcc.ca/en/news/releases/bc/2005/03/08/72179.html>; see also Ed Sutherland, *Clearwire Clouds VoIP Picture*, WI-FI PLANET, Mar. 31, 2005, <http://www.wi-fiplanet.com/columns/article.php/3494171> (noting that Clearwire blocks access to other VoIP services).

<sup>367</sup> Lenard, Tr. I at 176.

<sup>368</sup> *Id.* at 177.

<sup>369</sup> *Id.* at 178. Similarly, another Workshop participant suggested that perhaps there should be different rules governing the behavior of entrants than incumbents. See Rosston, Tr. I at 165.

<sup>370</sup> Pepper, Tr. I at 136-37.

selling its content or applications to more customers will increase the vertically integrated firm's incentives both to build out the network (*i.e.*, extend its reach) and to invest in technology that will increase the types and/or amount of content it can offer.<sup>371</sup> In addition, there may be technical or information efficiencies for a vertically integrated entity, even where a platform provider tries to cooperate with independent content or applications developers.<sup>372</sup>

It is well understood that, when a delivery system owns the product it delivers, the delivery system has a greater incentive to serve more consumers.<sup>373</sup> Thus, sharing in the profits of content gives a broadband provider a greater incentive to build out its network and to lower access prices to reach additional customers. In addition to giving incumbents incentives to expand, net neutrality opponents also argue that certain vertical relationships might be beneficial to generating new entry, "and some of these vertical relationships that people are concerned about . . . may increase the profits of a new entrant, [and] may be the thing that is necessary in order to get a new entrant . . . to compete."<sup>374</sup>

A second potential benefit from vertical integration is increased choice of content and applications. Just as increased content revenue can provide an incentive for build-out of a network, so too can the prospect of new subscribers create an incentive to invest in content or applications that might attract additional customers – even if the revenues that would be derived from the content or applications as stand-alone offerings would not cover their costs.<sup>375</sup> For example, according to a Workshop participant, vertical integration by cable television providers in the early days of the cable industry gave those providers additional incentives to invest in content to make the entire cable package more attractive to potential subscribers.<sup>376</sup>

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<sup>371</sup> See Rosston, Tr. I at 165 ("[B]ut on the other hand you do need to have incentives to – for the incumbents to upgrade their networks, as well, and to try to provide higher speed access."); *see also* Lenard, Tr. I at 177.

<sup>372</sup> See, e.g., Farrell & Weiser, *supra* note 318, at 102.

<sup>373</sup> See *id.* at 101.

<sup>374</sup> Lenard, Tr. I at 164-65.

<sup>375</sup> Compare Farrell, Tr. I at 204 ("[A]lthough, as an economist, I certainly agree that there are kinds of innovation for which you really do need to make sure that the financial incentives are there, I also think it's important to remember that openness to many, many millions of people doing little stuff is quite important."), with Rosston, Tr. I at 214 ("[W]hen you say ample supply of content on the Internet, it's true, there is a lot of stuff out there. But it may not be the right stuff that people want to use that, for example, may cause people to increase their demand for broadband, even though it may be a zero profit on the content side.").

<sup>376</sup> Rosston, Tr. I at 197.

#### **D. Brief Summary and Remaining Questions**

The prospect of increased vertical integration of broadband services raises various and competing concerns. In particular, vertical integration in broadband Internet goods and services markets could prompt Internet access providers to block or degrade content or applications or charge higher prices. On the other hand, because vertical integration may offer certain efficiencies that are procompetitive and pro-consumer, and because potential harms are contingent, not all vertical integration is problematic. In particular, some degree of vertical integration may facilitate investment in infrastructure, investment in content or applications, optimization of fit between content and delivery systems, and pricing benefits for certain consumers. Some degree of vertical integration may also facilitate entry, and thereby increase competition, in broadband Internet access markets. The balance between competing incentives raises complex empirical questions and may call for substantial additional study of the market generally, of local markets, or of particular transactions.

There are also important questions regarding the costs of various proposed means of addressing the harms vertical integration may cause, should they arise. For example, one Workshop participant who has done considerable work to chart possible harms from vertical integration in this market suggested that a vertical separation “*could* be part of the discussion,”<sup>377</sup> but that it is not necessarily cost-justified, and that the debate on net neutrality has not yet provided “any good exposition of answers to that question.”<sup>378</sup> Another participant suggested that “the terminating monopoly problem, the problem of final interconnection is real,” but stated that existing laws and regulations were adequate to deal with it and that one ought to “proceed with prudence and caution.”<sup>379</sup>

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<sup>377</sup> Farrell, Tr. I at 213 (emphasis added).

<sup>378</sup> *Id.* at 215.

<sup>379</sup> Wilkie, Tr. I at 218.

## V. DATA PRIORITIZATION

One of the central issues in the network neutrality debate is network operators' use of prioritization – that is, differential treatment of Internet traffic on the basis of certain characteristics of the data. As discussed in Chapter I, to date, the Internet has used primarily a best-efforts protocol that transmits packets on a first-in-first-out basis. Widespread adoption of new prioritization technologies that can provide specialized handling for particular packets based on their application type, source, or content could result in significant changes in the functioning of the Internet.

Prioritization can occur in numerous forms. For purposes of this Chapter, prioritization refers to the provision of higher or lower transmission priority to packets of data. Such priority can be given to packets by different entities in the provision and delivery of data, through various technologies and business models. These prioritization efforts can occur throughout the network, including at the last-mile and in the backbone.<sup>380</sup> As described in Chapter I, last-mile ISP prioritization may involve utilization of special algorithms in routers to prefer packets based on their application type, source, or content by, for example, channeling them into separate bandwidths, scheduling them ahead of other packets, providing shorter paths to their destinations, and making them less likely to be dropped should the number of waiting packets become too large.<sup>381</sup>

To some extent, long-standing techniques provide a means of traffic handling whose effects are similar to the effects of prioritization. For example, a content or applications provider may have a preferred connection to the Internet through its “first-mile” ISP, via a higher-capacity link, resulting in faster uploads than those available to other such providers.<sup>382</sup> Recently, though, technologies for prioritization have significantly increased the options for favoring some transmissions and disfavoring

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<sup>380</sup> While some prioritization does occur on the backbone, prioritization generally has not been necessary – nor would it apparently have much effect – in the backbone, given the large capacity of the networks comprising the backbone. See Ryan, Tr. I at 239-40. However, new bandwidth-intensive technologies may test backbone capacity in the future.

<sup>381</sup> Peha, *supra* note 36, at 5-6.

<sup>382</sup> *Id.* at 5. This option, priority at the “first mile” rather than the “last mile,” prioritizes the upload of some data packets over others, though Peha claims that “it alone does not allow the network to discriminate among traffic from a given source.” *Id.* Also, a recent OECD report notes that “administrators have implemented traffic shaping to smooth out traffic flows and prevent bottlenecks, typically in an effort to improve the user’s experience” in a way that did not use “high-speed deep-packet inspection and prioritisation.” ORG. FOR ECON. COOPERATION & DEV., INTERNET TRAFFIC PRIORITISATION: AN OVERVIEW 8 (2007) [hereinafter OECD Report], available at <http://www.oecd.org/dataoecd/43/63/38405781.pdf>. Further, as described in Chapter I, network operators can provide separate, dedicated bandwidth for certain applications such as video through VPNs. That is, not all broadband IP communications need be part of the Internet. Such use of VPNs currently does not raise much objection, see, e.g., Davidson, Tr. I at 229, though some commentators are concerned that continued growth of this practice eventually could decrease the total amount of bandwidth available for the wider Internet and possibly transform the Internet itself into a “slow lane.” See Lehr, Tr. I at 63.

others. The development of such technologies appears to be based in part on the increasing demand for content and applications that benefit from improved quality of service ("QoS"), which "typically involves the amount of time it takes a packet to traverse the network, the rate at which packets can be sent, and the fraction of packets lost along the way."<sup>383</sup>

Even with prioritization, ISPs or other network operators may not be able to guarantee a promised level of QoS because network operators can only control for delivery within their own networks and not for delivery throughout the rest of the Internet's multiple networks (absent agreements between networks to honor each other's QoS determinations).<sup>384</sup> Nevertheless, within the last-mile ISP's network, prioritization could allow the ISP to offer different levels of QoS.

The debate over prioritization focuses on disagreements about what advantages prioritization may have for ISPs, content and applications providers, and end users, and under what circumstances; whether it entails countervailing harms; what the effects on broadband prices, innovation, and investment may be; and whether there are better alternatives. As a result of numerous conflicting views and concerns, policy makers considering whether to regulate prioritization need to examine the complexity of prioritization and its potential implications for the future of the Internet.

This Chapter is organized as follows. Section A addresses the potential reasons for ISPs and other network operators to prioritize data within their networks; Section B examines the feasibility of network operators expanding the capacity of their networks as an alternative to data prioritization; Section C discusses the several potential types and uses of data prioritization; and Section D provides concluding observations on prioritization.

#### **A. Why prioritize data?**

The Internet provides access to a vast range and volume of content and applications, for a huge number of firms and individuals providing and/or using them. Nonetheless, transmission capacity is finite, and peak demand at certain periods and locations may strain a network. Networks use different technologies with different overall capacities. With increasing numbers and sizes of transmissions to increasing numbers of users, congestion – especially at the last mile – can be a problem. From the perspective of end users, the best-efforts delivery approach provides an adequate experience for many uses, but congestion in a best-efforts context may render use of certain content and applications undesirable, and perhaps even impossible.

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<sup>383</sup> Peha, *supra* note 36, at 5. Some commentators use the term more broadly to include aspects such as security controls.

<sup>384</sup> OECD Report, *supra* note 382, at 9. As one company has noted in its comments to the Commission, the "current 'best efforts' Internet only permits a packet of data to arrive at its destination as fast as the slowest network over which it traverses." Alcatel-Lucent, Public Comment 1, at 5. *See also supra* note 120.

Some content and applications, such as live streaming video, some VoIP services, and online games, are latency-sensitive; that is, if packets do not arrive sufficiently close together, the communication will be unsuccessful.<sup>385</sup> Some transmissions, such as software downloads or movies, might be large enough that interference due to congestion would cause user frustration and cancellation. From the perspective of providers of such content and applications, the value of their product may be substantially enhanced by mechanisms to avoid congestion problems, which could include prioritization. The availability of prioritization also could enhance innovation with respect to new applications that require higher QoS for successful use.<sup>386</sup> On the other hand, some argue that the need for enhanced QoS is the exception rather than the rule. As one commentator observed, “watching prerecorded audio or video streams doesn’t need QoS, because you can use buffering.”<sup>387</sup> Moreover, according to commentators and industry participants, even “many VoIP systems seem to work pretty well without any special QoS support in the network.”<sup>388</sup>

Further, extensive use of some high-demand content and applications, such as peer-to-peer (“P2P”) file sharing, could overcrowd existing capacity and significantly interfere with access to even non-sensitive content and applications.<sup>389</sup> From the ISPs’ perspective, the importance of providing successful transmission may at times necessitate the use of traffic-handling mechanisms, and prioritization of packets has become an option for such traffic handling.<sup>390</sup> The value to both users and content and applications providers of avoiding congestion may provide opportunities for ISPs to increase both their own direct revenue and their customer base through prioritization.

In addition, the Internet provides users with a wealth of choices of content and applications. From any provider’s perspective, prioritization in delivery can be a means of making its offering better than those of its competitors – faster, more reliable, and more effective. For example, a provider of a high-quality, expensive application may choose, if given the opportunity, to pay for a high level of certainty that all its packets will arrive quickly, while an application that has a slightly greater tolerance for delay or

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<sup>385</sup> For example, VoIP applications require their voice data packets to be received by the end user within 50 milliseconds after they are first spoken. Otherwise, delay in the voice transmission degrades the VoIP experience so that a “real-time conversation” cannot occur. Peha, *supra* note 36, at 8. In contrast, e-mail data packets are not time-sensitive, and an additional delay of a few seconds (or even minutes) of the data packets making such an electronic text message does not significantly affect the user’s experience with this application.

<sup>386</sup> See Ryan, Tr. I at 241.

<sup>387</sup> Felten, *supra* note 36, at 9.

<sup>388</sup> *Id.*; see also Davidson, Tr. I at 274 (stating that “many providers of Voice Over IP do not believe that they need prioritization in order to offer their service, including [Google’s voice service]”).

<sup>389</sup> See *supra* Chapter I.C.

<sup>390</sup> See *supra* Chapter I.C.

dropped packets may decline to pay for priority in an effort to keep costs down.<sup>391</sup> From the ISPs' perspective, the value placed by content and applications providers on priority treatment may create opportunities to increase ISP revenues, through general fees, partnerships, or financial interests in affiliated providers.

However, prioritization also could lead to countermeasures by some providers or users, leading ISPs to degrade a broader range of packets and/or fine tune their routers to deal with these circumventions, thus sparking an Internet "arms race" to provide or thwart prioritization.<sup>392</sup> For example, a user could encrypt all traffic using a particular application, which may prevent the ISP from recognizing and deprioritizing the application; the ISP, in turn, could respond by deprioritizing all encrypted transmissions. The potential for such an arms race and the unpredictability of its outcome adds an extra level of difficulty to determining the potential value and effects of prioritization.

## **B. Prioritization versus Capacity Expansion**

Some commentators predict a future of Internet traffic problems that will necessitate the use of prioritization technologies. For example, at the Workshop, a participant cited a report suggesting that if YouTube alone becomes a high-definition application, it would double the capacity needs of the entire Internet.<sup>393</sup> Others believe that these concerns are overblown and that prioritization at the last mile will not be required if individual users who desire increased capacity pay for increased bandwidth.<sup>394</sup>

Network expansion to build out capacity at a rate that outpaces congestion might eliminate any need for prioritization. A Workshop participant explains this view:

Note that the incentive to discriminate with respect to QoS and price is based on the assumption that there are limited resources. In fact, a network has a choice on that. Networks can deploy far more communications capacity than is usually needed, so congestion is simply not a problem.<sup>395</sup>

Another Workshop participant noted that his company's backbone network has far more capacity than normally needed, which readily allows for bursts in usage, outages, and other circumstances.<sup>396</sup> Similarly, the creators of the private Internet2 high-speed

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<sup>391</sup> Schwartz, Tr. I at 257-58.

<sup>392</sup> See generally Lehr et al., *supra* note 131.

<sup>393</sup> McCormick, Tr. I at 244; see also Wolf, Tr. II at 146-48.

<sup>394</sup> See, e.g., Davidson, Tr. I at 231.

<sup>395</sup> Peha, *supra* note 36, at 8.

<sup>396</sup> Ryan, Tr. I at 239-40.



network decided not to use prioritization techniques and instead relied on increased capacity at the last mile.<sup>397</sup>

Building and maintaining higher-capacity networks obviously creates costs, as do deploying and maintaining prioritization technologies. At issue is whether the costs of having enough capacity for peak loads, leaving substantial excess capacity at other times, outweigh the (direct and indirect) costs of using prioritization techniques instead. A participant has commented that “[e]conomically, it doesn’t make sense that the solution is always to build more. That’s going to involve carrying a lot of excess capacity, which is going to be expensive.”<sup>398</sup> In contrast, another participant has suggested the possibility that higher-capacity networks could provide cost savings through the use of cheaper processors that do not engage in sophisticated packet inspection and allow for simplified billing of capacity usage rather than using complicated prioritization algorithms.<sup>399</sup> The 1990s saw dramatic improvements in fiber-optics technology that forestalled the need for more expensive prioritization technologies to handle capacity issues.<sup>400</sup> However, progress in routing technology may upend this trend, and experts disagree on the question of whether network operators will have a greater incentive to continue increasing capacity or to turn to new prioritization technologies.<sup>401</sup> Opportunities for additional revenue through prioritization and costs attendant on these opportunities, as discussed below, also could be factors.<sup>402</sup> In the end, “[t]he best strategy depends on whether processing or communicating gets cheaper at a faster rate.”<sup>403</sup>

Another issue is whether broadband capacity can continue without limit to expand faster than the demands placed on it by new content and applications. For example, one last-mile network operator has estimated that “peer-to-peer file sharing services such as

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<sup>397</sup> Bachula, Tr. II at 169 (“It was cheaper [for Internet2] to provide more bandwidth than to install these sophisticated quality of service prioritization techniques. With enough bandwidth in the network, there is no congestion, and video bits do not need preferential treatment. All the bits arrive fast enough even if intermingled.”). A Workshop participant noted, however, that Internet2 operates for a limited number of academic users and suggested that it should not be a model for the commercial Internet. Wolf, Tr. II at 175.

<sup>398</sup> Schwartz, Tr. I at 255.

<sup>399</sup> Peha, *supra* note 36, at 8.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 8-9.

<sup>402</sup> One means for ISPs to reap additional income from excess capacity, as opposed to prioritization, is selling available extra capacity to providers or users as “boosts” of extra bandwidth for such specific tasks as downloading a movie or software. *E.g.*, Marguerite Reardon, *Comcast Gives Broadband Users a Speed Boost*, CNET NEWS.COM (June 1, 2006), [http://news.com.com/Comcast+gives+broadband+users+a+speed+boost/2100-1034\\_3-6079070.html](http://news.com.com/Comcast+gives+broadband+users+a+speed+boost/2100-1034_3-6079070.html).

<sup>403</sup> Peha, *supra* note 36, at 8.

BitTorrent already consume more than one-half of Internet bandwidth.”<sup>404</sup> Given the use of P2P and the possibility of other new bandwidth-intensive technologies such as high-definition Internet video, capacity expansion alone may not be capable of warding off congestion.<sup>405</sup>

Because there is little publicly available data regarding current traffic rates, it is difficult to ascertain the extent of congestion problems at this time.<sup>406</sup> The greater the actual or perceived congestion effects are, the greater are the incentives for each party involved to adopt approaches for active traffic handling. A variety of prioritization approaches have the potential to address congestion. The discussion below focuses on the provision of last-mile broadband access by DSL and cable modem services. Other broadband platforms (such as wireless, satellite, or broadband over powerlines) may have different overall capacity constraints and, therefore, may entail different tradeoffs between capacity increases and prioritization to handle increasing amounts of traffic.

### C. Types and Uses of Data Prioritization

#### 1. Prioritization Based on Type of Application

The individual types and uses of prioritization are discussed separately because their advantages and disadvantages vary significantly. Perhaps the least controversial type of prioritization is uniform application-based prioritization or “access tiering,” under which all applications of a certain type, such as VoIP or video, are in the same access tier and receive equal priority in delivery.

ISPs can manage traffic flow based on application type by, among other methods, identifying and assigning low priority to high-bandwidth applications to preserve sufficient bandwidth for other applications.<sup>407</sup> For example, routers that can identify P2P packets could allocate such traffic in a number of ways to prevent them from overwhelming the network. Routers can be programmed to prioritize packets so that a portion of the network is able to run non-P2P traffic without competing with high-bit-

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<sup>404</sup> See Verizon Communications Inc., Public Comment 60, at 14.

<sup>405</sup> See Xiaojun Hei, et al., Polytechnic University, *A Measurement Study of a Large-Scale P2P IPTV System* 1 (Nov. 2006), available at <http://cis.poly.edu/~ross/papers/P2PliveStreamingMeasurement.pdf> (“With the widespread adoption of broadband residential access, IPTV may be the next disruptive IP communication technology. With potentially hundreds of millions of users watching streams of 500 kbps or more, IPTV would not only revolutionize the entertainment and media industries, but could also overwhelm the Internet backbone and access networks with traffic.”). But see *id.* at 13 (“Our study demonstrates that the current Internet infrastructure is capable of providing the performance requirements of IPTV at low cost and with minimal dedicated infrastructure.”).

<sup>406</sup> Lehr, Tr. I at 36.

<sup>407</sup> Peha suggests ISPs may deprioritize the packets of applications that do not include within themselves mechanisms to reduce transmission rates in times of congestion. Peha, *supra* note 36, at 7.

demand P2P traffic.<sup>408</sup> Similarly, routers can allocate peak-time bandwidth by providing certain types of traffic with only off-peak priority. For example, an Australian ISP assigns low priority to P2P traffic between noon and midnight. Such a policy is meant to create incentives for users who use P2P technologies to shift such usage to off-peak hours.<sup>409</sup>

Conversely, ISPs can identify data packets that are more sensitive to delayed delivery than others and give these packets higher priority to ensure timely delivery. For example, VoIP packets may be given priority by routers because delay in delivering each packet of voice data could make the voice communication unacceptable. A router algorithm could meet the QoS needs of such applications by identifying each application type and its urgency level and assigning priority to time-sensitive packets. As one company described its routers' functionality, "preferential treatment can be given to latency-sensitive applications during periods of increased network congestion," and "[p]acket marking based on application classification . . . enables routers upstream or downstream . . . to prioritize traffic based on individual application requirements and address congestion at relevant network points."<sup>410</sup>

Some commentators have suggested that it will be difficult to define access tiers and to categorize packets, given the heterogeneity of applications and the constantly evolving nature of Internet usage.<sup>411</sup> Also, ISPs and providers may disagree on the appropriate tier for particular applications. For example, disputes could emerge regarding whether applications belong in the voice tier or video tier – especially as applications converge.

#### **a. Charging for Application-based Prioritization**

Although the use of application-based prioritization algorithms to improve delivery of certain types of applications (*e.g.*, latency-sensitive ones) or deprioritize others (*e.g.*, P2P) purely as an internally defined traffic-management tool has not raised significant controversy, the same cannot be said of the prospect of ISPs and other network operators charging fees for such application-based prioritization. As explained by an opponent of network neutrality, when an ISP seeks payment for priority based on

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<sup>408</sup> Oregon State University ResNet: Bandwidth, Security & Architecture, [http://oregonstate.edu/resnet/guides/security\\_architecture.php](http://oregonstate.edu/resnet/guides/security_architecture.php) (last visited May 17, 2007) ("Web browsing, SSH, telnet and games are set to a higher priority. . . . All other traffic bound for the Internet (not counting P2P) such as ftp, streaming audio or video, is given a lower priority. If the bandwidth is available, then the only limit is our bandwidth cap. Peer to Peer (P2P) is given the lowest priority.").

<sup>409</sup> OECD Report, *supra* note 382, at 31. In another example, a United Kingdom ISP recently announced traffic-shaping policies that created priority categories based on the type of application and the user's broadband service plan. *Id.* P2P traffic is slated for the next-to-last level of priority. *Id.*

<sup>410</sup> CISCO SYS., CISCO SERVICE CONTROL: A GUIDE TO SUSTAINED BROADBAND PROFITABILITY 4-5 (2005), available at <http://www.democraticmedia.org/PDFs/CiscoBroadbandProfit.pdf>.

<sup>411</sup> See Lehr, Tr. I at 32-33.

type of application, it provides a revenue stream to the ISP to support the service and, perhaps, additional investment in its network.<sup>412</sup> Further, as one commentator has maintained, “[i]f broadband companies did not believe they could maximize the value of the technology by selling premium products to purchasers willing to acquire them, they would likely invest in other areas.”<sup>413</sup>

ISPs receiving payments from content and applications providers for priority service might choose to lower access prices for users and thus increase broadband penetration, providing even greater value to providers. The market for broadband Internet access has been described as a “two-sided market” because “both consumers and content/applications providers derive value from the sale of broadband access.”<sup>414</sup> An ISP has asserted that last-mile ISPs can “allocate charges based on each side’s willingness and ability to pay,” which will allow last-mile ISPs to “keep prices for consumers lower than they would otherwise be.”<sup>415</sup> Further, a Workshop participant has argued that charging providers for prioritization would “increase economic welfare by increasing broadband penetration[] because it would enable network operators to subsidize access prices for income constrained or price-sensitive end-users who currently forgo broadband entirely.”<sup>416</sup> On the other hand, according to some network neutrality proponents, users could experience higher costs to access Internet content and applications, reflecting their costs for priority service.<sup>417</sup> Some proponents further suggest that network operators already receive significant fees for access by content and applications providers.<sup>418</sup>

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<sup>412</sup> Verizon Communications Inc., Public Comment 60, at 13-14. *See also* Telecommunications Industry Association, Public Comment 56, at 4 (“Broadband Internet access service is no different than any other market. Network neutrality rules that restrict [differentiated pricing and product offerings] could end up harming consumers and driving up costs because network providers will lose the incentive to maintain and upgrade their increasingly congested networks.”); U.S. Chamber of Commerce, Public Comment 58, at 4 (“Mandating ‘net neutrality’ provisions will create regulatory barriers that deter investment in these high-speed broadband networks, which will ultimately hurt every American and, certainly, the nation’s small businesses.”).

<sup>413</sup> American Bar Association Section of Antitrust Law, Public Comment 2, at 6.

<sup>414</sup> Verizon Communications Inc., Public Comment 60, at ii.

<sup>415</sup> *Id.*

<sup>416</sup> Sidak, *supra* note 287, at 362; *see also* Schwartz, Tr. I at 258; Kahn, Tr. I at 188-89 (“Would you say that newspapers should be prohibited from charging advertisers, and should get their money entirely from the people who buy the newspapers?”).

<sup>417</sup> “‘It seems to me that if broadband operators are charging Google and Amazon for the use of their network, then those costs will automatically get passed on to consumers,’ said Gigi Sohn, president and co-founder of Public Knowledge, a Beltway advocacy group. ‘And ultimately that will lead to higher prices for consumers.’” Marguerite Reardon, *Without “Net Neutrality,” Will Consumers Pay Twice?*, CNET NEWS.COM (Feb. 7, 2006), [http://news.com.com/Without+Net+neutrality,+will+consumers+pay+twice/2100-1034\\_3-6035906.html](http://news.com.com/Without+Net+neutrality,+will+consumers+pay+twice/2100-1034_3-6035906.html).

<sup>418</sup> *See, e.g.*, Davidson, Tr. I at 289; Tulipane, Tr. I at 264.

Charging for application-based prioritization raises two further issues of substantial concern to commentators. First, there is disagreement among participants in the network neutrality debate on whether creating priority “fast” lanes necessarily would result in degraded service in the remainder of a given network. For example, a Workshop participant has stated that prioritization in the last mile “degrades competing services, and creates incentives to relegate some of those competing services to a slow lane . . . [given] that the only way that you can have a fast lane that you can charge for, that is useful, is if there are also slow lanes that are less useful, and less attractive.”<sup>419</sup> By contrast, an ISP has asserted that “providing better quality to some does not necessarily entail inferior service for others; next-generation broadband networks will have enough capacity and functionality to provide superior services across the board.”<sup>420</sup>

ISPs have incentives to maintain sufficient best-efforts service that allows access to all content and applications providers because the value of an ISP priority service to a provider would be affected by the size of the ISP’s customer base. ISPs may lose subscribers if they do not provide sufficient access. Some Workshop participants argued, however, that ISPs also have an incentive to create scarcity of bandwidth so that “they can charge more, restricting output in order to raise prices, and charging monopoly rents.”<sup>421</sup> Whether preferred priority arrangements lead to an ineffective slow lane likely would depend on various factors, including the extent of capacity constraints, application and content requirements, and the demand for prioritization services, as well as the potential tradeoff in income streams from content and applications providers paying for priority transmission and from customers that demand non-prioritized Internet access.

Second, access-tier prioritization could require content and applications providers to make payment arrangements with multiple last-mile ISPs worldwide. Currently, as a general matter, both providers and users have contracts only with their own ISPs. Each ISP and other network operator has arrangements with others that result in the delivery of the packets across networks. Some commentators have observed that, if last-mile ISPs impose charges on remote providers for priority delivery to their own customers, providers would need to make arrangements with every such ISP to obtain priority treatment for packets directed to the ISPs’ customers.<sup>422</sup>

Aggregator services or other kinds of settlement services could simplify this situation.<sup>423</sup> Despite an initial phase of multiplicity of arrangements, market forces may

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<sup>419</sup> Davidson, Tr. I at 228-30; *see also* Lehr et al., *supra* note 131, at 19; CENTER FOR DEMOCRACY & TECHNOLOGY, PRESERVING THE ESSENTIAL INTERNET 7-8 (2006), *available at* <http://www.cdt.org/speech/20060620neutrality.pdf>.

<sup>420</sup> Verizon Communications Inc., Public Comment 60, at 17.

<sup>421</sup> *See, e.g.*, Bachula, Tr. II at 170.

<sup>422</sup> *See, e.g.*, Davidson, Tr. I at 226, 274-75.

<sup>423</sup> Payment settlement mechanisms for other two-sided markets, such as stock exchanges and credit cards, may provide helpful models. *See* Blumenthal, Tr. I at 287.

lead to pooling of demand for Internet access via a common ISP<sup>424</sup> or other companies offering to handle the multitude of transit negotiations for content and applications providers. Alternatively, fees for application-based prioritization might be incorporated into peering and other arrangements among network operators, so that the fees an applications provider pays to its own ISP would reflect the priorities granted by last-mile ISPs. The issue remains whether such arrangements between and among networks would be too complex to sustain. A Workshop participant, for example, stated that the methodology for charging for priority access has not been thought through as a technical matter and, if attempted, likely would not work at all.<sup>425</sup>

## **2. Prioritization Based on Source**

Prioritization also could be based on the source of the data packet, that is, the particular content or applications provider. Prioritization by source would allow ISPs to sell differentiated transmission offerings to content and applications providers.<sup>426</sup> An ISP, for example, could offer two or more levels of QoS, allowing providers to choose the priority level they are willing to buy for particular content or applications.<sup>427</sup> This would create incentives for providers to determine accurately their data-transmission needs, and allow network operators to allocate their resources more efficiently. Providers that do not need peak performance or timing could pay less for less urgent prioritization or standard best-efforts delivery. Providers also could tailor their content and applications to account for these realities. For example, a VoIP provider could offer different on-peak and off-peak rates to its customers to mirror the rate structure of the ISP. A Workshop participant has stated that “pricing actually becomes a form of congestion control that has quantifiable advantages over more traditional technical approaches.”<sup>428</sup>

### **a. Source-based, Provider-selected Priority Levels**

Source-based prioritization, in which the ISP simply offers different QoS levels at graduated prices to any interested provider, can, like paid application-based prioritization, provide the ISP with an income stream and the concomitant potential for profitability, expansion, innovation, and increased broadband deployment. Charges for source-based prioritization also may create incentives for applications providers to innovate in their

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<sup>424</sup> OECD Report, *supra* note 382, at 5.

<sup>425</sup> Ryan, Tr. I at 287-88.

<sup>426</sup> ISPs also could offer priority transmission services based on the destination of the data (for example, data packets sent to a particular content or applications provider).

<sup>427</sup> Schwartz, Tr. I at 257.

<sup>428</sup> Peha, *supra* note 36, at 8.

applications to minimize the level of priority they need.<sup>429</sup> A QoS system for which each provider chooses whether to have higher-quality service for a charge could encourage new types of products.<sup>430</sup> On the other hand, it could discourage innovative but capacity-demanding products by providers that cannot initially pay for a higher quality of service.

**b. Source-based Prioritization and Preferential Arrangements**

The most contentious issue regarding source-based prioritization appears to be ISPs favoring or disfavoring particular content and applications providers based on their identity, rather than the nature of their offering. For example, ISPs could favor affiliated or partnered providers. Network neutrality advocates argue that the ISP could act as a gatekeeper controlling which content and applications providers succeed and which fail – a role that could have a significant impact on the future face of the Internet. Some commentators who do not object to access tiering to resolve congestion problems do object to prioritization that discriminates among providers within a tier.<sup>431</sup>

Prioritization based on source would allow a content or applications provider to differentiate its product through improved delivery. Such product differentiation could aid providers in competing with others offering otherwise similar products.<sup>432</sup> In addition, ISPs that own or are otherwise affiliated with providers may give them priority service, for a lower charge than they make available to other providers for the same service, to the ISP's ultimate financial benefit.<sup>433</sup> Prioritization through preferential arrangements has the potential to provide ISPs with additional revenue, perhaps much more than other forms of prioritization. On the other hand, if a system of contracts develops between the ISPs and providers, it is possible that providers of the most popular content and applications could charge an ISP to make the providers' offerings available to the ISP's customers.<sup>434</sup>

Some commentators view network operators' use of prioritization as potentially creating barriers to entry or unfairly using an ISP's position with its customers to

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<sup>429</sup> In this respect, the development of broadband itself was a means of obtaining higher QoS, and its increased capacity encouraged providers to create continually more complex content and applications, making narrowband a less and less useful access route.

<sup>430</sup> Yoo, Tr. II at 220 (using the example that Medtronic will only provide heart monitoring services if it can obtain guaranteed QoS in terms of response time).

<sup>431</sup> See, e.g., Windhausen, Jr., *supra* note 238, at iii ("Net Neutrality does not necessarily prevent network operators from offering levels of access, at higher rates, as long as the tier is offered on a nondiscriminatory basis to every provider . . .").

<sup>432</sup> Schwartz, Tr. I at 259.

<sup>433</sup> For example, Cisco's marketing materials note that the option of higher priority delivery "provides added incentive for the nonfacility operator to partner with the service provider for joint delivery of quality services." CISCO SYS., *supra* note 410, at 8.

<sup>434</sup> Davidson, Tr. I at 288-89.

disadvantage competitors of its affiliated provider;<sup>435</sup> others consider it an appropriate business model for ISPs and providers to seek growth and investment.<sup>436</sup> Some believe competitive pressures will limit the use of such practices.<sup>437</sup> Others believe that competition among ISPs is too attenuated<sup>438</sup> or that information on the use of such prioritization is too inaccessible to provide a restraining force.<sup>439</sup>

Source-based prioritization also may raise some of the same concerns as application-based prioritization, such as the adequacy of a best-efforts “slow lane.” Prioritization technologies enable not only complete blocking of disfavored content or applications, but also degrading of their delivery that may, in the limit, be tantamount to blocking.<sup>440</sup> If an ISP enters exclusive deals for priority and simultaneously fails to provide for adequate delivery of non-priority packets, then the ISP could effectively eliminate the traditional ability of every user to reach every content and applications provider (and vice versa) with a single Internet interface.<sup>441</sup>

In addition, potentially significant transaction costs could be introduced if each provider must choose and communicate its desired level of QoS. Prioritization for preferred sources requires the creation of preferred source arrangements; that is, negotiations between providers and any and all remote ISPs. A Workshop participant pointed to cable television as an illustration of such a system – one that would entail complex negotiations between every content and applications provider and ISP, imposing substantial transaction costs that do not now exist for Internet transmissions.<sup>442</sup> For many providers, especially new entrants, niche interest providers, and individuals posting content, the costs of obtaining priority through individual ISP arrangements could be

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<sup>435</sup> See, e.g., Tim Wu, *The Broadband Debate: A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 89 (2004) (“The NN rules create a structural bias that favors entry of any player, operator or application, or equipment-developer, into the market for consumer usage of the Internet. They are designed to make the Vonage story repeat itself.”).

<sup>436</sup> See, e.g., Pepper, Tr. I at 88-89; Verizon Communications Inc., Public Comment 60, at 5-6.

<sup>437</sup> See, e.g., Verizon Communications Inc., Public Comment 60, at 27-28; McCormick, Tr. I at 246-47.

<sup>438</sup> See, e.g., G. Sohn, Tr. I at 96-98; Feld, Tr. II at 20-21. The state of competition in the broadband Internet access area is discussed in more detail in Chapter VI below.

<sup>439</sup> See, e.g., Posting of Patrick Barnard to VoIP Blog, <http://blog.tmcnet.com/blog/rich-tehrani/voip/is-net-neutrality-enforceable.html> (Mar. 4, 2006) (“[C]onsumers can't tell whether the packets they are receiving have been properly 'prioritized' - so, in the absence of these complaints, who will be responsible for policing the Internet to make sure network operators aren't 'degrading' signals – even to the slightest of degrees?”). But see Pepper, Tr. I at 94 (asserting that large service providers “have the ability to identify” problems such as discrimination).

<sup>440</sup> See, e.g., Davidson, Tr. I at 229 (citing Rogers Cable in Canada as degrading network video traffic).

<sup>441</sup> See also *supra* Chapter IV.B.2 for a discussion of concerns over the potential balkanization of the Internet.

<sup>442</sup> Tulipane, Tr. I at 260-63.



prohibitive.<sup>443</sup> These costs could function as an effective barrier to entry for such providers with products that require priority, and as a barrier to entry for any provider if ISPs do not maintain adequate resources for the best-efforts portions of their networks.<sup>444</sup>

Finally, preferred priority arrangements could entail exclusions of non-preferred content and applications providers. For a provider with an application that requires priority treatment, an ISP's preferred arrangement with a competitor may preclude that provider's ability to reach the ISP's customers. Again, if the ISP does not maintain adequate resources for best-efforts delivery, all providers excluded from priority arrangements may effectively be precluded from reaching the ISP's customers. Commentators differ considerably, however, in their projections of the likelihood of such results.<sup>445</sup>

### c. Innovation at the "Edges" of the Internet

Some network neutrality proponents argue that innovation by content and applications providers at the "edges" of the Internet would suffer with preferential source-based prioritization, complicated fees and negotiations to distribute content and applications over the fast lane, and inadequate service on the best-efforts lane.<sup>446</sup> This could translate into a devaluing of the overall network as fewer offerings and participants and fewer imaginative new uses could depress the value of broadband Internet service. One response is that ISPs and other network operators have an interest in ensuring "that there is rapid innovation and vibrant competition for Internet content and applications" because consumers are interested not only in greater speeds, "but also new forms of content and application[s] that take advantage of such speeds."<sup>447</sup>

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<sup>443</sup> Libertelli, Tr. I at 73.

<sup>444</sup> Davidson, Tr. I at 274.

<sup>445</sup> For example, Harold Feld has asserted that last-mile ISPs have an opportunity to engage in discriminatory behavior, Feld, Tr. II at 70-72, while Verizon has argued that "providers will have numerous alternative means of distributing their products and services to consumers." Verizon Communications Inc., Public Comment 60, at 27.

<sup>446</sup> See, e.g., Libertelli, Tr. I at 73 ("[Skype] support[s] net neutrality, because it embodies a policy of decentralized innovation. For [Skype], net neutrality is not a theory, but a concrete example of what is possible on the Internet when entry barriers are low."); *id.* at 75 ("If government policy becomes too focused on the interests of network owners, we put at risk all of the innovation and software development that has allowed the Internet to thrive."); Davidson, Tr. I at 226-27 ("And so, we are very eager to preserve the innovation and openness of the Internet that has allowed companies like Google to develop."); D. Sohn, Tr. II at 223-24.

<sup>447</sup> Verizon Communications Inc., Public Comment 60, at 6. See also OECD Report, *supra* note 382, at 17 ("[S]ome commentators are worried that a multi-tiered structure would introduce a new barrier to entry and stifle innovation at the edges. Any increased barriers to entry will reduce the amount of competitive entry into the market. It is not clear though how the access to higher-speed delivery would be priced and the amount of burden it would place on new firms. On the other hand, the introduction of higher-quality, guaranteed connections could also spur innovation for services that require such connectivity.").

### 3. Prioritization Based on Particular Content

A Workshop participant has noted that new technologies can allow network operators to determine, at least to some extent, the particular content of a data transmission.<sup>448</sup> These technologies make possible differentiation at an even more specific level than by application or source. The use of such mechanisms could allow higher (or lower) priority treatment targeted specifically to content such as streaming video for a medical examination or a child's tutoring.<sup>449</sup> The decision to favor or disfavor certain content could be done by the ISP, the provider, or the user, and the effects described above could apply at this more targeted level.<sup>450</sup>

#### D. Conclusion

Technological developments have enabled network operators, including last-mile ISPs, to identify information about the data packets such operators transmit and to differentiate the treatment that they provide to these packets, allowing a variety of prioritization mechanisms. These developments lead to a wide range of possibilities at all levels of the Internet, but there remains substantial disagreement among commentators as to both the likelihood and desirability of many of them.

Prioritization technologies provide potential benefits for ISPs, content and applications providers, and consumers. For example, prioritization may improve QoS for certain content and applications, reduce overall infrastructure costs, and allocate resources to their highest-valued uses. Prioritization may aid innovation in applications or content that need higher QoS to operate effectively. It also may enable ISPs to obtain income streams from beneficiaries of their networks besides their own customers, either generally or on a preferential basis, and could provide a dimension for both content and applications providers and ISPs to differentiate their offerings. Prioritization may thus improve ISPs' profitability and enable greater investment and innovation in network quality and expansion. Prioritization also could improve certain content and applications providers' sales and profitability, facilitating growth and innovation by such providers.

Widespread use of prioritization technologies, however, poses potential risks as well. It also could create difficulties for newer or competitively weaker providers to enter or remain online or to innovate and successfully disseminate their innovations – difficulties that are routine with most means of communication, but typically not with the Internet. Prioritization could enable not only complete blocking of disfavored content and applications, but also intentional or passive degrading of their delivery, which could be tantamount to blocking. It could enable exclusive deals for priority that, if combined with inadequate delivery of non-priority packets, might eliminate the traditional ability of

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<sup>448</sup> Peha, *supra* note 36, at 4-5.

<sup>449</sup> McCormick, Tr. I at 242-44.

<sup>450</sup> See *infra* Chapter VIII.B.3 for a discussion of privacy and data security concerns raised by certain prioritization technologies.

every user to reach every content and applications provider through a single Internet access agreement. If an ISP has market power, use of these abilities might enable extraction of consumer surplus from Internet access markets as well as related markets. Further, whether an ISP is employing these technologies and whether any of these harms are occurring as a result may be difficult for consumers to determine.

Not every use of prioritization technologies is apt to have all of these positive or negative results. Policy makers considering whether to allow or restrict any or all usage of prioritization technologies should take into account the many and varied implications of such usage.

## **VI. THE CURRENT AND FUTURE STATE OF BROADBAND COMPETITION**

Broadband Internet service is a relatively new industry characterized by high levels of demand growth from consumers, as well as high market shares held by incumbent cable and telephone providers and many new entrants trying to take some of that market share. As proponents and opponents of network neutrality regulation analyze the various competitive forces at work in the industry, they have fundamental differences over the current and future competitiveness of the market. As discussed throughout this Report, those differences play out not only in the regulatory policies proposed by each side, but in the proposed antitrust policies to be pursued to protect consumers.

In this Chapter, we consider the changing nature of the broadband industry, beginning with a brief, historical review of the narrowband, or dial-up, Internet access industry in Section A. Section B reviews competition among the various platforms through which broadband access is provided and then summarizes the sometimes conflicting views on current and future broadband competition in the U.S. Section C provides an overview of municipal provision of wireless Internet service, a subject that often arises in the discussion of broadband competition. Section D addresses federal spectrum policies, a subject that often is raised in the network neutrality debate as a potential source of additional broadband competition. Finally, Section E provides some international perspective on the broadband experience, identifying the various factors that have influenced broadband deployment and adoption rates in a few foreign nations that are often cited as having higher such rates than the U.S.

### **A. Historical Background: Dial-up Service**

In the early days of commercial Internet services – that is, the late 1980s – consumer access to the Internet was provided by narrowband, or dial-up, service. Consumers purchased Internet access at speeds of up to 28 (and later 56) Kbps delivered through the same local telephone lines that delivered voice services. Because the telephone lines were analog, narrowband service required not only dial-up access but a modem to translate digital computer data into an analog signal.

Entry into the provision of Internet services through narrowband was not difficult, and the market was characterized by hundreds of small start-up companies. As in many new markets, shares of the leading companies fluctuated rapidly. First-mover America Online was the largest Internet service provider in the narrowband market, with approximately 45 percent of the narrowband market by the third quarter of 2003.<sup>451</sup> MSN and EarthLink were the next two largest, with approximately 10 and 8 percent of the market, respectively. Over time, broadband began to supplant narrowband: by the fourth quarter of 2003, broadband accounted for 36 percent of the total Internet access

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<sup>451</sup> Press Release, comScore, comScore Announces Breakthrough National and Local Market ISP Benchmarking Report (Nov. 24, 2003), *available at* <http://www.comscore.com/press/release.asp?press=385>.

market, and AOL's share of U.S. consumer ISP subscriptions had fallen to 28 percent.<sup>452</sup> At the end of 2003, broadband's share of the Internet access market had reached nearly 50 percent in many major geographic areas.<sup>453</sup> By 2006, almost 75 percent of U.S. Internet users logged on using a broadband connection.<sup>454</sup>

Although narrowband is still the service of choice for some subset of consumers, as indicated above, that number is dwindling. This does not mean, however, that the narrowband market has become competitively irrelevant. As an acceptable substitute for broadband for some consumers, narrowband appears to retain some constraining influence on broadband prices, and presumably that influence would grow (or decline more slowly) if broadband prices were to rise (or quality to erode).<sup>455</sup> In this regard, narrowband is like any other supplanted technology whose competitive influence lasts long after the early adopters have turned to the newer alternative. Although we are not able to quantify the impact of this competitive restraint, we note its continued presence.

## **B. Views on the State of Broadband Competition<sup>456</sup>**

Both proponents and opponents of net neutrality agree that broadband technologies will continue to supplant narrowband as the means of accessing the Internet. Where those groups differ is on the issue of the current and future state of competition in the broadband marketplace. One of the fundamental issues dividing the two sides is whether broadband suppliers have sufficient market power to engage in anticompetitive practices that will not only harm consumers of applications and content, but that will also degrade the open nature of the Internet and adversely impact the market dynamics for all parties connected to it.

One crucial issue in this particular debate is to determine which entities are effective current and future competitors in the provision of broadband Internet access. An initial step is thus to define what we mean by broadband service. The FCC has stated that 200 Kbps is "enough capacity to provide the most popular forms of broadband – to

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<sup>452</sup> Press Release, comScore, Broadband Usage Poised to Eclipse Narrowband in Largest U.S. Markets (Mar. 10, 2004), available at <http://www.comscore.com/press/release.asp?press=439>.

<sup>453</sup> *Id.*

<sup>454</sup> Carol Wilson, *Nielsen: Broadband Use Nears 75% in U.S.*, TELEPHONY ONLINE, June 22, 2006, [http://telephonyonline.com/broadband/news/Nielsen\\_broadband\\_Internet\\_062206/index.html](http://telephonyonline.com/broadband/news/Nielsen_broadband_Internet_062206/index.html).

<sup>455</sup> See Wallsten, Tr. II at 47 ("Lots of things actually reduce demand for broadband. One of them is dial[-]up connections. . . . Most people who have dial[-]up say they have no interest in broadband connections, according to the Pew Internet American Trust Foundation in a recent survey they did. Sixty percent have no interest in broadband. Obviously, that's going to change as prices continue to come down and content available on[]line increases.").

<sup>456</sup> As discussed below in this Chapter, a detailed, locality-by-locality analysis of each broadband market in the U.S. is beyond the scope of this Report. Instead, this Chapter conveys the views on broadband competition generally that various interested parties have expressed. This Chapter also identifies certain national trends in the provision of broadband service.

change web pages as fast as one can flip through the pages of a book and to transmit full-motion video.”<sup>457</sup> However true that may have been in 1999, that speed now is widely considered too slow.<sup>458</sup> No consensus has yet emerged, however, as to the appropriate definition of broadband service.<sup>459</sup> DSL services typically start at approximately 700 Kbps, and most emerging technologies, including wireless, are measured in megabits per second.

However it is defined, broadband service is now the appropriate focus of any inquiry into the state of competition in the delivery of Internet services. This market has quickly evolved from one in which consumers could get broadband only if they had access to cable systems offering it, to one in which many, if not most, consumers can get broadband from either a cable or telephone provider.<sup>460</sup> In 2000, over 80 percent of broadband service was provided by cable modem.<sup>461</sup> By the middle of 2006, broadband service by cable had fallen to 55.2 percent, while DSL’s residential share had increased to 40.3 percent.<sup>462</sup> The balance of the market consisted mostly of mobile wireless, with fiber, satellite, fixed wireless, and broadband over powerlines garnering relatively small shares.

By some accounts, the broadband Internet access industry is showing signs of robust competition, including fast growth, declining prices for higher-quality service,<sup>463</sup>

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<sup>457</sup> *In re Inquiry Concerning the Dev. of Advance Telecomms. Capability to All Americans in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Dev. Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 FCC Rcd 2398, 2406 (1999).

<sup>458</sup> Wallsten, Tr. II at 45; G. Sohn, Tr. I at 97; Ryan, Tr. I at 267; Weiser, Tr. II at 90.

<sup>459</sup> Wallsten, Tr. II at 67 (“I’m pretty sure that if you tried to define it today, a year from now, it would look very different.”); Feld, Tr. II at 71 (“[T]he market definition question . . . is murky.”).

<sup>460</sup> This does not necessarily mean that most consumers have access to only two broadband providers. According to the FCC, by June 30, 2006, consumers in more than 87% of all U.S. zip codes had access to 3 or more broadband choices, while 63% of zip codes were served by 5 or more broadband providers. FCC, HIGH-SPEED SERVICES, *supra* note 18, at 20 tbl.15. However, the competitive relevance of this data has been questioned because the FCC counts a zip code as served by a broadband provider if only one customer in the zip code has access to that provider. See Wallsten, Tr. II at 44, 46. Cf. William J. Baumol et al., *Economists’ Statement on Network Neutrality Policy 1* (AEI-Brookings Joint Center, Working Paper No. RP-07-08, 2007), available at <http://ssrn.com/abstract=976889> (“Just because a zip code has multiple providers does not mean that those providers compete directly, so whether ‘enough’ firms compete yet is debatable; the trend, however, is positive. Furthermore, consumers are making greater use of new technologies. Mobile wireless use went from fewer than half a million subscribers in 2005 to more than 20 million subscribers in 2006. In short, more people are getting served by more providers and more platforms.”).

<sup>461</sup> Press Release, FCC, FCC Releases Data on High-Speed Services for Internet Access (Oct. 31, 2000), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hspd1000.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf).

<sup>462</sup> FCC, HIGH-SPEED SERVICES, *supra* note 18, at 7 tbl.3.

<sup>463</sup> Sidak, Tr. I at 108; Muris, Tr. II at 120. See also Sidak, *supra* note 287, at 399 (documenting changes in speed and price of cable and DSL services during 2000-2006 period).

and the current market-leading technology (*i.e.*, cable modem) losing share to the more recently deregulated major alternative (*i.e.*, DSL). Broadband deployment and penetration have both increased dramatically since 2000. From June 2000 to June 2006, the number of high-speed Internet lines increased from 4.1 million to 64.6 million, with 52 percent growth from June 2005 to June 2006 alone.<sup>464</sup> The FCC estimated that by 2006, broadband DSL service was available to 79 percent of the households that were served by a telephone company, and cable modem service was available to 93 percent of the households to which cable companies could provide cable television service.<sup>465</sup> Penetration kept pace with deployment, as by 2006, broadband Internet access accounted for over 70 percent of all U.S. Internet access.<sup>466</sup>

Prices for DSL broadband services have also fallen rapidly as the telephone companies have competed aggressively to take market share from the cable companies. By one estimate, the average monthly revenue per user of DSL service decreased from 40 dollars in 2002 to 31 dollars in 2006.<sup>467</sup> From May 2005 to April 2006, AT&T reduced the monthly price of 3.0 Mbps DSL service from \$29.95 to \$17.99.<sup>468</sup> Quality-adjusted cable modem prices too have fallen.<sup>469</sup>

Proponents of net neutrality regulation, however, posit a duopoly with substantial market power residing with the telephone and cable companies in the delivery of Internet services to the home.<sup>470</sup> According to this scenario, structure is determinative and a duopoly inevitably will lead to anticompetitive conduct.<sup>471</sup> Alternative services are not yet seen as effective substitutes.<sup>472</sup> Plans to supply a quality-of-service component to the

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<sup>464</sup> FCC, HIGH-SPEED SERVICES, *supra* note 18, at 5 tbl.1.

<sup>465</sup> *Id.* at 19 tbl.14.

<sup>466</sup> *See supra* note 454.

<sup>467</sup> BERNSTEIN RESEARCH, BROADBAND UPDATE: "VALUE SHARE" AND "SUBSCRIBER SHARE" HAVE DIVERGED 4 (2006).

<sup>468</sup> *Id.* at 6.

<sup>469</sup> Robert W. Hahn & Robert E. Litan, *The Myth of Network Neutrality and What We Should Do About It* 10 (AEI-Brookings Joint Center, Working Paper No. RP-06-33, 2006), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1357> ("While the absolute price of a cable modem has not declined as rapidly, the quality-adjusted price has declined significantly, as cable modem connection speeds have more than doubled while prices held steady.").

<sup>470</sup> *See, e.g.*, Libertelli, Tr. I at 76; G. Sohn, Tr. I at 96; Feld, Tr. II at 21; Tulipane, Tr. I at 273.

<sup>471</sup> Save the Internet, Frequently Asked Questions, <http://www.savetheinternet.com/faq> (last visited June 15, 2007) ("The cable and telephone companies already dominate 98 percent of the broadband access market. And when the network owners start abusing their control of the pipes, there will be nowhere else for consumers to turn.").

<sup>472</sup> Feld, Tr. II at 21 ("[T]here is no evidence of substitutability for other services."); Putala, Tr. II at 28; G. Sohn, Tr. I at 96.

next generation Internet, along with interest in vertically integrating into applications and content, are seen as the first and necessary steps to use that market power in an anticompetitive fashion. Net neutrality proponents also foresee plans to deny or degrade access to certain content or applications by telephone and cable companies.

Opponents of net neutrality regulation see a different market for access to high-speed Internet services. They believe that high-speed wireless services compete directly with DSL and cable modem services already and will do so increasingly as those services become ubiquitous.<sup>473</sup> Specifically, they note that a substantial number of consumers now have access to high-speed service from satellite technologies, as well as other wireless technologies, such as Wi-Fi, Wi MAX, and 3G cellular services. Three companies have deployed infrastructure to provide satellite broadband service to most of the U.S.<sup>474</sup> According to the FCC, there were over 400,000 satellite broadband customers by the end of 2005.<sup>475</sup> Wi-Fi, which uses unlicensed spectrum, provides download speeds of up to 20 Mbps in over 40,000 hot spots across the country.<sup>476</sup> A number of municipalities are exploring the deployment of Wi-Fi networks.<sup>477</sup> Wi MAX technology is also being deployed, with over 150 pilot projects under way by May 2006.<sup>478</sup> Sprint, for example, is building a nationwide Wi MAX network and expects to reach 100 million customers by 2008.<sup>479</sup> 3G cellular technology is already deployed, with speeds of up to 3

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<sup>473</sup> McCormick, Tr. I at 246-47. *See also* Wireless Internet Service Providers Association, Public Comment 61, at 1-2 (not taking a position on network neutrality, but estimating that in 2004 there were 3,000-6,000 wireless ISPs ("WISPs") servicing more than 1 million customers in the U.S. and maintaining that "though many of our membership are smaller in size when compared to the larger wireline [ISPs], WISPs do constitute a 3rd Internet pipe in the US market"); CTIA – The Wireless Association, Public Comment 13, at 9-13 ("Unlike the predictable performance of a mature, oligopoly market, the market for broadband access and services is characterized by new entry and ramped-up investment and build-out using new technologies.") (describing ongoing investment of wireless carriers).

<sup>474</sup> *See* GOV'T ACCOUNTABILITY OFFICE, GAO-06-426, BROADBAND DEPLOYMENT IS EXTENSIVE THROUGHOUT THE UNITED STATES, BUT IT IS DIFFICULT TO ASSESS THE EXTENT OF DEPLOYMENT GAPS IN RURAL AREAS 15 (2006) [hereinafter GAO BROADBAND DEPLOYMENT].

<sup>475</sup> FCC, HIGH-SPEED SERVICES, *supra* note 18, at 5 tbl.1.

<sup>476</sup> JiWire, Wi-Fi Hotspots in the U.S., [http://www.jiwire.com/hot-spot-directory-browse-by-state.htm?country\\_id=1](http://www.jiwire.com/hot-spot-directory-browse-by-state.htm?country_id=1) (last visited June 15, 2007).

<sup>477</sup> *See infra* Chapter VI.C for a more detailed discussion of municipal provision of wireless Internet access.

<sup>478</sup> GAO BROADBAND DEPLOYMENT, *supra* note 474, at 60.

<sup>479</sup> Amol Sharma & Don Clark, *Sprint to Spend Up to \$3 Billion to Build Network Using WiMAX*, WALL ST. J., Aug. 9, 2006, at B2. *See also* Sprint Nextel Corp., Public Comment 52, at 7 ("Sprint Nextel's investment in wireless WiMax will provide access of up to 4Mbps.").



Mbps.<sup>480</sup> Additionally, telephone companies are deploying fiber-optic broadband networks,<sup>481</sup> and BPL technology is already deployed in a handful of local markets.<sup>482</sup>

Net neutrality proponents dispute these characterizations of competitive alternative technologies. Proponents argue that satellite, wireless, and BPL providers face technical problems and other barriers to entry into consumer broadband markets, and that their competitive impact should be discounted as a result. They note first the small market shares and slower speeds of BPL and fixed and mobile wireless.<sup>483</sup> Further, satellite service is available only to those consumers that have a clear view to the satellite.<sup>484</sup> In addition to these technical issues, regulatory policies, such as spectrum availability and local franchise requirements, can raise barriers to entry for wireless access providers.<sup>485</sup>

Some commentators also have identified the area of so-called special access services as a potential obstacle to more robust competition in the area of broadband Internet access.<sup>486</sup> Special access services involve dedicated (typically high-capacity) facilities that run directly between the end user and a carrier's network or between two discrete end-user locations.<sup>487</sup> With respect to broadband Internet access, such services are sold at the retail level to large enterprise customers, particularly those with multiple locations, and at the wholesale level to various broadband access providers, including

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<sup>480</sup> Altschul, Tr. II at 7.

<sup>481</sup> *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers, 18 FCC Rcd 16978, 17146 (2003) (triennial review order) (“[C]ompetitive LECs have demonstrated that they can self-deploy FTTH loops and are doing so at this time.”).

<sup>482</sup> See *N.Y. Eases Limits on Utility Role in BPL Transactions, Says Industry Source*, COMM. DAILY, Oct. 19, 2006, at 3; Press Release, Cal. Pub. Utils. Comm’n, PUC Approves New Broadband Over Power Lines Regulatory Framework (Apr. 27, 2006). See also Yinka Adegoke & Robert MacMillan,  *DirecTV May Try Broadband on Power Lines*, REUTERS, May 14, 2007, available at <http://www.reuters.com/article/technologyNews/idUSN1433448320070514?feedType=RSS&rpc=22> (discussing DirecTV’s potential testing of delivery of broadband over powerlines within the next year).

<sup>483</sup> See Putala, Tr. II at 29. But see CTIA – The Wireless Association, Public Comment 13, at 20 (“The relative speeds of the newer generations of wireless technologies are comparable to the average DSL speeds experienced by consumers, and the next generations of wireless technologies promise even faster speeds.”).

<sup>484</sup> See Feld, Tr. II at 20.

<sup>485</sup> See, e.g., Feld, Tr. II at 18-20 (identifying, among others, federal spectrum licensing and intellectual property barriers to entry); Wallsten, Tr. II at 48-49 (discussing local franchise rules for IPTV). See *infra* Chapter VI.D for a more detailed discussion of federal spectrum policies.

<sup>486</sup> See, e.g., Sprint-Nextel Corp., Public Comment 52, at 1-5; BT Americas Inc., Public Comment 5, at 8. Special access services also are referred to as dedicated access services or local private line services.

<sup>487</sup> *Special Access NPRM*, 20 FCC Rcd 1994, 1997 (2005). In contrast to special access services, switched access services use local exchange switches to route originating and terminating voice and data traffic. *Id.*

other carriers competing for enterprise customers and wireless network operators that do not have their own facilities connecting their transmitters (e.g., cell towers) to their switches.<sup>488</sup> Some commentators argue that competition in the provision of special access services is “*de minimis*”<sup>489</sup> and that this lack of competition constrains the ability of some ISPs, particularly wireless access providers, to compete with the ISPs that also own special access facilities.<sup>490</sup> After taking certain deregulatory actions in the area of special access services in 1999,<sup>491</sup> the FCC currently is conducting “a broad examination of the regulatory framework to apply to . . . interstate special access services . . . .”<sup>492</sup>

Because alternative broadband providers are not perfect substitutes for cable or DSL broadband providers, the mere counting of providers using new technologies does not answer the question of whether or not they are effective competitive alternatives to cable and DSL.<sup>493</sup> The alternatives must have some ability to discipline incumbents attempting to exercise market power before they can be considered part of the market. In certain circumstances, however, alternative products or services need not be perfect substitutes for all consumers to be considered part of a relevant antitrust market.<sup>494</sup> If a wireless broadband service appeals to a sufficient number of marginal cable modem or DSL broadband consumers to constrain pricing activity by the cable and telephone

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<sup>488</sup> See *id.* at 1995-96; Sprint-Nextel Corp., Public Comment 52, at 2; BT Americas Inc., Public Comment 5, at 8 n.31.

<sup>489</sup> Sprint-Nextel Corp., Public Comment 52, at 2-3 (“The vast majority of buildings and cell sites throughout the country have access to only one provider of these essential inputs – either AT&T or Verizon.”).

<sup>490</sup> See, e.g., *id.* at 5.

<sup>491</sup> See *In re Access Charge Reform*, 14 FCC Rcd 14221 (1999) (fifth report and order and further notice of proposed rulemaking), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Some have criticized the FCC’s basis – that is, a sufficient amount of competition for provision of special access services – for taking these actions. See, e.g., GOV’T ACCOUNTABILITY OFFICE, GAO-07-80, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (2006).

<sup>492</sup> *Special Access NPRM*, 20 FCC Rcd at 1995. Even with the deregulatory actions taken by the FCC, special access services remain subject to Title II of the Communications Act. Sprint Nextel Corp., Public Comment 52, at 3 n.7.

<sup>493</sup> Feld, Tr. II at 16 (“[T]he FTC understands that it is not just an issue of counting noses.”); Waz, Tr. II at 162 (“[M]arket share is only the beginning of the analysis.”).

<sup>494</sup> See FTC & DOJ, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 15 (boundaries of a relevant antitrust product market may not be clear cut when “substitutes exist along a continuum”). Cf. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14885 (2005) (report and order and notice of proposed rulemaking) (“We recognize that the attributes of the available broadband platforms vary, particularly as to price, speed, and ubiquity. We expect that customers will weigh these attributes for each platform and make service-related decisions based on their specific needs. For example, a customer may select a broadband Internet access service with a somewhat slower speed than that associated with other service platforms in return for the lower price of the selected service.”).

companies, then it may be considered a competitive alternative and counted as part of the relevant market.

Even products or services not currently being sold to consumers may constrain anticompetitive conduct by incumbent firms. The Horizontal Merger Guidelines jointly issued by the FTC and the Department of Justice Antitrust Division provide extensive guidance on establishing relevant antitrust markets generally and on the inclusion of potential entrants in a relevant market in particular.<sup>495</sup> These Guidelines consider potential entrants, under certain circumstances, to be capable of affecting current business decisions of incumbent firms.<sup>496</sup>

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The broadband marketplace is in considerable flux.<sup>497</sup> The competitive impact of all of the alternative broadband technologies on the incumbent telephone and cable companies, therefore, is not totally clear. Nonetheless, there are national trends that appear to show an increasing number of competitive alternatives across all markets. Of course, effective national competition for broadband customers does not mean that all consumers enjoy competitive local markets. Relevant antitrust markets in the broadband industry may be highly localized, as cable franchise laws, population density, income dispersion, and other factors may limit some consumers' current choices of broadband providers. However, without identification and analysis of each local market – which is well beyond the scope of this Report – we cannot determine which consumers currently benefit from competitive broadband markets.

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<sup>495</sup> See DOJ & FTC, HORIZONTAL MERGER GUIDELINES § 3.2 (1997).

<sup>496</sup> *Id.* (“The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.”). See also Yoo, Tr. II at 257 (“[I]n a world where Sprint is making a multi-billion dollar commitment to come in by the end of 2008, that’s a reasonable time frame to have.”).

<sup>497</sup> As the FCC has noted in its broadband rulemaking proceedings:

As the Internet and related applications mature and continue to evolve, the demand for broadband Internet access services will likely grow. The presence of more content available through the Internet and the enhanced means of presenting the content, together with growth in broadband-related applications, such as streaming video, will lead more subscribers to seek broadband Internet access service. As the number of subscribers grows, so does the opportunity for alternative technologies and their respective providers. As any provider increases its market share or upgrades its broadband Internet access service, other providers are likely to mount competitive challenges, which likely will lead to wider deployment of broadband Internet access service, more choices, and better terms.

*In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Red 14853, 14885 (2005) (report and order and notice of proposed rulemaking).

### C. Municipal Provision of Wireless Internet Access

In recent years, hundreds of municipalities throughout the United States have considered whether they should provide broadband Internet access to their residents and, if so, how.<sup>498</sup> Some municipalities have installed costly fiber-optic or cable wiring. More recently, with the development of wireless Internet technologies that are less expensive to deploy, such as Wi-Fi and Wi MAX, municipalities also have explored and, in some cases played a role in the development of, municipal wireless broadband networks. These municipalities have done so either in conjunction with an outside entity, such as a private ISP, or in their own capacity as a municipal provider of wireless Internet service. Municipalities and other entities that have implemented such networks have most commonly used one of six general operating models: non-profit, cooperative, contracting out, public-private partnership, municipal, and government loan-grant. A variety of hybrids may be created by combining various features of each model.<sup>499</sup>

FTC staff issued a report in October 2006 on the *Municipal Provision of Wireless Internet*.<sup>500</sup> The report concluded that the arguments for and against municipal involvement in wireless Internet service may vary depending on a municipality's particular factual circumstances. Accordingly, rather than attempt to provide a single answer to the question of whether, and to what extent, a municipality should involve itself in the provision of wireless Internet services, the report provides an analytical framework for policy makers considering such a decision.<sup>501</sup>

Some commentators suggest that, whatever the particular operating model, municipal-based wireless networks may be a significant issue in the broadband Internet connectivity debate.<sup>502</sup> In particular, some suggest that municipal networks may add an additional competitive point of delivery to other existing wireline and emerging wireless technologies like third generation and fourth generation mobile broadband and satellite. Some network neutrality opponents, therefore, argue that the proliferation of municipal-level wireless networks demonstrates not only that broadband competition is sufficiently robust, but that it is increasingly intense and obviates the need for a new *ex ante* regulatory regime. In particular, they point out that some network neutrality proponents, like Google and EarthLink, are themselves working to deploy large-scale municipal

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<sup>498</sup> See generally Posting of Esme Vos to MuniWireless, <http://www.muniwireless.com/article/articleview/5495> (Apr. 5, 2007, 03:14).

<sup>499</sup> See generally FTC STAFF, MUNICIPAL PROVISION OF WIRELESS INTERNET (2006), available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>.

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* at 41-49.

<sup>502</sup> See, e.g., Lehr, Tr. I at 43. According to Lehr, "alternative access connections, and municipal networking where communities get together, maybe with the help of their local government . . . or local utility . . . get together and provision a network. And if that network is an open access network, then that provides another way to deal with this." *Id.*

networks in competition with other technologies.<sup>503</sup> At least one network neutrality proponent also has suggested that the introduction of these additional delivery points may alleviate many of the “last mile” concerns raised in the broadband connectivity debate.<sup>504</sup>

Others argue, however, that municipal networks are not necessarily a panacea and could themselves raise important connectivity issues.<sup>505</sup> Some observers view the concerns raised by network neutrality proponents as a potential stumbling block to the deployment of municipal-level networks because municipalities, in many cases, may need to rely on private network operators for their technical expertise and financial backing.<sup>506</sup> Some municipal network operators, however, indicate that they intend to resell non-discriminatory, wholesale access to other non-facilities-based Internet service providers in order to alleviate these concerns.<sup>507</sup> Some private companies also are attempting to create municipal-scale networks by distributing wireless Internet routers to consumers without charge and then deriving revenues from advertising-supported services or fees from users who are not router owners. Essentially, this business model seeks to create a wide-area network of overlapping, privately operated wireless Internet hotspots.<sup>508</sup>

In addition, although the potential speeds of new wireless Internet technologies are comparable to those of DSL, cable, and fiber wirelines, a wireless network’s actual

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<sup>503</sup> Sidak, for example, argues that Google’s involvement in municipal networks “has just removed one of the two principal arguments that have been made in favor by [Google] for network neutrality regulation – the supposed absence of competition in the broadband access market.” Sidak, Tr. I at 109. *See also* Thorne, Tr. II at 36-38 (citing Google and EarthLink’s involvement municipal wireless networks).

<sup>504</sup> Lawrence Lessig, a network neutrality proponent, argues that “[t]here’s an explosion in municipal mesh networks . . . . [If] people unify them, the last mile is solved. The last mile is provided free of proprietary control.” Gavin Clark, *Municipal WiFi is the New Hope for Net Neutrality – Thinker*, THE REGISTER, Aug. 16, 2006, available at [http://www.theregister.com/2006/08/16/wifi\\_net\\_neutrality\\_lessig](http://www.theregister.com/2006/08/16/wifi_net_neutrality_lessig).

<sup>505</sup> *See, e.g.*, Lehr, Tr. I at 43 (“And so, in principle, that will help, because more choices [are] better. But it’s possible that the municipal network, if it’s not an open access network, could also be guilty of non-neutral-treatment. There is no reason to presume that your municipal carrier, if it has market power, may be any better behaved than an investor-owned carrier.”). *See also* Rosston, Tr. I at 210-11 (warning that cities may favor one wireless network and attempt to exclude others).

<sup>506</sup> Visiongain concludes that the “network neutrality [debate] is not a fuel for the municipal broadband movement in the U.S. . . . It’s a . . . stumbling block.” Ed Gubbins, *Neutrality and Municipalities*, TELEPHONY, Feb. 20, 2006, at 24, available at [http://telephonyonline.com/mag/telecom\\_neutrality\\_municipalities](http://telephonyonline.com/mag/telecom_neutrality_municipalities) (according to analyst Pam Baker, municipalities “need technology companies’ expertise, experience, and money . . . . But they cannot afford to give those companies total, or even majority, control . . . . Yet cities repeatedly fail when they attempt to provide [networks] themselves.”).

<sup>507</sup> Putala, Tr. II at 60 (“[EarthLink is] committed to offering as many local ISPs, to AOL, to anyone else who wants to sell capacity on our Wi-Fi networks, the ability to get the same non-discriminatory, very reasonable wholesale pricing, so they can make an offering.”).

<sup>508</sup> *See* FON, What’s FON?, <http://www.fon.com/en/info/whatsFon> (last visited June 18, 2007); Meraki, Our Story, <http://meraki.net/about> (last visited June 18, 2007).

performance may vary depending on its particular architecture, the number of users, its proximity to a high-speed backbone, and other factors like local geography or interference from other devices.<sup>509</sup> While current wireless technologies in many cases may be close substitutes for existing wireline technologies when used to access content and applications having light or moderate bandwidth requirements, they generally do not provide enough bandwidth to support certain applications, such as real-time video transmissions.<sup>510</sup>

Thus, given these varying factors, some observers view the competitive implications of municipal wireless networks as being highly fact-specific, much like the decision whether, and to what extent, a municipality should participate in providing such services in the first instance.<sup>511</sup> Further, some commentators suggest that an *ex ante* network neutrality regime might subject a wireless network to differential, negative effects beyond those that might befall a more traditional wireline network, due to the differing technical constraints of wireless technologies.<sup>512</sup>

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<sup>509</sup> See, e.g., Peha, Tr. I at 60. See also FTC STAFF, *supra* note 499, at 6-12, app.

<sup>510</sup> See, e.g., Putala, Tr. II at 30 (“For EarthLink, this means as we go to compete with Comcast and Verizon in Philadelphia, we are going to try to offer both our municipal Wi-Fi broadband service with speeds of about a meg [one megabit] up and down, as well as our eight megabits ADSL two plus or wicked fast broadband service that requires us to have access to Verizon’s unbundled loops.”).

<sup>511</sup> See, e.g., Lehr, Tr. I at 53-54. According to Lehr:

With respect to municipal entry, a lot of folks, you know, make the false conclusion that when local governments, or local communities build infrastructure, or get involved in the infrastructure provisioning question, that that’s a – you know, that’s a sort of binary good/bad thing, and they do it one way or they don’t do it.

The answer is, it’s a very complex mix of strategies they face. The particular technologies and strategies they undertake, how they do that, is a very complicated thing, and has big implications for what sorts of net neutrality problems may happen.

For example, if they do . . . a fiber deployment that’s an open access platform, then that really does go a long way towards eliminating concerns, most of the net neutrality concerns. But such an infrastructure plan is unlikely to make sense in most communities. And other alternative sorts of strategies, if they make sense at all, need to be evaluated in this.

*Id.*

<sup>512</sup> See, e.g., Altschul, Tr. II at 51-52 (stating that network neutrality regulations “would have unique effects and they would be negative effects” for wireless Internet networks); Sidak, Tr. I at 104-05 (stating that, “[o]bviously, there are very different network architecture considerations for wireless networks than for wireline networks” and warning against applying network neutrality rules without further evidence of harmful practices). See also Lehr, Tr. I at 56-57. Lehr explains that, generally, “spectrum is perceived to be a very scarce resource, RF spectrum. So that, generically, your bandwidth is more of something – a resource you’re going to be more concerned with in the wireless world . . . . [S]o the need to, for example, carefully manage traffic on a wireless network is greater.” *Id.* See also *id.* at 61-64 (comparing wireless, DSL, cable modem, and fiber technologies).

#### D. Federal Spectrum Policies<sup>513</sup>

Electromagnetic spectrum is a finite natural resource. The artificial scarcity of spectrum that results from government use restrictions further reduces the supply of wireless services available to consumers, including broadband Internet access. Thus, some commentators suggest that the federal government's electromagnetic spectrum policies constitute a key component of the broadband connectivity debate.<sup>514</sup> Wireless Internet technologies have become increasingly important alternatives to wireline (*i.e.*, DSL and cable modem) services,<sup>515</sup> and they may have important implications for the broader marketplace for Internet services by increasing competition among Internet access providers.<sup>516</sup> Some commentators suggest that making additional spectrum available to the private marketplace to enhance the competitiveness of wireless Internet services may be the best way to address concerns raised by network neutrality proponents.<sup>517</sup>

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<sup>513</sup> A comprehensive analysis of federal spectrum policies is beyond the scope of this Report. This Section merely provides a brief overview of the subject to inform the discussion of the role of spectrum policy in the broadband connectivity debate.

<sup>514</sup> See, e.g., Lehr, Tr. I at 54 (“[A] lot of the sorts of alternatives that we talk about really depend a lot on wireless, and new sorts of wireless technologies. . . . [S]pectrum reform is, obviously, a key element in that.”); Mercatus Center at George Mason University, Public Comment 4, at 20-21, 27-31.

<sup>515</sup> The FCC's Wireless Broadband Access Task Force, for example, concluded that “[b]roadband wireless service has the potential to compete with wireline technologies in urban and suburban markets as a primary pipe to the home and business, to complement wireline technologies by adding a component of mobility or portability, and to lead the way in rural markets where other broadband technologies are less feasible.” FCC WIRELESS BROADBAND ACCESS TASK FORCE, CONNECTED & ON THE GO: BROADBAND GOES WIRELESS 46 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-257247A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257247A1.pdf).

According to the FCC's most recent survey, during the June 2005-06 period, high-speed lines (over 200 Kbps in at least one direction) increased from 376,837 to 495,365 for satellite; from 208,695 to 360,976 for fixed wireless; and from 379,536 to 11,015,968 for mobile wireless. Advanced service lines (over 200 Kbps in both directions) increased from 10,966 to 27,489 for satellite; from 191,229 to 333,072 for fixed wireless; and from 21,079 to 1,913,904 for mobile wireless. FCC, HIGH-SPEED SERVICES, *supra* note 18, at 5 tbl.1, 6 tbl.2.

<sup>516</sup> See, e.g., Lehr, Tr. I at 67-68. Lehr suggests that making “more spectrum available down there [below one gigahertz] for commercial communication services, would open up new options to help alleviate last mile facilities competition concerns.” *Id.* In his view, “the question about what we do with that 700 megahertz spectrum, I think, is an important aspect of this whole net neutrality debate.” *Id.* See also Baumol et al., *supra* note 460, at 3 (“Congress and federal regulators should promote policies that increase the opportunities for competition and foster Internet innovation. One such policy would be spectrum liberalization. . . . The [FCC] should make additional licensed spectrum available for flexible use as soon as possible and allow it to be traded so that spectrum can be allocated to its highest-valued uses.”).

<sup>517</sup> See, e.g., Rosston, Tr. I at 164. According to Rosston, “the key is making sure, for example, when we get more spectrum out, that we actually enforce the anti-trust laws and make sure that we have the ability to have multiple competitors providing broadband access to the home.” *Id.* Thus, in his view, “that is going to help alleviate these concerns. In my mind, this is a much better way than trying to mandate network neutrality.” *Id.*

The federal government affects the availability and price<sup>518</sup> of wireless Internet services by determining how much spectrum is available to private companies that provide such services to consumers. The Communications Act gave the FCC a broad grant of power to regulate spectrum in the public interest.<sup>519</sup> The FCC has authority over spectrum usage by commercial entities and local and state governments. The Department of Commerce, through the creation of the National Telecommunications and Information Administration ("NTIA") in 1978, also plays an important role in advising the President and managing the federal government's use of spectrum.<sup>520</sup> Other federal agencies also assist in the development and implementation of federal spectrum policy.<sup>521</sup>

The FCC and NTIA manage spectrum by dividing, or allocating, the entire spectrum into blocks, or bands, of frequencies established for a particular type of service. These allocated blocks can then be further subdivided, or allotted, into bands designated for a particular service. For example, an allocation of spectrum for land mobile service can be further divided into allotments for business, public safety, and cellular uses. In the final subdivision of spectrum, particular parties receive an assignment, or license, to operate a transmitter on a specific channel or group of channels in a particular geographic area under specific conditions.<sup>522</sup>

In the past, the FCC relied on comparative hearings or lotteries to award licenses.<sup>523</sup> Over time, this approach garnered significant criticism.<sup>524</sup> In the early 1990s,

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<sup>518</sup> Making more spectrum available to the private marketplace generally will be expected to lower its price and, thereby, reduce the price of associated services for consumers. See *In re Principles for Reallocation of Spectrum to Encourage the Dev. of Telecomms. Techs. for the New Millennium*, 14 FCC Rcd 19868, 19872-73 (1999) (policy statement) [hereinafter *1999 Policy Statement*]. Recent studies estimate that the costs of current restrictions on spectrum use run into the billions of dollars, annually. See Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulation*, 58 FED. COMM. L.J. 37, 80 (2006) (estimating the annual costs of current spectrum policy at \$77 billion or more, annually).

<sup>519</sup> 47 U.S.C. §§ 151 *et seq.*

<sup>520</sup> See NTIA, About the NTIA, <http://www.ntia.doc.gov/ntiahome/aboutntia/aboutntia.htm> (last visited June 18, 2007).

<sup>521</sup> See, e.g., Memorandum on Spectrum Policy for the 21st Century, 39 PUB. PAPERS 605 (June 5, 2003) [hereinafter *Memorandum on Spectrum Policy*] (establishing a Federal Government Spectrum Task Force to improve government spectrum use).

<sup>522</sup> FCC, CONNECTING THE GLOBE: A REGULATOR'S GUIDE TO BUILDING A GLOBAL INFORMATION COMMUNITY VII-1 to -10 (1999), available at <http://www.fcc.gov/connectglobe/regguide.pdf>.

<sup>523</sup> See generally FCC SPECTRUM POLICY TASK FORCE, ET DOCKET NO. 02-135, REPORT (2002) [hereinafter *FCC SPECTRUM POLICY TASK FORCE REPORT*], available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-228542A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf).

<sup>524</sup> See generally Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (questioning the command-and-control method and suggesting a market-based approach). See also Ewan Kwerel & John Williams, *A Proposal for a Rapid Transition to Market Allocation of Spectrum* 1 (FCC Office of Plans and Policy, Working Paper No. 38, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-228552A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228552A1.pdf) ("Billions of dollars of cumulative loss to the U.S. economy have been attributed to inefficient spectrum allocations . . .").



the FCC and NTIA began reviewing their spectrum management policies.<sup>525</sup> In 1993, Congress amended Title III of the Communications Act to authorize the FCC to assign licenses through a competitive bidding process, with the goal of matching spectrum to its highest-valued use.<sup>526</sup> The FCC began conducting auctions the next year.<sup>527</sup> In 1997, Congress granted the FCC express authority to allocate electromagnetic spectrum for flexible use.<sup>528</sup> A 1999 FCC Policy Statement outlined principles for future spectrum management to: allow for flexible spectrum use to better respond to marketplace demands; promote new spectrum-efficient technologies; develop secondary markets to improve spectrum utilization; and develop new ways to make more spectrum available.<sup>529</sup>

In 2002, the FCC Spectrum Policy Task Force completed the first comprehensive review of the FCC's spectrum policies. Its report concluded that, although the agency had improved its methods of spectrum allocation, FCC policy was still "not keeping pace with the relentless spectrum demands of the market."<sup>530</sup> Expanding on the 1999 Policy Statement's principles, the Task Force report concluded that the FCC should pursue a "balanced spectrum policy," based primarily on exclusive rights allocated via market-based mechanisms, a supplemental open-access spectrum commons, and the limited use of command-and-control regulations for certain purposes, such as public safety and national security. Thus, subject to certain exceptions, legacy command-and-control spectrum should be transitioned to the exclusive use and commons models "to the greatest extent possible."<sup>531</sup>

Congress, the FCC, and the NTIA have continued to make additional spectrum available to the private marketplace and have provided additional regulatory flexibility designed to foster innovation, efficient usage, and the development of secondary markets for trading spectrum rights.<sup>532</sup> Both the executive branch and Congress continue to investigate ways to improve spectrum use.<sup>533</sup>

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<sup>525</sup> See, e.g., NTIA, U.S. SPECTRUM MANAGEMENT POLICY: AGENDA FOR THE FUTURE (1991), available at <http://www.ntia.doc.gov/osmhome/91specagen/1991.html>.

<sup>526</sup> 47 U.S.C. § 309(j).

<sup>527</sup> FCC, About Auctions, [http://wireless.fcc.gov/auctions/default.htm?job=about\\_auctions](http://wireless.fcc.gov/auctions/default.htm?job=about_auctions) (last visited June 18, 2007).

<sup>528</sup> 47 U.S.C. § 303(y).

<sup>529</sup> See 1999 Policy Statement, 14 FCC Rcd 19868 (1999). See also *In re Principles for Promoting Efficient Use of Spectrum by Encouraging the Dev. of Secondary Mkts.*, 15 FCC Rcd 24178 (2000) (policy statement).

<sup>530</sup> FCC SPECTRUM POLICY TASK FORCE REPORT, *supra* note 523, at 1.

<sup>531</sup> *Id.* at 3, 6.

<sup>532</sup> See generally *id.* at 46-55; OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, COMMERCIAL SPECTRUM ENHANCEMENT ACT: REPORT TO CONGRESS ON AGENCY PLANS FOR SPECTRUM

Some commentators have suggested, however, that comprehensive, market-based reform is still needed to maximize the efficient use of U.S. spectrum. Generally, these commentators propose replacing the current licensing regime with a more robust property rights system that allows for maximum transferability and flexibility of use, subject to technical considerations.<sup>534</sup> Some observers also suggest that innovative technologies may allow primary spectrum rights-holders to share their spectrum with non-interfering secondary users in new ways.<sup>535</sup> Overall, these commentators suggest that comprehensive reform, combined with emerging wireless technologies, could lead to significant improvements in spectral efficiency, competition, and consumer welfare.

Federal spectrum policy has been cited by both proponents and opponents of network neutrality as an important component of the ongoing debate. Both sides agree that improved spectrum use could potentially increase competition in the marketplace for broadband services generally.<sup>536</sup> Many network neutrality proponents, however, express skepticism that wireless broadband services can, in fact, be a sufficiently close substitute to wireline services to check any potential abuses by wireline broadband providers.<sup>537</sup>

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RELOCATION FUNDS (2007), *available at*

[http://www.ntia.doc.gov/reports/2007/OMBSpectrumRelocationCongressionalNotification\\_final.pdf](http://www.ntia.doc.gov/reports/2007/OMBSpectrumRelocationCongressionalNotification_final.pdf).

<sup>533</sup> See Memorandum on Spectrum Policy, *supra* note 521; U.S. DEP'T OF COMMERCE, SPECTRUM POLICY FOR THE 21ST CENTURY – THE PRESIDENT'S SPECTRUM POLICY INITIATIVE: REPORT 1 (2004), *available at* [http://www.ntia.doc.gov/reports/specpolini/pressspecpolini\\_report1\\_06242004.htm](http://www.ntia.doc.gov/reports/specpolini/pressspecpolini_report1_06242004.htm); U.S. DEP'T OF COMMERCE, SPECTRUM POLICY FOR THE 21ST CENTURY – THE PRESIDENT'S SPECTRUM POLICY INITIATIVE: REPORT 2 (2004), *available at* [http://www.ntia.doc.gov/reports/specpolini/pressspecpolini\\_report2\\_06242004.htm](http://www.ntia.doc.gov/reports/specpolini/pressspecpolini_report2_06242004.htm); Memorandum on Improving Spectrum Management for the 21st Century, 40 WEEKLY COMP. PRES. DOC. 2875 (Nov. 30, 2004) (directing executive branch agencies to implement the Spectrum Task Force reports' recommendations). See also FCC, STRATEGIC PLAN 2006-2011, at 10-12 (2006) (outlining future objectives for the efficient and effective use of spectrum), *available at* <http://www.fcc.gov/omd/strategicplan>.

<sup>534</sup> See, e.g., Ellig, *supra* note 518, at 81-85. See also generally Reed E. Hundt & Gregory L. Rosston, *Communications Policy for 2006 and Beyond*, 58 FED. COMM. L.J. 1 (2006); Jon M. Peha, *Emerging Technology and Spectrum Policy Reform*, International ITU Workshop on Market Mechanisms for Spectrum Management (Jan. 2007), *available at* [http://www.itu.int/osg/spu/stn/spectrum/speakers\\_pres.html](http://www.itu.int/osg/spu/stn/spectrum/speakers_pres.html).

<sup>535</sup> See, e.g., Peha, Tr. I at 61 ("There may also be some opportunities to share spectrum more than we have in the past, at frequencies that allow you to cover large areas and rural areas."). See also Peha, *supra* note 36, at 1-2, 7-9.

<sup>536</sup> See, e.g., Lehr, Tr. I at 54 ("[M]aking sure that we have a really vigorous commercial market for new wireless technologies, I think, is critical to addressing this problem. . . . [S]pectrum reform is, obviously, a key element in that.").

<sup>537</sup> See, e.g., Putala, Tr. II at 29 ("The much heralded independent alternatives are still tiny.").

## E. International Comparisons

The reasons for differing rates of broadband deployment and customer adoption across countries are the subject of considerable debate.<sup>538</sup> Certain factors appear to have influenced these rates in some countries. These include: government subsidization of Internet infrastructure or computer use; local loop<sup>539</sup> unbundling requirements; population density and demographics; and consumer demand. This Section provides an overview of the broadband experiences of South Korea, Japan, and the Netherlands, which are often cited as having more extensive broadband deployment and adoption than the U.S.<sup>540</sup>

### 1. South Korea

South Korea is frequently described as the most “wired” country in the world in terms of Internet service. Although it had less than one Internet user per 100 inhabitants in 1995, by 2002 it was one of the world’s largest Internet markets, with 26 million users, and, by 2003, 78 percent of South Korean Internet users logged on via a broadband connection.<sup>541</sup> Several factors have been cited for this explosive growth.

The South Korean government privatized the historical monopoly telecommunications operator, Korea Telecom (“KT”), in the early 1990s and has extensively involved itself in the telecommunications sector to upgrade the country’s information technology infrastructure and to promote computer use by businesses and individuals.<sup>542</sup> Initiated in 1995, the Korea Information Infrastructure project has emphasized public-private partnerships in funding a national, high-speed public

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<sup>538</sup> See generally FCC OFFICE OF STRATEGIC PLANNING & POLICY ANALYSIS & INT’L BUREAU, BROADBAND INTERNET ACCESS IN OECD COUNTRIES: A COMPARATIVE ANALYSIS (2003) [hereinafter FCC OECD ANALYSIS], available at <http://www.coe.montana.edu/ee/rwolff/ee543%20papers/fcc-broadband.pdf>. This report cautions that “[t]here is no simple way to compare the variety of broadband service packages available in different countries.” *Id.* at 6. See also DANIEL K. CORREA, ASSESSING BROADBAND IN AMERICA: OECD AND ITIF BROADBAND RANKINGS (2007), available at <http://www.itif.org/files/BroadbandRankings.pdf> (examining various measurements of broadband deployment and adoption rates).

<sup>539</sup> For purposes of this Section, the term “local loop” is used to mean the last mile of Internet access.

<sup>540</sup> See, e.g., Schmidt, Tr. II at 55 (reading the following question from a Workshop audience member: “Why can’t consumers get cheap, super high[-]speed broadband from Verizon, EarthLink or other companies like Japanese consumers can?”). According to the OECD, as of December 2006, the number of broadband subscribers per 100 inhabitants in the United States was 19.6, while the corresponding numbers were 29.1 in South Korea, 20.2 in Japan, and 31.8 in The Netherlands. OECD, OECD BROADBAND STATISTICS TO DECEMBER 2006 (2006), available at [http://www.oecd.org/document/7/0,3343,en\\_2649\\_34223\\_38446855\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3343,en_2649_34223_38446855_1_1_1_1,00.html).

<sup>541</sup> INT’L TELECOMMS. UNION, BROADBAND KOREA: INTERNET CASE STUDY 1, 10 (2003) [hereinafter ITU KOREA STUDY], available at [http://www.itu.int/ITU-D/ict/cs/korea/material/CS\\_KOR.pdf](http://www.itu.int/ITU-D/ict/cs/korea/material/CS_KOR.pdf).

<sup>542</sup> *Id.* at 5, 33-34.

backbone, information technology pilot projects, and technology investment funds.<sup>543</sup> The South Korean government also implemented local loop unbundling requirements in 2002.<sup>544</sup>

This environment seems to have spurred the emergence of multiple ISPs.<sup>545</sup> Some commentators note, however, that many of the ISPs that emerged during the last decade have experienced periods of unprofitability and suggest that market consolidation is already underway.<sup>546</sup> Also, in 2004, the South Korean government subjected KT to stricter service and pricing regulations on the grounds that KT's dominance was a barrier to competition in the broadband market.<sup>547</sup>

Another important factor in South Korea's broadband deployment appears to be the country's high average population density of 1,265 people per square mile with 82 percent of its 48 million people living in urban areas.<sup>548</sup> Apartments account for approximately 48 percent of South Korea's housing stock<sup>549</sup> and provide housing for

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<sup>543</sup> It is estimated that the South Korean government spent approximately \$24 billion on backbone infrastructure during the 1995-2002 period and will spend over \$53 billion on information technology projects during the 2003-2008 period. *Id.* The actual amount of past and projected investment may be higher, and is difficult to discern, as the government also has directed substantial amounts of private investment. Some estimates run into the tens of billions of dollars. See, e.g., James B. Speta, *Commentary: Policy Levers and Demand Drivers in Korean Broadband Penetration*, J. KOREAN L., 2004-2005, at 1, 7.

<sup>544</sup> *Id.* at 8. Some commentators suggest, however, that the major advances in broadband deployment had already happened by 2002 and were mainly the result of facilities-based competition in a generally deregulatory environment. See, e.g., Thomas W. Hazlett, *Broadband Miracle*, WALL ST. J., Aug. 26, 2004, at A12.

<sup>545</sup> Heejin Lee & Bob O'Keefe, *The Growth of Broadband Internet Connections in South Korea: Contributing Factors*, 14th Bled Electronic Commerce Conference 438 (2001), available at [http://domino.fov.uni-mb.si/proceedings.nsf/0/fa0fcb8fecb778fbc1256e9f0030a71f/\\$FILE/27\\_Lee.pdf](http://domino.fov.uni-mb.si/proceedings.nsf/0/fa0fcb8fecb778fbc1256e9f0030a71f/$FILE/27_Lee.pdf).

<sup>546</sup> One survey reports: "Except for KT and one of the mobile operators, none of Korea's facilities-based telecommunications providers made a profit in 2001." ITU KOREA STUDY, *supra* note 541, at 7. KT competitor "Thrunet reorganized under bankruptcy laws in 2003, and Hanaro reported its first profits only in mid-2004." Hazlett, *supra* note 544. See also Kim Tae-gyu, *Hanaro Exposed to Greater M&A Risk*, Korea Times, Mar. 19, 2007.

<sup>547</sup> See Kenji Kushida & Seung-Youn OH, *Understanding South Korea and Japan's Spectacular Broadband Development: Strategic Liberalization of the Telecommunications Sectors* 22-23 (Berkeley Roundtable on the Int'l Econ., Working Paper No. 175, 2006), available at <http://brie.berkeley.edu/publications/wp175.pdf>.

<sup>548</sup> POPULATION REFERENCE BUREAU, SOUTH KOREA (2006), available at <http://www.prb.org/DataFind/datafinder7.htm>. The U.S., by comparison, has an average population density of 80 people per square mile and 79% of its population lives in urban areas. POPULATION REFERENCE BUREAU, UNITED STATES (2006), available at <http://www.prb.org/DataFind/datafinder7.htm>. Nearly half of South Koreans live in urban areas with more than one million people, compared to 37% of Americans. Speta, *supra* note 543, at 15.

<sup>549</sup> In the U.S., 27% of households live in apartment buildings. INT'L TELECOMMS. UNION, PROMOTING BROADBAND: THE CASE OF JAPAN 34 (2003) [hereinafter ITU JAPAN STUDY], available at <http://www.itu.int/osg/spu/ni/promotebroadband/casestudies/japan.pdf>.

approximately 40 percent of its population. The average distance of a customer to a telephone exchange is about two kilometers, with 95 percent of customers living within four kilometers of an exchange, the target range of asymmetric DSL. This close proximity simplifies the last-mile roll-out of such networks.<sup>550</sup>

In addition, some observers conclude that the Internet has become much more of a cultural phenomenon in South Korea than in some other countries.<sup>551</sup> For example, although South Koreans' per-capita income is less than a third of that of Americans, they are willing to spend twice as much of their household income on broadband services.<sup>552</sup>

## 2. Japan

Japan is frequently cited as having some of the lowest prices and highest speeds in the world for Internet service. The Japanese government began a partial privatization of its historical telecommunications monopoly, Nippon Telegraph & Telephone Corp. ("NTT") in the mid-1980s. Some observers have characterized Japan's communications sector since this time as shifting away from government-managed competition and toward a more dynamic, market-oriented system.<sup>553</sup> Japanese industrial policy since the early 1990s, however, has continued to promote the deployment of fiber-optic infrastructure through the use of subsidies and loans from the Development Bank of Japan ("DBJ"),<sup>554</sup> as well as extensive direct investment by NTT.<sup>555</sup>

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<sup>550</sup> ITU KOREA STUDY, *supra* note 541, at 12. "This high population density simplifies network development and lowers costs investment [sic]." *Id.* at 67.

<sup>551</sup> *Id.* at 12 ("[T]hough more difficult to measure, it is widely agreed that Korean 'mentality' is also a key factor. Many Korean Internet users first got a taste of high-speed access at Internet cafes . . . and subsequently wanted the same rapidity at home. There is also a 'copy-cat' syndrome; once one person gets something everyone else wants it, too."). *But see* Associated Press, *Nearly 50 Percent of Americans Have Little Use for Internet and Cell Phones, Survey Finds*, FOXNEWS.COM, May 7, 2007, <http://www.foxnews.com/story/0,2933,270392,00.html> (summarizing findings of the Pew Internet and American Life Project study).

<sup>552</sup> Speta, *supra* note 543, at 6, 10. As of 2003, Japanese spent 0.02% of their household income on broadband services, Americans spent 0.04%, and Swedes and Koreans spent 0.08%. FCC OECD ANALYSIS, *supra* note 538, at 7.

<sup>553</sup> In this view, Japanese broadband markets "grew out of a transition in its regulatory regime away from 'managed competition.'" Kushida & OH, *supra* note 547, at 23. That is, "[t]he shift entailed the government giving up many of the policy tools to manage competition, but adding new institutions and regulations in a transition from ex ante regulation through licenses and approval, towards an ex post mode of regulation relying on a dispute resolution commission and other institutions." *Id.*

<sup>554</sup> The DBJ has offered providers low or no-interest loans for broadband access lines. The Telecommunications Advancement Organization of Japan ("TAO") has subsidized up to 2% interest on DBJ loans. In addition, the government has offered corporate tax rate reductions for operators' broadband equipment and a reduction on the fixed asset tax for broadband equipment. The TAO also has a program to guarantee debt liabilities of operators introducing broadband access networks. ITU JAPAN STUDY, *supra* note 549, at 33-34.

<sup>555</sup> Kushida & OH, *supra* note 547, at 29.

Non-facilities-based startup firms began to offer DSL service in the late 1990s, relying primarily on access to NTT's existing infrastructure. Interconnection regulations at that time, however, did not cover these access arrangements. The new ISPs, therefore, were operating largely at the discretion of NTT, and, in 2000, the Japanese Fair Trading Commission warned NTT over its treatment of new DSL providers.<sup>556</sup> At the same time, the Ministry of Internal Affairs and Communications ("MIC") required NTT to clarify the terms and fees it offered competitors for access to its network, lease out its unused fiber-optic infrastructure at low prices, and unbundle its metallic and fiber-optic local loops.<sup>557</sup> The Japanese government has continued to review policies relating to competitors' access to NTT's network and also entertained a possible breakup of the company.<sup>558</sup> By 2001, the new entrant DSL providers began to make significant headway.<sup>559</sup>

In addition to other government industrial policy measures, Japan's regional electric power utilities had invested substantially in laying fiber-optic networks since the late 1980s.<sup>560</sup> Another company also entered from the cable radio business by deploying 100 Mbps fiber wirelines along its already-existing nationwide electric-pole network.<sup>561</sup> By the end of 2005, approximately 44 percent of Japanese households had broadband access.<sup>562</sup>

Despite government subsidies for broadband deployment by approved service providers, as of 2003, it has been reported that all Japanese DSL providers were unprofitable, notwithstanding rapid growth in the market for Internet services.<sup>563</sup> Thus, some commentators have questioned whether there is sufficient demand for fiber speeds up to 100 Mbps to justify the Japanese government's industrial policy expenditures.<sup>564</sup>

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<sup>556</sup> *Id.* at 26.

<sup>557</sup> *Id.* at 26-27.

<sup>558</sup> *Japan Requires NTT to Provide Access for High-Speed Internet Network to Rivals*, ASIA PACIFIC TELECOM, Aug. 1, 2006, at 6.

<sup>559</sup> In particular, Softbank / Yahoo! created a price shock in the marketplace by setting its monthly subscription price at \$22, the lowest in the world at that time. This prompted other DSL providers, including NTT regional companies, to lower their prices in response. See Kushida & OH, *supra* note 547, at 28.

<sup>560</sup> ITU JAPAN STUDY, *supra* note 549, at 14.

<sup>561</sup> *Id.*

<sup>562</sup> Kushida & OH, *supra* note 547, at 5.

<sup>563</sup> Hidenori Fuke, *The Spectacular Growth of DSL in Japan and Its Implications*, COMM. & STRATEGIES 4th Quarter 2003, at 175, 180, available at [http://www.idate.fr/fic/revue\\_telech/22/C&S52\\_FUKE.pdf](http://www.idate.fr/fic/revue_telech/22/C&S52_FUKE.pdf).

<sup>564</sup> According to one study, beyond service area coverage, "[t]he second and more insurmountable challenge has to do with content, such as: when will there be content attractive enough to the majority of users to migrate from ADSL to FTTH [(Fiber to the Home)]?" ITU JAPAN STUDY, *supra* note 549, at 15.

But a fall in the price of fiber-optic service to below \$40 per month in 2003 apparently attracted significant demand.<sup>565</sup> Other commentators have suggested that while local loop unbundling may have spurred short-term price competition, it may also give rise to long-term disincentives to invest in new facilities infrastructure and develop new service offerings.<sup>566</sup>

Finally, Japan's population density is relatively high at 876 people per square mile. Seventy-nine percent of its 127 million people live in urban areas.<sup>567</sup> Thirty-eight percent of Japanese households live in apartment buildings. In Tokyo and Osaka, 66 percent and 52 percent of households, respectively, live in apartment buildings.<sup>568</sup> As in the case of South Korea, such demographics appear to facilitate the deployment of network infrastructure.

### 3. The Netherlands

The Netherlands has been cited as Europe's leader in broadband penetration.<sup>569</sup> This achievement is often credited to facilities-based competition between cable and DSL in a generally deregulated environment.<sup>570</sup> At the beginning of telecommunications liberalization in Europe during the 1990s, it was left largely to the national governments

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<sup>565</sup> *Id.* at 31. As of 2003, the monthly price for 100 Mbps service was approximately \$36.00. Fuke, *supra* note 563, at 181, 186.

<sup>566</sup> In this view, "DSL services based on line-sharing demonstrate the problems with competition policy relying on the unbundling of network functions of incumbent carriers. . . . Other competitive carriers can enjoy this low wholesale price without taking the risk of . . . investing in an uncertain business." Fuke, *supra* note 563, at 180-81. As a result, "[h]ere we are caught in a dilemma between the short-term promotion of service-based competition and the long-term promotion of technological innovations." *Id.* at 186. Similarly, because "DSL services are offered on NTT local companies' metallic subscriber lines, it is virtually impossible for providers of DSL to differentiate their products. . . . This has led to a situation where competition is primarily based on marketing abilities, including price. Other DSL service providers were obliged to match these low prices." *Id.* at 179.

<sup>567</sup> POPULATION REFERENCE BUREAU, JAPAN (2006), *available at* <http://www.prb.org/DataFind/datafinder7.htm>.

<sup>568</sup> ITU JAPAN STUDY, *supra* note 549, at 34.

<sup>569</sup> See generally INFO. SOC'Y & MEDIA DIRECTORATE-GEN., EUROPEAN COMM'N, EU TELECOM RULES: WHERE ARE WE NOW? 2 (2007), *available at* [http://ec.europa.eu/information\\_society/newsroom/cf/document.cfm?action=display&doc\\_id=266](http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=266) ("The Netherlands is the leading country in the world in broadband penetration. Competition between networks and services has been increasing as cable operators cover almost the whole territory and offer, alongside several DSL providers, attractive and inexpensive packages to consumers.").

<sup>570</sup> See *id.* See also generally AGENCY FOR INT'L BUS. & COOPERATION, THE NETHERLANDS MINISTRY OF ECON. AFFAIRS, BROADBAND AND GRIDS TECHNOLOGY IN THE NETHERLANDS [hereinafter AGENCY FOR INT'L BUS. & COOPERATION], *available at* <http://www.hightechconnections.org/2005/broadband.pdf> (last visited June 14, 2007). By 2006, in addition to the deployment of copper wirelines, ninety-eight percent of Dutch houses were connected to a cable TV network, with almost all of these networks offering broadband Internet services. *Id.*

of individual European Union (“EU”) member states to decide whether and how local loops should be unbundled.<sup>571</sup> During 1996 and 1997, Dutch government restrictions on offering telecommunications infrastructure were generally discontinued.<sup>572</sup> Previously, incumbent monopoly telecom provider KPN had almost unrestricted rights in these fields. Local unbundling was implemented in 1999, and, consistent with subsequent EU rules, firms with significant market power also have special obligations, such as mandated interconnection at cost-based rates.<sup>573</sup> The Dutch government also has subsidized Internet infrastructure projects and has provided tax breaks for computer purchases.<sup>574</sup> In addition, the Netherlands generally is considered the most densely populated country in Western Europe, with an average population density of 1,037 people per square mile and 65 percent of its population living in urban areas.<sup>575</sup> As a result, over 70 percent of the Dutch population lives in an apartment building, attached row house, or semi-detached house.<sup>576</sup>

<sup>571</sup> See generally *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Fifth Report on the Implementation of the Telecommunications Regulatory Package*, COM (1999) 537 final (Nov. 10, 2007), available at [http://ec.europa.eu/comm/information\\_society/policy/telecom/5threport/pdf/5threp99\\_en.pdf](http://ec.europa.eu/comm/information_society/policy/telecom/5threport/pdf/5threp99_en.pdf).

<sup>572</sup> See generally Nico van Eijk, *Broadband Services and Local Loop Unbundling in the Netherlands*, IEEE COMM. MAG., Oct. 1999, at 2-3, available at <http://www.ivir.nl/publications/vaneijk/broadband.pdf>.

<sup>573</sup> E.g., Regulation 2887/2000, Unbundled Access to the Local Loop, 2000 O.J. (L 336) 4. The EU has continued to take subsequent measures to harmonize the way in which member states regulate access to communications networks. See generally *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 12th Report on the Implementation of the Telecommunications Regulatory Package*, COM (2007) 155 final (Mar. 29, 2007) [hereinafter *EC 12th Report*], available at [http://ec.europa.eu/information\\_society/policy/ecom/doc/implementation\\_enforcement/annualreports/12threport/com\\_2007\\_155\\_en.pdf](http://ec.europa.eu/information_society/policy/ecom/doc/implementation_enforcement/annualreports/12threport/com_2007_155_en.pdf).

<sup>574</sup> For example, the Dutch government has spent 106 million Euros on various research projects such as the GigaPort Next Generation Network, which is claimed to be the fastest research and development network in the world. See AGENCY FOR INT’L BUS. & COOPERATION, *supra* note 570. See also Kevin J. O’Brien, *Dutch Found To Be the Most Computer Literate in World*, INT’L HERALD TRIB., Feb. 21, 2006, available at <http://www.ihl.com/articles/2006/02/21/business/pew.php> (describing a 1997-2004 Dutch tax law that allowed workers to deduct from pretax wages the cost of personal computers if they were also used for business purposes); U.S. DEP’T OF STATE, 2006 INVESTMENT CLIMATE STATEMENT – THE NETHERLANDS (2006), available at <http://www.state.gov/e/eeb/ifd/2006/62022.htm> (“[T]he Netherlands ranks eighth in the world [in Internet deployment] thanks to continued rollout of broadband services, internet-related legislation and government broadband programs. In 2004, the government embarked on a broadband action program aimed at creating a regulatory framework that will stimulate and facilitate broadband development.”).

<sup>575</sup> See FRANK SIDDIQUI, THE NETHERLANDS MINISTRY OF ECON. AFFAIRS, HEALTHY AND STRUCTURAL GROWTH OF DUTCH ECONOMY (2006), available at <http://www.hollandtrade.com/vko/zoeken/showbouwsteen.asp?bstnum=1423>; POPULATION REFERENCE BUREAU, NETHERLANDS (2006), available at <http://www.prb.org/DataFind/datafinder7.htm>.

<sup>576</sup> STATISTICS NETHERLANDS, NETHERLANDS OFFICIAL STATISTICS 2000-3 (Autumn 2000), available at <http://www.cbs.nl/NR/rdonlyres/CB145B5F-068C-4086-B0D7-4BA74C3B6791/0/nios003.pdf>.



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Because the socio-economic status of individual countries and the historical nature of their telecommunications regimes can vary widely, comparisons of broadband deployment and adoption rates across countries may not be meaningful.<sup>577</sup> It appears to be generally recognized that these measures can be affected by a number of factors.<sup>578</sup> Some observers suggest, therefore, that particular policies aimed at facilitating broadband deployment and adoption may have differential effects in different places, depending on the relevant circumstances.<sup>579</sup> For the United States, its larger geographic size and relatively dispersed population make it difficult to compare broadband experiences directly with many of the smaller and more densely populated countries that are sometimes cited as global Internet leaders.<sup>580</sup> As a result, although many commentators have urged U.S. policy makers to do more to facilitate the roll-out of broadband Internet services, at the same time, some observers have cautioned against trying to model U.S. policy decisions after those of other countries.<sup>581</sup>

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<sup>577</sup> See generally Robert M. McDowell, Commissioner, FCC, Address at Catholic University School of Law Symposium: Broadband Deployment in a Multi-Media World: Moving Beyond the Myths to Seize the Opportunities (Mar. 15, 2007), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-271555A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271555A1.pdf). See also FCC OECD ANALYSIS, *supra* note 538; CORREA, *supra* note 538.

<sup>578</sup> "Broadband transmission speeds vary across the EU, which on average still lag behind the US, Japan, and Korea. To some extent this can be explained by the high population density in South Korea and Japan, and the presence of more high capacity cable networks in the US compared to several major EU countries." *EC 12th Report*, *supra* note 573, at 12.

<sup>579</sup> One commentator suggests, for example, that "[w]hereas the Nordic region and the Benelux countries [Belgium, Netherlands, and Luxembourg] are in favor of open [unbundled] networks, southern countries with a less-developed cable infrastructure fear that this would discourage investments." Matthijs Leendertse, *Don't Stop at Local Loop*, INDUSTRY STANDARD EUROPE, Jan. 17, 2001, available at <http://www.vandusseldorp.com/vdapintheppress/TheStandard%2017%20Jan%202001.htm>.

<sup>580</sup> See McDowell, *supra* note 577, at 2 ("[When compiling statistics, the] OECD does not account for population density, which puts a country as large as ours—with sizable rural areas—at a disadvantage. No other country above the U.S. on the OECD list occupies an entire continent like we do. No other country above on this list is 75 percent rural.").

<sup>581</sup> For example, one commentator has cautioned that, "[i]t is undeniable that [population density] accounts for much of the difference between broadband penetration in the United States and Korea. This suggests caution in adopting those elements of Korean industrial policy that are most different from the general regulatory presumptions in the United States." Speta, *supra* note 543, at 16. See also Seth Sacher & Scott Wallsten, *What U.S. Broadband Problem?*, CNET NEWS.COM, July 3, 2006, [http://news.com.com/What+U.S.+broadband+problem/2010-1034\\_3-6090408.html](http://news.com.com/What+U.S.+broadband+problem/2010-1034_3-6090408.html) (noting that OECD and other international statistics generally are self-reported and that the methodologies for compiling such statistics generally are not published).

## VII. ANTITRUST ANALYSIS OF POTENTIAL BROADBAND PROVIDER CONDUCT

As explained in the preceding Chapter, an important issue raised in the debate over network neutrality regulation is whether the broadband market – however it may be defined – is competitive. The competitive issues raised in this debate, however, are not new to antitrust law, which is well-equipped to analyze potential conduct and business arrangements involving broadband Internet access. In conducting an antitrust analysis, the ultimate issue would be whether broadband Internet access providers engage in unilateral or joint conduct that is likely to harm competition and consumers in a relevant market.

Section A of this Chapter provides broad principles that underlie the antitrust laws and explains that any type of antitrust analysis involving such conduct would entail a case-by-case evaluation of the procompetitive and anticompetitive effects of the conduct to determine its overall impact on consumer welfare. Section B explores some of the most likely antitrust theories that would apply to potential conduct by broadband providers, including exclusive dealing, vertical integration, and unilateral conduct.

### A. General Principles Underlying the Antitrust Laws

The antitrust laws are grounded in the principle that competition – “that state of affairs in which output is maximized, price is minimized, and consumers are entitled to make their own choices”<sup>582</sup> – serves to protect consumer welfare. This persistent focus on the consumer ensures that enforcement resources are directed at protecting consumers through the competitive process, not at protecting individual market players.

Vigorous competition on the merits by a single firm, such as the charging by such firm of a price that may be higher than would occur in a market with more competitors, does not by itself constitute anticompetitive conduct. As the Supreme Court noted recently in the *Trinko*<sup>583</sup> case, the charging of monopoly prices by a lawful monopolist by itself “is not only not unlawful; it is an important element of the free market system.”<sup>584</sup> Thus, the antitrust laws do “not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.”<sup>585</sup> Empirical evidence and our enforcement experience confirm that competition itself can force changes on a market and erode monopoly profits. Indeed, it is the purpose of the antitrust laws to protect that competitive process.

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<sup>582</sup> HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 5.6b, at 258 (3d ed. 2005) (citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986)).

<sup>583</sup> *Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

<sup>584</sup> *Id.* at 407.

<sup>585</sup> *Id.* at 415-16.

Conduct that has the potential to be both anticompetitive and harmful to consumers, under certain conditions, and procompetitive and capable of improving efficiency, under other conditions, is analyzed under the “rule of reason” to determine the net effect of such conduct on consumer welfare.<sup>586</sup> In contrast, conduct that is always or almost always harmful to consumers – such as collusion among horizontal competitors – generally is deemed *per se* illegal under the antitrust laws.<sup>587</sup> As discussed in the following section, these principles apply to Internet-related markets in the same manner as they do to other markets in our economy.

## B. Potential Antitrust Theories

The potential for anticompetitive harm exists in the various Internet-related markets, as it does in all markets. The FTC’s primary mission is to protect consumers by attacking unfair methods of competition and unfair or deceptive acts or practices,<sup>588</sup> and some have called for antitrust enforcement against potential anticompetitive conduct by broadband providers.<sup>589</sup> Antitrust enforcement – outside the merger review context – involves the *ex post* investigation and prosecution of anticompetitive practices, wherever they are found, rather than *ex ante* regulation to prevent or mitigate potential market failure.<sup>590</sup>

It appears that the competitive issues relating to last-mile access to consumers that have been raised in the network neutrality debate largely can be addressed through antitrust enforcement. Depending on the particulars, blocking access to the Internet by content or applications providers or discriminating in favor of a supplier with whom the broadband provider has an affiliated or contractual relationship would be analyzed, for example, under either Section 1 of the Sherman Act,<sup>591</sup> as an exclusive dealing relationship, or under Section 2 of the Sherman Act,<sup>592</sup> as a unilateral refusal to deal.<sup>593</sup>

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<sup>586</sup> See, e.g., *Ind. Fed’n of Dentists*, 476 U.S. at 459 (balancing of competitive effects under rule of reason is appropriate “where the economic impact of certain practices is not immediately obvious”).

<sup>587</sup> See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85, 103-04 (1984) (“Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”).

<sup>588</sup> See *supra* Chapter II.A.

<sup>589</sup> See, e.g., G. Sohn, Tr. I at 100-01 (“We believe the FTC should investigate and act on allegations of anticompetitive conduct by broadband Internet access providers filed by consumers[,] [and] content[,] service, and applications providers.”); Pepper, Tr. I at 132; Davidson, Tr. I at 232; Muris, Tr. II at 118.

<sup>590</sup> Current antitrust jurisprudence is cognizant of the costs of government intervention in cases where the conduct at issue may not actually harm – and indeed may benefit – competition. The error costs of such “false positives” are part of the antitrust enforcement calculus when enforcement authorities make a decision on intervention in any particular case.

<sup>591</sup> 15 U.S.C. § 1.

<sup>592</sup> *Id.* § 2.

Vertical integration into content or applications by acquisition would be analyzed under the merger laws.<sup>594</sup> In addition, unilateral conduct on the part of broadband providers – including, for example, the degradation of Internet access service to force buyers into paying more for higher-quality service – would be analyzed under Section 2 of the Sherman Act.<sup>595</sup>

While these types of conduct are possible, the allegations of anticompetitive conduct by proponents of net neutrality regulation have for the most part been prospective. That is, there is little evidence to date of consumer harm from anticompetitive practices by ISPs or any other network operators; the allegations of anticompetitive conduct focus mainly on effects that may occur if certain actions, such as exclusive agreements or vertical integration, are undertaken in the future.<sup>596</sup> The only discriminatory action that both sides of the debate have acknowledged occurred when, in 2005, a small local telephone company allegedly blocked its customers from accessing a competing VoIP provider. The FCC took quick action and entered into a consent decree with the telephone company, Madison River, prohibiting the blocking of ports for VoIP traffic. The company also made a voluntary payment of \$15,000 to the U.S. Treasury.<sup>597</sup> The record in the case, however, is sparse and does not contain any analysis of the competitive effects of the actions taken by Madison River.

### 1. Exclusive Dealing

Exclusive dealing arrangements foreclose a seller's competitors from doing business with the buyer for the duration of the arrangement. In the broadband area, ISPs might sign contracts with content or applications providers to provide exclusive, or preferential, access to consumers. For example, an ISP might arrange to allow access

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<sup>593</sup> Section 5 of the FTC Act, *id.* § 45, which prohibits “unfair methods of competition,” encompasses both Sherman Act standards. The Robinson-Patman Act, *id.* §§ 13-13b, 21a, which prohibits, among other things, a seller from discriminating in price between different buyers when the discrimination adversely affects competition, applies to sales involving “commodities”; it does not apply to sales of services or intangible items. See ABA SECTION OF ANTITRUST LAW, *supra* note 177, at 495 (collecting cases). As such, the Robinson-Patman Act would not apply to sales of broadband Internet access services or online content and applications. Cf. *Metro Communs. Co. v. Ameritech Mobile Communs., Inc.*, 984 F.2d 739, 745 (6th Cir. 1993) (holding that Robinson-Patman Act does not apply to sale of cellular telephone service).

<sup>594</sup> Section 7 of the Clayton Act prohibits mergers or acquisitions, the effect of which “may be substantially to lessen competition, or tend to create a monopoly.” 15 U.S.C. § 18.

<sup>595</sup> In addition, horizontal collusive conduct between or among broadband providers would be found to be illegal without an elaborate market analysis. However, we have seen no allegations of such conduct in the broadband area.

<sup>596</sup> See, e.g., Muris, Tr. II at 119 (“This push for regulation is not based, however, on the current robust marketplace.”).

<sup>597</sup> *In re Madison River Communs., LLC*, 20 FCC Rcd 4295 (2005) (consent decree).

only to a single VoIP provider. Other VoIP providers might then be denied last-mile access to that ISP's customers or end users.

Antitrust analysis is guided by the question of whether specific conduct ultimately is harmful to competition and consumers.<sup>598</sup> Under certain circumstances, exclusive dealing contracts can violate the antitrust laws.<sup>599</sup> The courts analyze exclusive dealing contracts under the "rule of reason," which balances the contracts' procompetitive and anticompetitive effects.<sup>600</sup> Thus, the net economic effect of the arrangement will determine whether it violates the antitrust laws. A detailed analysis of how an exclusive dealing arrangement affects competition is required, and – critically – that analysis goes beyond the number of foreclosed competitors.<sup>601</sup> The FTC has held that "a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant market, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity."<sup>602</sup>

Courts have decided exclusive dealing cases on a number of different factors. Although they have looked first at the amount of commerce foreclosed, there is no consensus on how much foreclosure will trigger liability. There appears to be a safe harbor for foreclosure of less than 30 to 40 percent of the relevant market,<sup>603</sup> and even higher shares have been allowed.<sup>604</sup> Other relevant factors in the foreclosure analysis

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<sup>598</sup> See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (federal antitrust laws designed for "the protection of *competition*, not *competitors*") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

<sup>599</sup> See, e.g., *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); *Luria Bros. v. FTC*, 389 F.2d 847 (3d Cir. 1968).

<sup>600</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-47 (1984) (O'Connor, J., concurring); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961).

<sup>601</sup> See, e.g., *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1326 (4th Cir. 1995) (plaintiff must show substantial anticompetitive effect); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 394 (7th Cir. 1984) (plaintiff must show that the probable effect of the exclusion will be to raise prices above competitive levels or otherwise harm competition).

<sup>602</sup> *Beltone Elecs. Corp.*, 100 F.T.C. 68, 204 (1982) (dismissal order).

<sup>603</sup> See, e.g., *Minn. Mining & Mfg. Co. v. Appleton Papers Inc.*, 35 F. Supp. 2d 1138, 1143 (D. Minn. 1999) (30-40% at minimum); *Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp. 1196, 1212-14 (W.D.N.C. 1989) (even 40% would not enable defendant to raise prices above competitive level). Cf. *Microsoft*, 253 F.3d at 70 ("A monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

<sup>604</sup> See, e.g., *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162-65 (9th Cir. 1997) (upholding exclusive dealing contracts by firm with 55% market share that foreclosed 38% of the relevant market).

include the length of the exclusive dealing contract,<sup>605</sup> the presence of alternative distribution channels,<sup>606</sup> ease of entry,<sup>607</sup> and actual injury to competition.<sup>608</sup>

In the recent exclusive dealing case of *United States v. Dentsply International, Inc.*,<sup>609</sup> for example, the court held that a manufacturer of prefabricated artificial teeth violated Section 2 of the Sherman Act by means of its exclusivity arrangements with its several distributors.<sup>610</sup> After finding that the defendant enjoyed monopoly power in the relevant market, the court ruled that the defendant's exclusive dealing arrangements were an unlawful exercise of that power.<sup>611</sup> In reaching that conclusion, the court considered, among other things, the alternative distribution channels available to the defendant's competitors, finding that the use of such channels was not "practical or feasible in the market as it exists and functions."<sup>612</sup>

In the Internet access context, exclusive dealing cases would likely turn on market definition in the first instance. Such definition would involve both product and geographic dimensions. With respect to the product market, a court or agency would have to determine which online content and applications are substitutable or interchangeable by consumers by reason of the products' characteristics, prices, and intended uses.<sup>613</sup> A court or agency also would have to determine whether the geographic boundary of such market is local, regional, national, or, perhaps, global.<sup>614</sup> In

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<sup>605</sup> See *id.* at 1162 (one-year term held legal); accord *Thompson*, 57 F.3d at 1326. Longer terms may not survive challenge. See *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1307-08 (9th Cir. 1982) (greater than 10 years held illegal).

<sup>606</sup> See *CDC Techs., Inc. v. Idexx Labs., Inc.*, 186 F.3d 74, 80-81 (2d Cir. 1999); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1384-85 (5th Cir. 1994).

<sup>607</sup> See *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000).

<sup>608</sup> See *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 151 (4th Cir. 1990); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478-79 (7th Cir. 1988).

<sup>609</sup> 399 F.3d 181 (3d Cir. 2005).

<sup>610</sup> *Id.* at 196.

<sup>611</sup> *Id.*

<sup>612</sup> *Id.* at 193.

<sup>613</sup> An antitrust plaintiff also could challenge an exclusive dealing arrangement as harming competition in a broadband Internet access product market.

<sup>614</sup> Some commentators have argued that the online content and applications market is global, see, e.g., Verizon Communications Inc., Public Comment 60, at 23-24, or national, see, e.g., Sidak, *supra* note 287, at 470; Yoo, *supra* note 276, at 72-73. Others, however, have characterized this market as regional. See, e.g., Herman, *supra* note 267, at 134 ("The emphasis on national rather than regional market share is highly problematic. Not all Internet content providers care primarily about national market share. Several prominent regional Web sites exist within the boundaries of any given regional Bell or cable company . . .").

sum, any exclusive dealing arrangement in the Internet content and applications market – like any such arrangement in any other market – would be subject to a market- and fact-specific antitrust analysis. Indeed, it is not possible, based on generalized data or predictions of future business arrangements, to conclude that the online content and applications market suffers or will suffer from anticompetitive conduct.

## 2. Vertical Integration

As discussed in Chapter IV, antitrust jurisprudence generally regards vertical integration as harmless or even beneficial to consumer welfare.<sup>615</sup> Such integration, however, may be anticompetitive under certain circumstances. A vertical merger, for example, could foreclose opportunities and thereby harm competition.<sup>616</sup> Such foreclosure might occur by either denying competitors access to essential inputs (for example, in the market for broadband Internet access) or denying access to downstream distribution outlets (for example, in the market for online content and applications).<sup>617</sup> In the Internet access context, for example, an ISP that merges with or acquires a VoIP provider may have the incentive to deny access to its network to competing VoIP providers.<sup>618</sup>

Earlier court cases found vertical mergers to be illegal based primarily on the foreclosure of a small market share.<sup>619</sup> More recent cases, however, have rejected a simplistic market share analysis and have insisted on a showing of anticompetitive effects.<sup>620</sup> The FTC has brought a number of cases alleging downstream foreclosure that would harm competition. In *CMS Energy Corp.*, for example, the FTC required an electric power company to divest certain generation assets before acquiring a utility with a monopoly natural gas pipeline due to concerns that the merged company would have an incentive to foreclose access to the pipeline to rival generation companies.<sup>621</sup> In *Ceridian*

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<sup>615</sup> Because vertical agreements can generate procompetitive efficiencies, they are less suspect than horizontal activity under long-accepted antitrust jurisprudence. See 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1902a, at 209 (2d ed. 2005) (“[H]orizontal agreements as a class deserve stricter scrutiny than (a) unilateral acts, (b) horizontal mergers, or (c) vertical agreements.”).

<sup>616</sup> See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>617</sup> Vertical mergers also may have anticompetitive effects when they are used, for example, to facilitate horizontal collusion by competitors or by public utilities to avoid the impact of rate regulation. See HOVENKAMP, *supra* note 582, §§ 9.3d, 9.3e, at 385-86.

<sup>618</sup> See *supra* Chapter IV for a more detailed discussion of potential discrimination by vertically integrated ISPs.

<sup>619</sup> See, e.g., *Brown Shoe Co.*, 370 U.S. 294; *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

<sup>620</sup> See, e.g., *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987); *Reazin v. Blue Cross & Blue Shield, Inc.*, 663 F. Supp. 1360, 1489 (D. Kan. 1987), *aff’d in part, remanded in part*, 899 F.2d 951 (10th Cir. 1990).

<sup>621</sup> *CMS Energy Corp.*, 127 F.T.C. 827 (1999) (consent order).

*Corp.*, a marketer of trucking-fleet credit cards acquired the owner of the dominant point-of-sale system for fleet cards.<sup>622</sup> The potential anticompetitive effect of the acquisition was the foreclosure of rival fleet-card owners from access to the only fleet-card processing system. The consent order settling this case required Ceridian to grant licenses to other fleet-card issuers to use the processing system.

The merger between AOL and Time Warner raised many of the same issues that concern some proponents of net neutrality regulation today. At the time of the merger, AOL was the nation's largest ISP and Time Warner owned cable television systems serving approximately 20 percent of U.S. cable households. One concern was that the merger would lessen competition in the residential broadband Internet access market and reduce AOL's incentive to promote DSL broadband service as an emerging alternative to cable broadband, and that foreclosure of, or discrimination against, competitors of AOL by Time Warner could have harmed competition. The terms of the consent order settling the case required the merged company to provide non-discriminatory access in a number of markets. For example, the order required Time Warner to open its cable system to competitor ISPs and prohibited it from interfering with content passed along the bandwidth contracted for by non-affiliated ISPs. The order also required the company to make available at least one non-affiliated cable broadband ISP service before AOL began offering service and at least two other such services within 90 days to certain subscribers. The consent order also prevented the merged company from discriminating on the basis of affiliation in the transmission of content or from entering into exclusive arrangements with other cable companies with respect to ISP services.<sup>623</sup>

The AOL/Time Warner matter highlights the FTC's ability to protect consumers in Internet markets from vertical integration that may have anticompetitive effects. However, internal expansion by a broadband provider into content or applications would not be covered by the merger laws. Discriminatory conduct by an integrated firm instead would be analyzed as unilateral conduct under Section 2 of the Sherman Act.

### **3. Unilateral Conduct**

Unilateral conduct by firms with sufficient market power can violate the antitrust laws if that conduct is deemed exclusionary or predatory.<sup>624</sup> A court assessing such conduct under Section 2 of the Sherman Act, for example, will initially screen for monopoly power, which is "the power to control market prices or exclude

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<sup>622</sup> Ceridian Corp., FTC Dkt. No. C-3933 (Apr. 5, 2000) (consent order), *available at* <http://www.ftc.gov/os/caselist/c3933.shtm>.

<sup>623</sup> Am. Online, Inc. & Time Warner Inc., FTC Dkt. No. C-3989 (Apr. 17, 2001) (consent order), *available at* <http://www.ftc.gov/os/caselist/c3989.shtm>.

<sup>624</sup> The appropriate liability standard to apply under Section 2 to unilateral conduct, such as refusals to deal, tying, and bundling, recently has been the subject of considerable debate among antitrust practitioners, commentators, and the business community. The FTC and DOJ held hearings from June 2006 to May 2007 to explore the appropriate legal framework for analyzing unilateral conduct. Information relating to these hearings is available on the FTC's Web site at <http://www.ftc.gov/os/scctiontwohearings/index.shtm>.



competition”<sup>625</sup> in a relevant antitrust market.<sup>626</sup> Monopoly power can be shown by direct evidence of control over prices in the relevant market.<sup>627</sup> Where direct evidence is not available, indirect evidence, such as the defendant’s share of the relevant market and the existence of barriers to entry, may be used.<sup>628</sup> There is no universally agreed upon market share that alone is sufficient to create an inference of monopoly power, but shares above 70 percent and below 50 percent are often predictive.<sup>629</sup>

If monopoly power can be shown, a plaintiff also must show exclusionary or predatory behavior: anticompetitive conduct that confers or protects, or otherwise extends, monopoly power.<sup>630</sup> The mere exercise of lawfully acquired monopoly power, including the charging of monopoly prices, is not a violation of Section 2.<sup>631</sup> Use of exclusive dealing contracts, or other vertical agreements, may support a monopolization claim.<sup>632</sup> However, an exclusivity arrangement will not be condemned unless it leads to anticompetitive effects; “[t]hat is, it must harm the competitive *process* and thereby harm consumers.”<sup>633</sup>

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<sup>625</sup> *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

<sup>626</sup> A court must be able to determine which particular product (*e.g.*, broadband Internet access or online content and applications) and geographic markets a defendant is monopolizing or attempting to monopolize. *See, e.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993); *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

<sup>627</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946) (exclusion of competitors is proof of market power); *Microsoft*, 253 F.3d at 51 (prices substantially above competitive level are proof of market power).

<sup>628</sup> *Microsoft*, 253 F.3d at 51.

<sup>629</sup> *See du Pont*, 351 U.S. at 404 (75% would constitute monopoly power); *Echlin Mfg. Co.*, 105 F.T.C. 410, 478 (1985) (46.8% insufficient). *See also* ABA SECTION OF ANTITRUST LAW, *supra* note 177, at 231-32 (“A market share in excess of 70 percent generally establishes a *prima facie* case of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output. In contrast, courts virtually never find monopoly power when market share is less than about 50 percent.”) (footnotes omitted).

<sup>630</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (defining exclusionary conduct as “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”).

<sup>631</sup> *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979); HOVENKAMP, *supra* note 582, § 6.3, at 273 (“The sale of output at a monopoly price is itself not sufficient to brand someone an unlawful monopolist. . . . Eventually the high profits will attract other producers into the market. Collectively these producers will increase output and prices will be driven to the competitive level.”).

<sup>632</sup> *Microsoft*, 253 F.3d at 70.

<sup>633</sup> *Id.* at 58.

As indicated above, refusals to deal can be the basis of a Section 2 claim. Generally, even a firm with monopoly power has no duty to deal with a competitor,<sup>634</sup> but that right is not “unqualified.”<sup>635</sup> Under certain narrowly defined circumstances, a monopolist’s physical plant, facility, or other asset may be considered sufficiently essential to competition in a relevant market that it must be shared with competitors.<sup>636</sup> It is unlikely, however, that the courts will extend any essential facility obligation to a duopoly, as some have characterized the Internet access industry.<sup>637</sup> Even in a monopoly context, the courts have not looked with favor on refusal to deal cases – particularly essential facilities cases – in recent years. In *Trinko*, for example, the Supreme Court rejected as a basis for antitrust liability an allegation that a local exchange carrier (“LEC”) “had filled rivals’ orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs,”<sup>638</sup> noting that the Court has been “very cautious in recognizing . . . exceptions”<sup>639</sup> to a monopolist’s right to refuse to deal with competitors. In any event, an antitrust analysis of a refusal to deal claim or any other claim involving unilateral conduct on the part of a broadband provider would involve a fact-specific determination of whether the conduct at issue harms competition and consumers.

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<sup>634</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1985).

<sup>635</sup> *Id.* at 601.

<sup>636</sup> See, e.g., *MCI Communs. Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (setting forth test requiring showing of following elements: (1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility). The Supreme Court recently has noted that it has never had occasion either to recognize or repudiate this “‘essential facilities’ doctrine crafted by some lower courts.” *Verizon Communs. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-11 (2004).

<sup>637</sup> See *supra* Chapter VI.B.

<sup>638</sup> *Trinko*, 540 U.S. at 404.

<sup>639</sup> *Id.* at 409.

## VIII. CONSUMER PROTECTION ISSUES

This Chapter analyzes the Federal Trade Commission Act's prohibition against unfair and deceptive acts and practices as a framework for ensuring that consumers are adequately protected when purchasing and using broadband Internet access services. Consumer protection issues relating to broadband Internet access often are treated as secondary in the network neutrality debate. Having well-informed consumers of broadband Internet access, however, is crucial to fostering competition, and consumer protection issues will remain important with or without enactment of some form of network neutrality regulation. This Chapter offers a broad overview of basic consumer protection law in Section A; discusses the applicability of consumer protection laws to broadband Internet access services in Section B; and explores additional methods that can be used to protect the interests of consumers in the broadband services marketplace in Section C.

### A. An Overview of Section 5 of the FTC Act

As discussed in Chapter II, Section 5 of the FTC Act prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce.<sup>640</sup> An act or practice is deceptive if it involves a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and the representation, omission, or practice is material.<sup>641</sup> Thus, an advertisement is deceptive if it includes material information that is false or that is likely to mislead a consumer acting reasonably under the circumstances. Likewise, an advertisement is deceptive if it omits material information, and that omission is likely to mislead a consumer acting reasonably under the circumstances.<sup>642</sup> Requiring accurate disclosure of material terms allows consumers to compare similar services offered by one or multiple providers and weigh the different terms being offered in making decisions about what services to purchase.

An act or practice is unfair, also in violation of the FTC Act, if it causes injury to consumers that: (1) is substantial; (2) is not outweighed by countervailing benefits to consumers and competition; and (3) consumers themselves could not reasonably have avoided.<sup>643</sup> The Commission has used its unfairness jurisdiction in a broad array of cases. For example, the Commission has taken the position that cramming unauthorized charges for information services onto consumers' telephone bills is an unfair practice.<sup>644</sup> In the data security context, the Commission has challenged the failure to implement

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<sup>640</sup> 5 U.S.C. § 45(a).

<sup>641</sup> *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984). See also *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998).

<sup>642</sup> *Cliffdale Assocs.*, 103 F.T.C. at 175 (appending FTC Policy Statement on Deception).

<sup>643</sup> 15 U.S.C. § 45(n); see also *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988).

<sup>644</sup> See, e.g., *FTC v. Verity Int'l Ltd.*, 443 F.3d 48 (2d Cir. 2006). See also *supra* Chapter II.A for a discussion of this case.

reasonable safeguards to protect the privacy of consumer information, where the failure causes substantial injury without offsetting benefits, as an unfair practice.<sup>645</sup> The Commission also has taken the position that a unilateral change of contract may be an unfair practice. For example, in the context of lifetime service contracts used by an exterminator, the Commission challenged unilateral changes of material terms of the contract by the company as unfair trade practices.<sup>646</sup>

## **B. Applicability of Consumer Protection Laws to Broadband Internet Access Services**

Participants at the FTC's Broadband Connectivity Competition Policy Workshop primarily addressed two broad areas of consumer protection: (1) clear and conspicuous disclosure of material terms; and (2) security and privacy issues created by broadband Internet access services. Current federal consumer protection law can address both sets of concerns. Consideration of the first area suggests that consumers of broadband Internet access would benefit from an industry-initiated effort to: (1) more clearly identify those terms that are material to consumers' decisions to purchase broadband Internet access services; and (2) devise methods to effectively disclose those terms. In the second area, the discussion at the Workshop indicated that further study of the privacy and security practices in the broadband Internet access industry is needed to address concerns that policy makers and others have expressed about those practices.

However the current network neutrality debate is resolved, effective consumer protection in the broadband marketplace will be essential to robust competition in that market. Without truthful marketing and clear disclosure of material terms, consumers will lack the information they need to make informed decisions in the broadband Internet access marketplace. Likewise, inadequate protection of privacy of personal information and data security in the provision of broadband Internet access could hamper consumer confidence in the industry.

### **1. Clear and Conspicuous Disclosure of Material Terms**

In analyzing which acts or practices in the offering of broadband Internet access services are likely to be deceptive, Workshop participants discussed terms that could be considered material to consumers purchasing broadband Internet access services. "A

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<sup>645</sup> See, e.g., CardSystems Solutions, Inc., FTC Dkt. No. C-4168 (Sept. 5, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0523148/0523148CardSystemsdo.pdf>; DSW, Inc., FTC Dkt. No. C-4157 (Mar. 7, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0523096/0523096c4157DSWDecisionandOrder.pdf>; United States v. ChoicePoint, Inc., No. 106-CV-0198 (N.D. Ga.) (settlement entered on Feb. 15, 2006), available at <http://www.ftc.gov/os/caselist/choicepoint/0523069stip.pdf>; BJ's Wholesale Club, Inc., FTC Dkt. No. C-4148 (Sept. 20, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf>.

<sup>646</sup> See *Orkin Exterminating*, 849 F.2d at 1363-66. See also *FTC v. Certified Merch. Servs., Inc.*, No. 4:02-cv44 (E.D. Tex. Dec. 30, 2002) (final judgment and order), available at <http://www.ftc.gov/os/2003/01/cms.pdf>.

claim is considered material if it 'involves information important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product.'"<sup>647</sup> Express claims are presumed to be material, that is, likely to affect a consumer's choice or conduct regarding a product.<sup>648</sup> Existing case law easily would support determinations that certain types of terms common to most or all Internet service contracts, such as price and duration, are "material."

Identifying and reaching agreement on what other terms are material to consumers of broadband Internet access and how to provide those consumers with meaningful disclosure is more difficult. Among the terms and conditions that could be considered material, participants and commentators have focused most of their attention on connection speed, limitations on use, and broader network management policies.

Speed was a particular focus of the participants. As a number of them discussed, the connection speed or speeds that a broadband provider offers to its customers, including both upload and download speeds, are terms that likely are material to broadband consumers.<sup>649</sup> Indeed, speed is one of the primary qualitative features on which broadband providers are competing. Consumers can use online "speed test" tools to attempt to determine the actual transmission speeds that they are experiencing through their broadband connections. However, as one Workshop participant noted, the speed of a connection is not completely within the control of the customer's last-mile broadband provider.<sup>650</sup> Myriad factors beyond the control of the provider can affect the download speed that a customer experiences at any particular time, including, among others, the nature of the content or application that the customer is trying to access and the number of other users seeking to access the same content or application at the same time.

Moreover, the type of information about access speeds that should be conveyed is a difficult question. One issue raised by the participants was whether a disclosure that the provider will give the consumer connection speeds of "up to" a certain speed is sufficient. That is, should the provider be required to make more detailed disclosures of average speeds or a range of minimum and maximum speeds? One participant argued that advertisements that tout "theoretical" bandwidth speeds that, in practice, are available only at limited times are likely to mislead consumers. He maintained that more effective disclosures would tell consumers the "effective" or typical bandwidth speed they could expect to receive.<sup>651</sup> In response, another participant argued that, because the bandwidth speeds that consumers will receive at any given time may vary widely due to a number of conditions, disclosure of average bandwidth speeds would be more likely to mislead

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<sup>647</sup> *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). See also *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994).

<sup>648</sup> *Kraft*, 970 F.2d at 322.

<sup>649</sup> Weiser, Tr. II at 87-88; Brenner, Tr. II at 97-98.

<sup>650</sup> Brenner, Tr. II at 97-98.

<sup>651</sup> Weiser, Tr. II at 87.

consumers than disclosure of maximum, “up to” bandwidth speeds.<sup>652</sup> He explained that the reason that such claims are effective is that consumers understand that “up to” claims are not the same as “average” claims and, thus, will discount the claims accordingly.<sup>653</sup>

Several of the Workshop participants also discussed disclosure of limitations on use imposed by broadband providers, an issue often raised in the network neutrality debate. As previously discussed, material omissions that are likely to mislead consumers acting reasonably under the circumstances are deceptive in violation of Section 5 of the FTC Act. Some have argued, for example, that if a broadband provider intends to prohibit its customers from using their broadband connections to access specific content or applications, such as VoIP telephone calls or streaming video, the provider should disclose those limitations clearly and conspicuously before the transaction is completed.<sup>654</sup> Similarly, it can be argued that usage limitations, such as a limitation on bandwidth usage or connection times, also should be disclosed.<sup>655</sup>

Other commentators have suggested that network management practices, such as traffic discrimination and traffic shaping, are material terms that must be disclosed to consumers.<sup>656</sup> Where a broadband provider gives priority to traffic coming to or from a particular content provider pursuant to a commercial relationship, the prioritization may enhance the performance of traffic to or from the favored content provider and degrade the performance of traffic to or from other content providers, including the favored provider’s competitors. This implicates the question of whether such commercial relationships are material terms that must be disclosed to potential customers. One commentator has argued that offers of broadband Internet access that do not disclose such relationships and their effects are likely to mislead consumers because consumers traditionally expect “that Internet access entails the ability of users to communicate with

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<sup>652</sup> Muris, Tr. II at 132.

<sup>653</sup> *Id.*

<sup>654</sup> See, e.g., G. Sohn, Tr. I at 101; Putala, Tr. II at 32; Tim Wu, *Wireless Net Neutrality: Cellular Carterfone on Mobile Networks* 22-23 (New America Foundation Wireless Future Program, Working Paper No. 17, 2007), available at [http://www.newamerica.net/files/WorkingPaper17\\_WirelessNetNeutrality\\_Wu.pdf](http://www.newamerica.net/files/WorkingPaper17_WirelessNetNeutrality_Wu.pdf).

<sup>655</sup> See Weiser, Tr. II at 88-89; Brenner, Tr. II at 94-95; Atkinson & Weiser, *supra* note 255.

<sup>656</sup> See, e.g., Center for Democracy & Technology, Public Comment 7, at 8 (“Public disclosure of prioritization arrangements could enable consumers to exert pressure against any policies they perceive as excessive ISP meddling in their choices among competing Internet content, services, and applications.”); Bancroft, Public Comment 3, at 1 (“[V]oluntary disclosure of the existing packet management practices on a residential user’s high-speed Internet access arrangement is the logical and necessary first step.”); van Gelder, Public Comment 59, at 26 (“Truth in advertising with full disclosure of [an ISP’s] intention to discriminate based on content provider would allow consumers to make informed choices about what they are paying for and from whom they wish to obtain Internet service.”). Cf. OECD Report, *supra* note 382, at 30 (“Other safeguards that policy makers could consider include encouraging or requiring ISPs to clearly state their broadband packet shaping policies to consumers before they sign up for broadband and keeping existing subscribers aware of any changes.”).

any and all other Internet users without interference from one's own ISP."<sup>657</sup> If broadband providers begin entering into pay-for-priority arrangements with content and applications providers, issues about the degree to which those arrangements must be disclosed no doubt will arise. Whether particular network management practices will be material to consumers (and therefore must be disclosed), however, cannot be determined in the abstract, but will require an examination of specific practices and consumer expectations.

There is, further, the question of how these types of information can be disclosed clearly and conspicuously so that it is meaningful to consumers. One Workshop participant argued that the disclosures currently used by many broadband providers are inadequate to meaningfully inform consumers of the terms and conditions of their service plans.<sup>658</sup> Meaningful disclosure may prove particularly challenging in this high-tech arena. Some studies of consumer behavior indicate that many pre-purchase disclosures for high-tech products and services, such as end user licensing agreements ("EULAs") for computer software, are not written in language that laypeople can easily understand or are too lengthy.<sup>659</sup> If consumers either do not read disclosures or do not understand them, the purpose of the disclosures is frustrated. The challenge of disclosures in the broadband access area, therefore, is to make such disclosures in a way that will enable consumers to understand both the services at issue and the ISPs' descriptions of how those services are provided. This will allow consumers to make meaningful comparisons of the offerings of competing providers and to know whether they are receiving the promised services.

The bundling of broadband Internet access with other services by many providers may raise special challenges regarding disclosure of material terms in the broadband Internet access area. In some instances, bundling may offer benefits to consumers and competition, but, in all instances, consumers must, of course, receive truthful and non-misleading disclosure of material information.<sup>660</sup> Prime examples of such bundling are the "triple play" packages offered by some telephone and cable television companies, in which broadband Internet access, telephone service, and video service are offered as a package with a single monthly price.<sup>661</sup> The practice of bundling can complicate the task

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<sup>657</sup> Center for Democracy & Technology, Public Comment 7, at 7.

<sup>658</sup> Kenney, Tr. II at 107.

<sup>659</sup> See, e.g., NATHANIAL GOOD, ET AL., STOPPING SPYWARE AT THE GATE: A USER STUDY OF PRIVACY, NOTICE AND SPYWARE (2005), available at <http://www.law.berkeley.edu/clinics/samuelson/papers/other/SamuelsonClinicSpyware.pdf>.

<sup>660</sup> For a useful discussion on bundling see Patrick DeGraba, *The Loss Leader is a Turkey: Targeted Discounts from Multi-Product Competitors*, 24 INT'L J. INDUS. ORG. 613 (2006); Yannis Bakos & Erik Brynjolfsson, *Bundling and Competition on the Internet*, 19 MKTG. SCI. 63 (2000); and Yannis Bakos & Eric Brynjolfsson, *Bundling Information Goods: Pricing, Profits, and Efficiency*, 45 MGMT. SCI. 1613 (1999).

<sup>661</sup> Some providers have recently begun to offer "quadruple play" packages, which include mobile telephone services in addition to the other three services.

of comparing the price and quality of the bundled broadband access with the offerings of other providers. Additionally, bundled packages can increase the transactional costs to a consumer who decides to switch to another broadband provider that is offering service with better quality or at a better price.<sup>662</sup>

## **2. Unilateral Change of Contract**

Some broadband providers offer consumers discounted prices for service contracts with durations of a year or more. Consumers who subscribe to such offerings are likely to expect a consistent level of service throughout the contract period, and, as noted above, the Commission and the courts have found that a unilateral change of contract can be an unfair practice.<sup>663</sup> This raises several important questions to consider as providers' practices change over time. What duties do providers owe to those customers in an industry as dynamic as the broadband industry? If a provider begins to differentiate traffic among various content and applications providers in the midst of such a contract, how will it notify and receive the consent of its subscriber to do so? If a subscriber does not consent to such a change, but the provider implements it anyway, might the change in service be considered an unfair unilateral change in contract if it materially affects the service that the subscriber receives?

## **3. Privacy and Data Security**

A number of Workshop participants recognized the heightened privacy and data security concerns raised by the volume and sensitivity of the user information available to broadband providers.<sup>664</sup> The discussion and commentary on privacy and security concerns in the broadband industry has focused on two areas: (1) disclosure of privacy policies; and (2) data security. Further exploration of each area is justified. At the same time, it is worth noting that the FTC has used its full range of law enforcement authority to address privacy and data security concerns and will continue to do so, where appropriate, in the broadband arena.

An important privacy question raised in this and many other contexts is whether companies in practice live up to their privacy and security policies. For more than a decade, the Commission has encouraged companies to provide information about their privacy practices. At the same time, the Commission has taken the position that companies are obligated to provide the privacy and security protections they advertise and has brought approximately a dozen cases alleging that failure to comply with stated privacy and security practices is a deceptive practice in violation of Section 5 of the FTC

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<sup>662</sup> Kenney, Tr. II at 106.

<sup>663</sup> See, e.g., *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988).

<sup>664</sup> See Peha, Tr. I at 18-29; Kenney, Tr. II at 103, 129; Yokubaitis, Tr. II at 130-31.



Act.<sup>665</sup> We recommend that all companies, including broadband providers, closely review their privacy policies and actual practices to make sure that they are consistent.

Some privacy and security concerns, however, may be unique to the broadband industry. At the Workshop, a participant described a variety of techniques and commercially available tools that broadband providers can use to analyze data packet streams, including, most notably, flow classification and deep packet inspection.<sup>666</sup> Flow classification allows the provider to keep track of “things like packet size, and the time between packets, and stream duration.”<sup>667</sup> Even if the packets are encrypted, such monitoring may allow a provider to harvest a significant amount of information about a user, including the kinds of applications the user is employing. Deep packet inspection allows the provider to identify not only the type of application being used, but also the content of the communication. Moreover, as the participant noted, a provider can cross-index the information it gets by monitoring a user’s traffic with other information such as “billing information, or [the user’s] credit card information.”<sup>668</sup> While the participant focused on these tools as part of a discussion about how a provider can discriminate against or prioritize traffic, he also pointed out that these tools can be and are used to improve network security by identifying and protecting the network against viruses, spyware, and other dangers to the system.<sup>669</sup> Not surprisingly, some participants expressed concern that the use of deep packet inspection and other monitoring tools could impinge on user privacy and network security.<sup>670</sup>

The privacy and security implications of the practices of broadband Internet service providers warrant continued monitoring and review. The Commission recognizes that there is no one-size-fits-all data security plan. Rather, data security plans must be adapted to the size and nature of the business, the nature of the tools available, and the security risks the business is likely to face. Like other companies that have access to

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<sup>665</sup> See, e.g., Gateway Learning Corp., FTC Dkt. No. C-4120 (Sept. 10, 2004), available at <http://www.ftc.gov/os/caselist/0423047/040917do0423047.pdf>; Petco Animal Supplies, Inc., FTC Dkt. No. C-4133 (Mar. 4, 2004), available at <http://www.ftc.gov/os/caselist/0323221/050308do0323221.pdf>; Microsoft Corp., FTC Dkt. No. C-4069 (Dec. 20, 2002), available at <http://www.ftc.gov/os/caselist/0123240/microsoftdecision.pdf>; FTC v. Toysmart.com, LLC, No. 00-11341-RGS (D. Mass. July 21, 2000), available at <http://www.ftc.gov/os/2000/07/toysmartconsent.htm>.

<sup>666</sup> Peha, Tr. I at 19. See also *supra* Chapter I.C.3.

<sup>667</sup> Peha, Tr. I at 19.

<sup>668</sup> *Id.*

<sup>669</sup> *Id.* at 21-22.

<sup>670</sup> See, e.g., Kenney, Tr. II at 103; Yokubaitis, Tr. II at 130-31. As one participant noted, “the technology that broadband providers will use to facilitate tiering and network discrimination poses some substantial privacy issues.” Kenney, Tr. II at 103. Another participant was even more pointed, noting in his written comments that, “deep packet inspection will yield and reveal some of the most personal and proprietary information customers have.” Yokubaitis, Participant Presentation 1, at 5.

large amounts of sensitive personal data, broadband providers have a serious obligation to take reasonable steps to protect that data.

### **C. Additional Measures to Protect Consumers**

As discussed above, it is not always a simple matter to apply the FTC Act's prohibitions against deceptive and unfair practices to broadband Internet access services. Moreover, both the telephone companies and the cable companies, which together provide the majority of broadband residential connections, have traditionally offered more highly regulated services. The move to a less regulated regime may require a significant conceptual shift for some in the industry to think about broad consumer protection standards that are applicable to broadband offerings. Commentators have proposed other measures – in addition to enforcement of the consumer protection laws – to ensure that the interests of consumers are adequately protected in this important industry. As discussed below, these measures include industry self-regulation and FTC guidance.

#### **1. Self-Regulation by the Industry**

One option for addressing consumer protection issues in the broadband industry is more active industry self-regulation. Self-regulation, for example, might take the form of voluntary industry-wide disclosure guidelines that would standardize the definitions of relevant terms and conditions of broadband access services to be disclosed to consumers.<sup>671</sup> A Workshop participant suggested that industry self-regulation could take the form of a dispute-resolution regime modeled along the lines of the Better Business Bureau's National Advertising Division and the National Advertising Review Board.<sup>672</sup> Such a mechanism could complement federal and state enforcement efforts by referring the most egregious or recalcitrant violators to law enforcement.

Although it has its limitations, as a general matter, the Commission applauds industry self-regulation. Self-regulation plans in several industries have protected and informed consumers and benefited honest businesses by taking action against competitors that use deceptive or unfair practices.<sup>673</sup> A more comprehensive approach to address the myriad consumer protection issues facing the industry, however, may be necessary. Moreover, any program of self-regulation is more effective when complemented by strong enforcement mechanisms.

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<sup>671</sup> See, e.g., Bancroft, Public Comment 3, at 2.

<sup>672</sup> Weiser, Participant Presentation, at 9.

<sup>673</sup> See Deborah Platt Majoras, Chairman, FTC, Self Regulatory Organizations and the FTC, Address Before the Council of Better Business Bureaus (Apr. 11, 2005), *available at* <http://www.ftc.gov/speeches/majoras/050411selfregorgs.pdf>.

## 2. FTC Guidance Regarding Consumer Protection Issues

Some commentators have suggested that the FTC might effectively address some of the disclosure issues discussed above by developing guidance to industry regarding the critical information that broadband providers should disclose to their customers and potential customers.<sup>674</sup> With respect to disclosure, such standardized information could allow consumers to conduct a meaningful comparison of the available offerings of broadband providers. Such guidance could be combined with consumer education campaigns to help consumers understand what the information contained in such disclosures means.

FTC guidance may be useful should consumers encounter widespread difficulty obtaining or understanding material information about broadband offerings and service. In any case, we intend to continue to monitor industry practices, and, if appropriate, engage the industry in discussions of best practices. We note that the Commission already provides businesses with substantial information about how to provide non-deceptive disclosures to consumers. In particular, we recommend that broadband providers review the advice offered in the FTC's business education guide on "Dot Com Disclosures,"<sup>675</sup> which offers a comprehensive look at how to provide clear and conspicuous disclosure and focuses on adequate disclosure in online marketing.

Even more recently, the Commission published a business guide, "Protecting Personal Information: A Guide for Business."<sup>676</sup> This guide provides tips about basic practices all businesses should consider when it comes to protecting the privacy of their customers and the security of their data. The plain-language guide includes checklists to get businesses thinking about the kind of data they collect, whether they need it, how they manage and store it, and how to properly dispose of it. The guide also provides tips about the basics of creating a plan for dealing with a security breach, in the event one does occur. We recommend that broadband providers review the guide and consider its applicability. As in other industries, FTC guidance can complement enforcement of the consumer protection laws in the broadband Internet access industry.

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<sup>674</sup> Weiser, Participant Presentation, at 8.

<sup>675</sup> This guide is available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.shtm>.

<sup>676</sup> This guide is available at <http://www.ftc.gov/infosecurity/>.

## IX. PROPOSALS REGARDING BROADBAND CONNECTIVITY

This Chapter discusses the various legal, regulatory, and other proposals relating to broadband Internet access that have been put forth to date. Section A reiterates briefly existing federal agency oversight in the broadband area and then explores various views on such oversight. Section B discusses more specifically the FCC's recent broadband policy statement and the conditions imposed by the FCC in approving several recent mergers. Section C summarizes the relevant legislation that Congress has proposed. Finally, Section D reviews some of the other proposals offered by various interested parties.

### A. Existing Agency Oversight

The central competition and consumer protection issues raised by broadband Internet access services are subject to the shared jurisdiction of the FCC, FTC, and DOJ. As discussed in Chapter II of this Report, FCC jurisdiction comes chiefly from the Communications Act, which establishes the FCC and provides for the regulation of telecommunications and information entities, services, and facilities.<sup>677</sup> The FTC's jurisdiction over broadband access comes chiefly from its statutory mandate to prevent "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce" under the FTC Act.<sup>678</sup> The FTC's authority to enforce the antitrust laws generally is shared with DOJ's Antitrust Division.<sup>679</sup>

As discussed in Chapter II, recent judicial and regulatory decisions have helped clarify the status of broadband Internet access services as information services not subject to the Communications Act's common carrier requirements.<sup>680</sup> Even proponents of imposing (or reimposing) some common carrier-type obligations,<sup>681</sup> however, generally support FTC oversight of broadband Internet access, as do other network neutrality proponents, as well as net neutrality opponents. For example, one Workshop participant, recognizing FTC jurisdiction and the absence of common carrier regulation, advocated the importance of traditional competition law concerns and, at the same time, regulatory "language along the lines of the AT&T merger condition[s]."<sup>682</sup> Another participant,

<sup>677</sup> 47 U.S.C. §§ 151 *et seq.* See also *supra* Chapter II.B (discussing FCC jurisdiction).

<sup>678</sup> 15 U.S.C. § 45(a)(1). See also *supra* Chapter II.A (discussing FTC jurisdiction).

<sup>679</sup> See *supra* note 154.

<sup>680</sup> See *supra* Chapter II.C.

<sup>681</sup> Under Title II common carrier regulation, broadband service providers would be required to, among other things, enable functional physical connections with competing carriers, 47 U.S.C. § 201(a), at "just and reasonable" rates, *id.* § 201(b), which the FCC would be empowered to prescribe, *id.* § 205, and would be prohibited from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services. . . ." *Id.* § 202(a).

<sup>682</sup> Libertelli, Tr. I at 74, 79. Libertelli went on to distinguish between "net neutrality" and "251 or Title II-style non-discrimination requirements." *Id.* at 126. The AT&T/BellSouth merger conditions imposed by the FCC are discussed below in Chapter IX.B.

advocating further regulation, and apparently critical – as a policy matter but not a legal one – of the *Brand X* decision, argued that “[t]he FCC and FTC often have concurrent jurisdiction, and the public would be well served if that were the case here, as well.”<sup>683</sup> Yet another participant, noting with caution that the FTC “has already testified twice before Congress, to oppose measures that would effectively extend the common carrier exemption to broadband,” recognized FTC jurisdiction and the importance of the FTC’s ability to protect the role of consumer information in competitive markets by enforcing existing FTC Act provisions.<sup>684</sup> Several participants were supportive of FTC jurisdiction, but opposed to further regulation, advocating, for example, a cautious, case-by-case application of current legal standards.<sup>685</sup>

Several participants highlighted the importance of FTC jurisdiction with regard to consumer protection concerns in particular.<sup>686</sup> One participant suggested that the classification of broadband services as information services provided not just FTC consumer protection authority, but, pursuant to that authority, an institutional capacity and experience in enforcing such provisions.<sup>687</sup> That participant argued that the FCC, in its enforcement of the Communications Act, has no substantial institutional history with consumer protection matters.<sup>688</sup> Another participant argued, similarly, for the importance of adequate consumer information and the authority, expertise, and experience of the FTC’s “historical consumer protection mission,” for enforcing consumer access to such information.<sup>689</sup> Yet another participant argued that, because transparency and disclosure

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<sup>683</sup> G. Sohn, Tr. I at 102. Sohn, however, did not advocate a return to Title II regulation: “I don’t know anybody who is talking about going back to Title II. . . . [T]hat is not what this debate is about.” *Id.* at 125.

<sup>684</sup> See Putala, Tr. II at 32 (the FTC “has jurisdiction over broadband connectivity, and everyone should be aware and watch very closely”); *id.* at 32-33 (regarding FTC Act enforcement). See also Center for Democracy & Technology, Public Comment 7, at 7 (“The FTC could send an important signal to the marketplace by publicly reiterating that . . . it will be on alert for signs of unfair competition in the broadband marketplace and will not hesitate to take enforcement action.”); BT Americas Inc., Public Comment 5, at 2 (“Until such time as effective competition emerges, the Federal Trade Commission should adopt a policy of enhanced antitrust oversight and enforcement to deter abuse of market power.”).

<sup>685</sup> See, e.g., Pepper, Tr. I at 81 (advocating enforcement of the FTC Act against concrete violations, but against further regulation); Muris, Tr. II at 121 (“[Competition law enforcement] plays an important but limited role to supplement the common law. It acts as a check on conduct that interferes with the proper functioning of the market, particularly collusion and fraud.”); Wolf, Tr. II at 144, 149 (arguing for sufficiency of existing agency oversight and antitrust law framework and that there is “no current demonstrated need for the proposed legislation or regulation”).

<sup>686</sup> See, e.g., Weiser, Tr. II at 86-87; *cf.* Putala, Tr. II at 32-33 (citing FTC Commissioner Leibowitz on importance of transparency and disclosure).

<sup>687</sup> Weiser, Tr. II at 86-87. See also *id.* at 123 (“There are serious collective action problems for consumers, and also expertise issues for regular common law courts. The FTC has an opportunity here to basically be an advocate for consumers, and to take cases that consumers would not prosecute on their own . . .”).

<sup>688</sup> *Id.* at 86-87. That participant also questioned the jurisdictional authority of state public utility commissions in the area of broadband Internet access. See *id.* at 86, 123.

<sup>689</sup> Pepper, Tr. I at 91.

were among “the most critical issues regarding the Internet,” FTC enforcement actions aimed at material failures to disclose were of central importance.<sup>690</sup>

Several Workshop participants recognized the importance of promoting and protecting competition in the area of broadband Internet access, and several participants linked these goals to the question of FTC jurisdiction explicitly, sometimes linking consumer protection and competition law questions. For example, one participant argued that the FTC has broad jurisdiction to protect consumers through enforcement of both the competition and consumer protection provisions of the FTC Act, as well as its research, education, and advocacy tools on behalf of consumers.<sup>691</sup> At the same time, the participant argued for the maintenance of the current regulatory structure, in tandem with market forces and common law remedies, and cautioned that regulators and lawmakers be wary of the costs of regulation, especially as they might arise from “prospective” regulation undertaken prior to evidence of significant market failure.<sup>692</sup> Another participant advocated that “the FTC should play a leadership role in protecting consumers and competition, by exercising its authority, experience, resources, and expertise, on a case-by-case basis.”<sup>693</sup>

As noted above, the question of whether existing law and agency oversight are adequate to address problems that may arise in broadband Internet access is a contentious one. One participant expressed concern regarding the potential adequacy of antitrust enforcement and endorsed the passage of proposed network neutrality legislation.<sup>694</sup> Other participants and commentators also have questioned the adequacy of antitrust enforcement to address concerns identified by network neutrality proponents.<sup>695</sup> Other

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<sup>690</sup> Putala, Tr. II at 32-33 (material failures to disclose should be regarded as “unfair, deceptive, and in violation of the FTC Act”).

<sup>691</sup> Muris, Tr. II at 119-20; *cf.* Weiser, Tr. II at 86 (FTC “can do a great service” bringing competition law tools to bear on broadband services, but that tractable “low hanging fruit” issues were more in the realm of consumer protection).

<sup>692</sup> Muris, Tr. II at 119-22; *see also* Sidak, Tr. I at 110 (“[I]t’s important to try to separate the purely hypothetical harms . . . from the problems that have been observed and remedied . . .”); Wolf, Tr. II at 149 (“asserted fears . . . are hypothetical at best”). Some commentators also expressed the general notion that “regulation should not be introduced absent a finding that there is pervasive otherwise anticompetitive conduct that cannot be addressed by the antitrust laws.” American Bar Association Section of Antitrust Law, Public Comment 2, at 1.

<sup>693</sup> Pepper, Tr. I at 81 (advocating enforcement of the FTC Act against concrete violations, but against further regulation).

<sup>694</sup> *See* Misener, Tr. II at 140 (advocating passage of the “Dorgan-Snowe bill”); *cf.* Bachula, Tr. II at 172 (“relying on after the fact enforcement through the anti-trust laws is not a practical remedy for universities”).

<sup>695</sup> *See, e.g.,* Farrell, Tr. I at 158-59 (“It’s often been suggested . . . that because these problems are, in a broad sense, competition problems, you could address them ex post with anti-trust. . . . I am not convinced that anti-trust, as currently enforced, is going to do a good job on those potential problems.”); Herman, *supra* note 267, at 139 (“Especially in the rapidly evolving market of online content and services, antitrust enforcement is far too slow a remedy for anticompetitive behavior to save embattled products. . . . If it is to

participants argued that additional legal force should be given to existing FCC policy statements or certain transaction-specific merger conditions.<sup>696</sup>

In contrast, several participants argued that existing law and oversight were adequate and that further regulation was bound to be costly.<sup>697</sup> One participant argued that federal and state agencies, as well as the private bar, “are all empowered right now and have tools at their disposal that may be used if there is indeed anti-competitive or unfair tactics engaged in by broadband providers.”<sup>698</sup> He concluded that “existing law provides sufficient oversight . . . especially in light of the adverse unanticipated consequences of proposed new regulation.”<sup>699</sup> Another participant insisted that antitrust law “can and must be sufficient to handle” concerns that have been raised about broadband access and blocking.<sup>700</sup>

## **B. FCC Policy Statement and Merger Conditions**

Several Workshop participants highlighted the importance of the FCC’s recently issued broadband access principles,<sup>701</sup> and several suggested that particular merger conditions imposed by the FCC ought to be regarded as a model for future broadband regulation.<sup>702</sup>

As noted in Chapter II of this Report, then-FCC Chairman Michael Powell challenged the industry, in a 2004 address, to preserve the following four central “Internet Freedoms”:

- (1) *The “Freedom to Access Content . . . consumers should have access to their choice of legal content”* (within “reasonable limits” imposed by legitimate network management needs);

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keep affected products from sliding into oblivion, any network neutrality regulation should go through the FCC.”).

<sup>696</sup> See, e.g., Libertelli, Tr. I at 79. The question of whether various FCC merger conditions or policy statements should serve as a model for future regulation is discussed in Section B of this Chapter, *infra*.

<sup>697</sup> See, e.g., Muris, Tr. II at 122; see also Waz, Tr. II at 156-58.

<sup>698</sup> Wolf, Tr. II at 145; see also American Bar Association Section of Antitrust Law, Public Comment 2, at 1, 8.

<sup>699</sup> Wolf, Tr. II at 145; see also Small Business and Entrepreneurship Council, Public Comment 49, at 1 (“Such ‘pre-regulation’ without proof that anything harmful has been or will be done undoubtedly will have unintended consequences for the development of the Internet, and in turn for our nation’s entrepreneurs.”).

<sup>700</sup> Kahn, Tr. I at 190-91.

<sup>701</sup> See, e.g., Pepper, Tr. I at 85.

<sup>702</sup> See, e.g., Libertelli, Tr. I at 79; G. Sohn, Tr. I at 100.

- (2) *The “Freedom to Use Applications . . . consumers should be able to run the applications of their choice”* (within service plan limits and provided the applications do not “harm the provider’s network”);
- (3) *The “Freedom to Attach Personal Devices . . . consumers should be permitted to attach any devices they choose to the connection in their homes”* (within service plan limits, provided the devices do not “harm the provider’s network or enable theft of service”); and
- (4) *The “Freedom to Obtain Service Plan Information . . . consumers should receive meaningful information regarding their service plans”* (so that “broadband consumers can easily obtain the information they need to make rational choices.”)<sup>703</sup>

Also discussed in Chapter II, an overlapping set of broadband connectivity principles were articulated by the FCC the next year in the Broadband Policy Statement that accompanied the Wireline Order. Those principles too were generally supportive of consumer access, as they recognized the importance of the following:

- (1) The ability of consumers to “access the lawful Internet content of their choice”;
- (2) the ability of consumers to “run applications and use services of their choice, subject to the needs of law enforcement”;
- (3) the ability of consumers to “connect their choice of legal devices that do not harm the network”; and
- (4) the existence of “competition among network providers, application and service providers, and content providers.”<sup>704</sup>

Support for these principles has been broad,<sup>705</sup> indeed considerably broader than agreement on their implementation or sufficiency. First, there has been disagreement regarding the question of whether the principles should be codified, via regulation or statute.<sup>706</sup> This question is grounded in part in the belief – expressed by Workshop participants and other commentators – that the principles are not legally enforceable.<sup>707</sup>

<sup>703</sup> See *supra* text accompanying notes 214-15 (regarding Remarks of Michael K. Powell, “Preserving Internet Freedom: Guiding Principles for the Industry”).

<sup>704</sup> See *supra* text accompanying notes 216-17 (regarding FCC Broadband Policy Statement).

<sup>705</sup> See, e.g., Pepper, Tr. I at 85 (“wide agreement that the connectivity principle should be followed”); Consumers for Cable Choice, Public Comment 10, at 2 (“The [FCC’s] Broadband Policy Statement is an available and viable deterrent against unjustly discriminatory conduct.”); National Association of Manufacturers, Public Comment 28, at 2 (opposing network neutrality regulation but stating: “[W]e embraced the ‘four freedoms’ later adopted by the [FCC] as official policy in 2005. The principles . . . are working.”).

<sup>706</sup> See, e.g., Pepper, Tr. I at 85 (“The debate is whether or not Congress should codify them . . .”).

<sup>707</sup> See, e.g., Libertelli, Tr. I at 117 (“[W]e’re talking about a policy statement; we’re not necessarily talking about a binding rule of decision. And so, more work could be done to make those principles binding on the network owners.”); Comstock House Testimony, *supra* note 265, at 23, 35.



Second, there has been disagreement regarding the question of whether the principles should be “a floor, or . . . a ceiling.”<sup>708</sup> One participant favored “case-by-case enforcement of access principles,” while arguing against codification of the principles and other significant additions to extant competition law, on the grounds that additional regulation was liable to suppress investment, and more generally, that the costs of additional regulation were likely to exceed its potential benefits.<sup>709</sup> As noted in the previous section, several participants echoed this concern about the costs of additional regulation more generally.<sup>710</sup> Others argued that “the four principles may be a good place to start,” but that they represented “a necessary, but not sufficient, protection of openness on the Internet.”<sup>711</sup> Yet another participant questioned why such principles should apply to network operators but not content and applications providers.<sup>712</sup>

While these abstract principles do not themselves specify the particulars of substantive regulatory implementation, FCC enforcement action in the *Madison River* matter<sup>713</sup> is instructive about the implications of the principles. In fact, *Madison River* has been used as a basis for: (1) arguments on behalf of additional regulation – on the basis that the underlying conduct in *Madison River* demonstrates very real market temptations to engage in harmful blocking that may warrant regulatory resolution;<sup>714</sup> (2) arguments against additional regulation – several participants observed that the underlying conduct alleged in *Madison River* appears to be rare, if not unique,<sup>715</sup> while

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<sup>708</sup> Ohlhausen, Tr. I at 115.

<sup>709</sup> See Pepper, Tr. I at 90-91.

<sup>710</sup> See *supra* text accompanying notes 697-99.

<sup>711</sup> Libertelli, Tr. I at 117; accord G. Sohn, Tr. I at 116 (regarding the need for, among other things, a fifth “non-discrimination” principle).

<sup>712</sup> See Sidak, Tr. I at 117-18.

<sup>713</sup> *In re Madison River Communs., LLC*, 20 FCC Rcd 4295, 4297 (2005). See *supra* notes 217 and 233 for additional information regarding this matter.

<sup>714</sup> Various proponents of net neutrality have cited the matter as illustrating the threat to access that would be posed by market pressures in favor of discrimination, absent their favored regulations. See, e.g., William D. Rahm, *Watching Over the Web: A Substantive Equality Regime for Broadband Applications*, 24 YALE J. ON REG. 1, 2, 6 (2007) (stating that “[t]hose who say the Internet has no gatekeeper have never heard of the Madison River case” and arguing for a “substantive equality” regime for broadband access).

<sup>715</sup> See, e.g., Pepper, Tr. I at 89-90 (“[T]o date there has only been one case of anti-competitive conduct . . . that has been brought to the FCC. And this . . . was the Madison River case, which was quickly remedied by the Commission . . .”); Kahn, Tr. I at 186 (“[T]he only case I know that has been cited as an argument for some sort of regulatory intervention is the one – the Madison River case.”); Sidak, Tr. I at 104 (“The one instance in which [blocking content] occurred has been a rural telephone company, and that is not a set of facts from which we can extrapolate to the behavior that would be followed by network operators supplying service to the vast majority of Americans.”); see also Verizon Communications Inc., Public Comment 60, at iii (“This isolated episode of a single rural company’s action is a slim reed on which to base the monolith of broadband regulation.”).

others observed that the conduct at issue was conspicuous and easily disciplined under existing authority;<sup>716</sup> (3) intermediate positions;<sup>717</sup> and (4) a suggestion that the alleged discrimination in that case was in fact the by-product of overly restrictive regulation.<sup>718</sup>

Participants in the broadband policy debate also have regarded FTC and FCC merger conditions – in particular, those attached to the AOL/Time Warner and the AT&T/BellSouth mergers – as significant. As discussed in Chapter II, the FTC challenged the proposed merger between AOL and Time Warner and entered into a consent order that required the merged entity to, among other things, open its cable system to competitor Internet service providers, including those offering broadband services, on a non-discriminatory basis, for all content.<sup>719</sup> The order also prevented the company from interfering with the content of non-affiliated ISPs.<sup>720</sup> Following the FTC's review, the FCC added conditions that would have pertained to AOL advanced instant-messaging ("IM") services, if AOL had developed them.<sup>721</sup>

As with the AOL/Time Warner merger, the parties to the AT&T/BellSouth merger entered into a voluntary, enforceable agreement regarding the terms of the merger and certain post-merger conduct.<sup>722</sup> These included, among other things, certain interconnectivity and related pricing conditions. Moreover, the agreement contains an express commitment to follow the four principles articulated in the FCC's Broadband Policy Statement, for a period of thirty months following the merger closing date.<sup>723</sup> In addition, the combined company committed to maintaining a "neutral network"; that is,

not to provide or sell to Internet content, applications, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades, or prioritizes any packet transmitted over

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<sup>716</sup> See, e.g., Kahn, Tr. I at 186 ("[A] more obvious case of an abuse of a vertical position I cannot imagine. And of course, it was properly treated, pre-emptorily, both in the United States and Canada."); Pepper, Tr. I at 89-90 ("[T]he Madison River case . . . was quickly remedied by the Commission . . .").

<sup>717</sup> See, e.g., Farrell, Tr. I at 156-60 (calling Madison River "arguably" a case of leveraging, and advocating "real" and "substantial" reasons for concern, but caution in seeking a "middle ground").

<sup>718</sup> See Ford, Tr. II at 235-36.

<sup>719</sup> Am. Online, Inc. & Time Warner, Inc., FTC Dkt. No. C-3989 (Apr. 17, 2001) (consent order), available at <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>.

<sup>720</sup> *Id.*

<sup>721</sup> *In re* Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 18 FCC Rcd 20595 (2001) (memorandum opinion and order).

<sup>722</sup> *In re* AT&T Inc. & BellSouth Corp., Application for Transfer of Control, 22 FCC Rcd 5662 (2007) (memorandum opinion and order).

<sup>723</sup> Where not otherwise specified, the conditions of the merger were to hold for a period of 42 months following the merger closing date.

AT&T/BellSouth's wireline broadband Internet access services based on its source, ownership, or destination.<sup>724</sup>

As with the FCC broadband principles discussed above, commentators have cited these merger conditions for varied, if not contrary, propositions. One Workshop participant suggested that regulators adopt "language along the lines of the AT&T merger condition[s]."<sup>725</sup> Another participant recommended that the AT&T merger conditions represented a tractable definition of network neutrality, and a "good place to start" in discussing non-discrimination policy.<sup>726</sup> Not all have been as supportive of these conditions. Another participant argued that they would work to "prohibit pro-competitive, pro-consumer [improvements] in quality of service and prioritization . . . ."<sup>727</sup> Two FCC Commissioners generally approving of the merger – including Chairman Martin – suggested that certain conditions were "unnecessary and may actually deter broadband infrastructure investment."<sup>728</sup> In particular, their joint statement suggested that, "[t]he conditions regarding net-neutrality have very little to do with the merger at hand and very well may cause greater problems than the speculative problems they seek to address."<sup>729</sup>

### C. Legislative Proposals

During the 109th Congress, telecommunications reform was a high priority and the focus of numerous congressional hearings in both the House and the Senate.<sup>730</sup> At many of those hearings, network neutrality played a significant role in the debate on the shape of telecommunications reform. The debate over the inclusion and nature of net neutrality provisions appears to have ultimately prevented comprehensive telecom reform

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<sup>724</sup> See *AT&T Inc. & BellSouth Corp.*, 22 FCC Red at app. F.

<sup>725</sup> Libertelli, Tr. I at 78-79.

<sup>726</sup> G. Sohn, Tr. I at 100, 127-28.

<sup>727</sup> Pepper, Tr. I at 121.

<sup>728</sup> *AT&T Inc. & BellSouth Corp.*, 22 FCC Red at 5826 (Chairman Martin & Comm'r Tate, concurring).

<sup>729</sup> *Id.*

<sup>730</sup> Telecommunications reform was the subject of over twenty hearings in the Senate Commerce, Science, and Transportation Committee (see S. REP. 109-355, at 4 (2006)) and six in the House Committee on Energy and Commerce (see H.R. REP. 109-470, at 6-8 (2006)) in 2006.

from being enacted in the last Congress.<sup>731</sup> At least eight legislative proposals addressing net neutrality were introduced in the House and Senate.<sup>732</sup>

The House of Representatives was the first to pass comprehensive telecom legislation and sent H.R. 5252, the "Communications, Opportunity, Promotion and Enhancement Act (COPE Act)," to the Senate.<sup>733</sup> H.R. 5252 was amended in the Senate Commerce, Science, and Transportation Committee and then forwarded to the full Senate, where its consideration was blocked by Senators who insisted that the legislation include network neutrality provisions.<sup>734</sup>

The change in party control in the 110th Congress has resulted in two advocates for net neutrality principles becoming Chairmen of the House and Senate committees with primary jurisdiction over telecommunications. In the House of Representatives, Rep. Ed Markey (D-MA), the sponsor of a net neutrality measure during the previous Congress, is now Chairman of the House Energy and Commerce Subcommittee on Telecommunications and the Internet.<sup>735</sup> To date, this Committee has not introduced net neutrality legislation.

In the Senate, Senator Byron Dorgan (D-ND) is now Chairman of the Senate Commerce, Science, and Transportation Subcommittee on Interstate Commerce, Trade,

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<sup>731</sup> See, e.g., Press Release, Office of Sen. Ron Wyden, Wyden Blocks Telecom Legislation Over Ineffective Net Neutrality Provision (June 28, 2006), *available at* [http://wyden.senate.gov/media/2006/06282006\\_net\\_neutrality\\_holds\\_release.html](http://wyden.senate.gov/media/2006/06282006_net_neutrality_holds_release.html).

<sup>732</sup> Of the bills introduced in the 109th Congress, one (S. 2917) would have amended the Communications Act of 1934 to establish certain net neutrality duties for broadband ISPs. A second bill (H.R. 5417) would have amended the Clayton Act to make certain non-neutral practices illegal. Five other bills (H.R. 5252, H.R. 5273, S. 2360, S. 2113, and S. 1504) would have given the FCC authority to enforce various types of neutrality rules. The eighth bill (S. 2686) would have required the FCC to report on developments regarding Internet access.

<sup>733</sup> H.R. 5252, sponsored by Rep. Joe Barton (R-TX), was passed on June 8, 2006, by a vote of 321-101. The bill would have given the FCC explicit authority to enforce its 2005 Broadband Policy Statement; authorized a maximum penalty of \$500,000 for each violation of such statement, with the FCC having exclusive authority to adjudicate complaints; and required a study from the FCC on whether the objectives of the policy statement and principles were being achieved.

<sup>734</sup> The Senate Commerce, Science, and Transportation Committee held a three-day markup where a net neutrality amendment offered by Senators Dorgan and Snowe failed by one vote. H.R. 5252, as amended by the Senate Commerce Committee, included an "Internet Consumer Bill of Rights" that would, among other things: require that ISPs allow subscribers choice to access and post lawful content, and to access any Web page, application, software, and search engine; allow subscribers to connect any legal device that does not harm any ISP's network; allow subscribers to receive clear and conspicuous notice on price, speed, capabilities, and limitations of any Internet service offered to the public; require that ISPs offer stand-alone Internet service to their subscribers; authorize the FCC to impose fines of \$500,000 per violation; and prohibit the FCC from promulgating any regulations beyond those specifically provided in the bill.

<sup>735</sup> Rep. Markey introduced H.R. 5273, the "Network Neutrality Act of 2006," which would have imposed certain non-discrimination and disclosure duties on broadband ISPs. The bill also would have required the FCC to create a complaint resolution system for addressing alleged violations of such duties.

and Tourism.<sup>736</sup> Senator Dorgan, along with Senator Olympia Snowe (R-ME), has introduced S. 215, the "Internet Freedom Preservation Act," which would amend the Communications Act of 1934 to establish certain Internet neutrality duties for broadband ISPs, including not interfering with or discriminating against the ability of any person to use broadband service in a lawful manner. The bill would allow ISPs to engage in certain activities to protect network security and to offer consumer protection services, such as parental controls on accessing content. At the same time, ISPs would be prohibited from requiring a subscriber to purchase a bundle of services as a condition on the purchase of broadband Internet access service. Additionally, the FCC would be required to give a report to specified congressional committees on ISPs' delivery of broadband content, applications, and services. The bill has been referred to the Senate Commerce Committee.<sup>737</sup>

#### **D. Other Proposals Relating to Broadband Connectivity**

In addition to the regulatory and legislative proposals discussed above in Sections A-C, various interested parties have developed both general principles and specific proposals relating to broadband connectivity. Following is a brief discussion of some of these proposals.

*USC Annenberg Center.* The University of Southern California Annenberg Center has articulated five "Principles for Network Neutrality."<sup>738</sup> First, network operators and customers "both should win." Network operators should be able to benefit from their investments, thereby encouraging infrastructure deployment. Customers should have the option of unrestricted access to the "global public Internet." Second, any regulation should be defined and administered "on a nationally uniform basis with a light touch." Any such regulation should be aimed primarily at markets where network operators have significant market power and should emphasize "prompt enforcement of general principles of competition policy, not detailed regulation of conduct in telecommunications markets." Third, network operators should provide a "Basic Access Broadband" service that offers a meaningful, neutral Internet connection. Beyond this basic service, network operators should be free to determine all service parameters, including performance, price, and prioritization of third-party data traffic. Fourth,

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<sup>736</sup> In the Senate, the Commerce, Science, and Transportation Committee has primary jurisdiction over telecommunications issues, but there is no longer a telecommunications subcommittee. At the start of the 109th Congress, then-Chairman Ted Stevens (R-AK) ended the telecommunications subcommittee and moved jurisdiction over telecommunications to the full committee.

<sup>737</sup> S. 215 is identical to S. 2917, legislation introduced in the 109th Congress by Senators Snowe and Dorgan. See also Sens. Byron L. Dorgan & Olympia J. Snowe, Public Comment 14 (advocating need for network neutrality legislation, as well as FTC involvement in area of broadband Internet access).

<sup>738</sup> USC Annenberg Center, *supra* note 252. See also Wilkie, Tr. I at 169-70 (discussing the creation of these principles). According to Wilkie, these principles modify the FCC's "four Internet freedoms to say that, rather than enforcing non-discrimination, that, essentially, the gist of the proposal is that consumers should have the choice of a net neutral package being offered to them. That is, we should establish a floor, a baseline level." *Id.*

customers should be provided with clear, understandable terms and conditions of service that explain how any network operator, ISP, or content provider will use their personal information and prioritize or otherwise control content that reaches them. Fifth, government policy should encourage competitive entry and technological innovation in broadband access markets to help achieve effective network competition and make high-speed Internet access available to the largest number of customers.

*Telecommunications Industry Association.* The Telecommunications Industry Association (“TIA”) has proposed a series of “Broadband Internet Access Connectivity Principles.”<sup>739</sup> In their view, consumers should receive meaningful information regarding their broadband Internet access service plans. Broadband consumers should have access to their choice of legal Internet content within the bandwidth limits and quality of service specified in their service plans. They should be able to run applications of their choice, within the bandwidth limits and quality of service of their plans, as long as they do not harm the provider’s network. Also, consumers should be permitted to attach any devices to their broadband Internet access connection, provided they operate within the bandwidth limits and quality of service of their service plans and do not harm the network or enable the theft of services.

The TIA principles further provide that broadband providers should remain free to engage in procompetitive 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. Broadband providers should remain free to offer additional services to supplement broadband Internet access, including speed tiers, quality-of-service tiers, security and spam services, and network management services, and should be free to enter into commercially negotiated agreements with unaffiliated parties for the provision of such additional services. In turn, network operators should be able to continue to optimize network efficiency, enable new services, and create incentives for continued buildout to meet increasing capacity demands. Also, broadband providers should 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.

*Public Knowledge.* Public Knowledge has outlined a set of five “Principles for an Open Broadband Future.”<sup>740</sup> First, broadband networks must be open to competition from any entity, including municipalities. Specifically, every consumer should be able to choose among multiple, competing broadband networks, services, applications, and content providers, including municipalities. Also, government policies should be technology-neutral and should forbear from regulating broadband networks except where necessary to promote competition. Second, broadband networks must be open to the

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<sup>739</sup> TELECOMMS. INDUS. ASS’N, BROADBAND INTERNET ACCESS CONNECTIVITY PRINCIPLES (2006), available at [http://www.tiaonline.org/policy/publications/white\\_papers/documents/TIABroadbandInternetAccessConnectivityPrinciples.pdf](http://www.tiaonline.org/policy/publications/white_papers/documents/TIABroadbandInternetAccessConnectivityPrinciples.pdf). See also TIA, Public Comment 56.

<sup>740</sup> PUBLIC KNOWLEDGE, *supra* note 280.

attachment of any equipment the user chooses, as long as it does not harm the technical operation of the broadband network. Third, such networks must be open and accessible to consumers, applications developers, information service providers, and other networks, without restrictions or degradation, except for law enforcement or network management purposes. As corollaries, consumers have the right to access information and ideas from a diversity of sources and the right to disseminate their own ideas to the public in any manner they desire. Likewise, every broadband network should be able to interconnect with every other broadband network. Fourth, broadband networks should be open to the maximally efficient number of licensed and unlicensed wireless providers. Thus, to the maximum extent possible, spectrum should be allocated so as to promote private commercial and non-commercial uses. Similarly, to the maximum extent possible, spectrum licensees should be given flexible use of their spectrum to offer new services in response to consumer demand. In addition, unlicensed services should have the benefit of a presumption that they be authorized in any spectrum band as long as they do not cause interference with existing licensees. Fifth, broadband networks must be open, available, and affordable to all consumers, regardless of income, race, geographic location, or disability.

*Center for Democracy and Technology.* The Center for Democracy and Technology ("CDT") has submitted principles that call for any legislation in this area to preserve at least four "essential elements" that are perceived by CDT to currently characterize the Internet, including: (1) non-discriminatory routing without regard to the identities of senders and receivers, the content of packets, the services accessed, or the providers of such content or services; (2) the ability to create and use new content, applications, protocols, and devices without negotiating or even consulting with network operators; (3) the ability to connect to the Internet at different speeds and service levels, as chosen by end users; and (4) the interconnection of networks on an open basis, in the sense that no network operator may be denied the opportunity to interconnect.<sup>741</sup>

CDT has stated that such legislation generally should not prohibit the use of caching services, the blocking or filtering of harmful or illegal content, or notice-and-takedown procedures or other cooperative actions aimed at identifying and removing pirated material. Also, it should not preclude the prioritization of data packets based on traffic type, as long as such services are equally available for similar types of content and any charges are assessed to end users, not content and applications providers. Such legislation, however, should not entail full common carriage obligations or price regulation and should not apply to video or other so-called "non-Internet" networks, such as virtual private networks.<sup>742</sup>

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<sup>741</sup> CENTER FOR DEMOCRACY & TECHNOLOGY, *supra* note 419. See also Center for Democracy & Technology, Public Comment 7; D. Sohn, Tr. II at 223-31.

<sup>742</sup> According to David Sohn, Staff Counsel for the Center for Democracy and Technology, "[i]f you look at the AT&T merger commitment, it takes exactly this kind of approach, it excludes enterprise managed IP services. It excludes IP television services." D. Sohn, Tr. II at 230. In his view:

CDT has suggested that these principles be further refined and enacted into legislation that would be enforced by the FCC or FTC using a streamlined complaint process. In CDT's view, the mere advancement of generic principles and case-by-case adjudication without a broader legislative framework would allow too much discretion at the agency level. CDT also has suggested that legislation might bar any non-complying service from being marketed using the terms "Internet," "broadband," or other similar language.

*Atkinson and Weiser.* Robert D. Atkinson and Professor Philip J. Weiser have proposed a "Third Way" between what they view as overly aggressive network neutrality legislation that may inhibit new quality-of-service offerings and other bills that do not provide sufficient mechanisms for dealing with potential harms.<sup>743</sup> First, these commentators suggest Congress should require broadband providers to state clearly their bandwidth levels, latency, and any limitations on users' ability to access certain content or applications. They suggest that the FCC be charged with monitoring compliance with these requirements under a framework mirroring the FTC's approach to Internet privacy. Further, any firm selling "broadband Internet access" would be required to make available to users a basic level of open, unmanaged, best-efforts access to the broader Internet. Such access would be expected to increase in speed along with general improvements in the delivery of Internet services. Network operators with market power not meeting this FCC-defined parameter would be prohibited from describing their service as "broadband."<sup>744</sup>

Second, Atkinson and Weiser advocate charging the FCC with responsibility for monitoring the use of discriminatory access arrangements to ensure they are not anticompetitive. The FCC would take an "antitrust-like" approach to enforcement and would manage all proceedings on an expedited basis using a case-by-case adjudicative model, rather than a broad, before-the-fact legislative approach. Under this model, the FCC should use Chairman Powell's 2004 "Internet Freedoms" as a starting point for enforcement. All quality-of-service arrangements would have to be offered on a universal basis, unless a network operator could demonstrate a legitimate business

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To use an analogy, I've sometimes heard in these debates people talk about the Postal Service and premium delivery services. Yes, by all means, a premium delivery service like FedEx should be allowed to exist. You shouldn't regulate that out of existence.

At the same time, there may be a very important policy objective of maintaining ordinary Postal Service delivery at an acceptable level of service. That, I think, is really what the goal ought to be here, to keep this neutral open Internet at an acceptable level of service, to keep that in existence even as experimentation with other networks and private networks, as discussed in the previous panel, even if that kind of experimentation proceeds.

*Id.* at 226.

<sup>743</sup> Atkinson & Weiser, *supra* note 255, at 47.

<sup>744</sup> *Id.* at 55-56.



justification for offering such a service on a limited or exclusive basis. As in antitrust enforcement, the FCC could determine certain practices to be per se illegal, while evaluating other practices under a rule-of-reason approach. Alternatively, if Congress determines that imposing antitrust-style enforcement on the FCC is not practical, it could assign this function to the FTC.<sup>745</sup>

Third, Atkinson and Weiser suggest that Congress should provide investment incentives for additional broadband deployment because, in their view, broadband networks create positive externalities that generate economic and social benefits beyond those captured by a network operator itself. They suggest, therefore, that companies investing in broadband networks be allowed to expense new investments in the first year, instead of depreciating them over fifteen years. Additionally, the moratorium on federal, state, and local broadband taxes should be extended, but made contingent upon network operators providing a basic level of open, unmanaged, best-efforts access to the broader Internet, as described above.<sup>746</sup>

*COMPTEL.* COMPTEL has recommended several changes to existing antitrust law.<sup>747</sup> First, this group suggests that Congress consider enacting a limited exception to the *Illinois Brick*<sup>748</sup> line of precedent to grant standing for indirect-purchaser private litigants bringing cases against formerly regulated “dominant” firms. Second, COMPTEL suggests that Congress introduce legislation clarifying that dominant carriers for which the FCC has eliminated common carrier regulatory status no longer enjoy liability limitations based on the “filed rate doctrine,” to the extent that this doctrine presumes lawfully filed tariffs to be reasonable. Rather, if de-regulated monopoly carriers are engaging in anticompetitive conduct that forecloses entry, unlawfully restricts output, or otherwise leads to supracompetitive pricing as a result of antitrust violations, then the damages – which are subject to trebling – must be based on the difference between the supracompetitive rate and the competitive rate the carrier has foreclosed. Third, the *Trinko*<sup>749</sup> precedent, which, in their view, tolerates aggressive exclusionary behavior, must be repudiated.

*Peha.* Professor Jon M. Peha has suggested a “balanced policy” that would allow the beneficial use of discrimination, while limiting harmful uses of discrimination if and only if the broadband market is not “highly competitive.”<sup>750</sup> In his view, network

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<sup>745</sup> *Id.* at 56-58.

<sup>746</sup> *Id.* at 58-59.

<sup>747</sup> Comstock House Testimony, *supra* note 265, at 36-37.

<sup>748</sup> See *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that, with certain limited exceptions, only direct purchasers may recover overcharges in private antitrust actions under the Clayton Act).

<sup>749</sup> See *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (holding that plaintiff’s complaint that Verizon breached a duty to share its network with competitors did not state a monopolization claim under Section 2 of the Sherman Act).

<sup>750</sup> Peha, *supra* note 36, at 17-18.

operators should be able to charge senders of data, recipients, or both, for services, thus allowing for two-sided market transactions. Network operators also should be allowed to provide different quality-of-service levels for different classes of traffic and to offer proprietary content and unique services to users, provided that they do not favor their own content and services over those of others.

Unless the broadband market is highly competitive, however, a network could not charge more for one data stream than another if the latter requires at least as many resources as the former. For example, a network operator could not charge more for a steady 50 Kbps VoIP data stream than it does for a steady 50 Kbps gaming application where the quality-of-service requirements are the same for both streams. A network would be prohibited from charging one user, whether a sender or a receiver, a price higher than that charged to another user for a comparable type of service, unless the operator could present a justification based on a cost difference. Similarly, a network could not offer content or services directly through an affiliate at a data rate or quality-of-service level that is not available to competitors at a comparable price. Likewise, a network could not make services available to itself or affiliates, but not to competitors. In addition, a network could not charge a higher price (or offer a lower quality of service) for data traffic that competes with a legacy, circuit-switched service than it charges for comparable traffic that does not compete with a legacy service.

Under this framework, networks should be allowed to block Internet traffic that they reasonably believe poses a threat to security, including traffic originating from an attached device that is reasonably believed to be harmful to the network or its users. But they could not block specific content or applications, absent a reasonable belief that the relevant data traffic presents a security threat. A network operator also could not block traffic from a properly functioning device while carrying traffic from other devices known to be technically equivalent. An operator could not degrade traffic based solely on the nature of the content or application.

*Internet2.* The Internet2 consortium has suggested that the best solution to the Internet connectivity debate is to upgrade network infrastructures to the point where they no longer suffer from capacity constraints or data congestion.<sup>751</sup> The model for this proposal is the not-for-profit 100-1,000 Mbps Internet2 network that connects 208 universities, 70 companies, and 51 affiliated organizations. This group wants to set a national goal for deploying 100 Mbps bandwidth connections (with symmetric speeds for uploading and downloading) to every home, business, and school in the country in five years and 1,000 Mbps connections in ten years. They suggest that the costs of deploying such high-speed lines, or upgrading existing ones, would be relatively low – once fiber wirelines are laid. In their view, the widespread deployment of such advanced, high-speed Internet services would obviate the need for any kind of prioritized data transmission.<sup>752</sup> In addition, they suggest that the FTC, the FCC, or both should issue

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<sup>751</sup> See Bachula, Tr. II at 164-73.

<sup>752</sup> Bachula Senate Testimony, *supra* note 253. According to Internet2, once basic wiring is in place, it costs about \$150 per end user to upgrade to a 100 Mbps connection, or \$30 per user over a five-year period.

specific and enforceable guidelines that would require the maintenance of “open and non-discriminatory networks.”<sup>753</sup>

*DPS Project.* The Dynamic Platform Standards Project for Real Network Neutrality (“DPS Project”) has suggested a disclosure and definitional approach to the issue of Internet connectivity.<sup>754</sup> DPS Project proposes legislation that would define “Internet access” to mean the transmission of data packets across networks under the TCP/IP protocol suite in a way that is “agnostic” to the nature, source, or destination of any packet. Network operators advertising the provision of “Internet” service would have to provide such service in conformance with the above definition, regardless of whether other additional, non-conforming services are also provided along with that service. Additional, special features that analyze or identify particular applications could not be described as “Internet” services. Under the proposed legislation, any violation of such rules would be treated as a violation of the FTC Act’s prohibition of unfair or deceptive acts or practices.

*Sidak.* Professor J. Gregory Sidak has proposed that network operators have at least six “fundamental rights” that should be protected.<sup>755</sup> First, a network operator should be allowed to innovate on its network. Second, network operators unilaterally should be able to price the use of their networks in any way that does not violate antitrust law. Third, a network operator should be able to refuse to carry content or applications that present a legitimate risk to the security or performance of its network or to attached devices. Fourth, network operators should be allowed to prioritize the delivery of data packets on their networks. Fifth, they should be able to reserve capacity on their networks. Sixth, network operators should be able to use capacity on their networks to vertically integrate into the provision of content or applications.

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By their estimates, it would cost about \$250 to upgrade to a 1,000 Mbps connection. *Id.* at 4. *See also* Thorne, Participant Presentation, at 1 (identifying Verizon Communications capital expenditures of approximately \$45 billion during the 2004-06 period); T. Randolph Beard et al., *supra* note 283, at 430 (estimating the cost of fiber-optic wireline deployment in a metropolitan area at approximately \$3 million per mile).

<sup>753</sup> Bachula, Tr. II at 172.

<sup>754</sup> *See* DYNAMIC PLATFORM STANDARDS PROJECT FOR REAL NETWORK NEUTRALITY, LEGISLATIVE PROPOSAL: THE INTERNET PLATFORM FOR INNOVATION, <http://www.dpsproject.com/legislation.html> (last visited June 7, 2007); Dynamic Platform Standards Project, Public Comment 15.

<sup>755</sup> *See* Sidak, *supra* note 287, at 373-85.

*Felten.* Finally, Professor Edward W. Felten and other commentators have suggested that taking a wait-and-see approach to the future development of the Internet might be the best option. In this view, there is not yet any simple policy solution that will not entail difficult line-drawing exercises or potentially create unintended consequences. Believing that “time is on our side,” however, a cautious, incremental approach is seen as a potential best solution.<sup>756</sup>

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<sup>756</sup> In Felten’s view:

Readers looking here for a simple policy prescription will be disappointed. The network neutrality issue is more complex and subtle than most of the advocates on either side would have you believe. Net neutrality advocates are right to worry that ISPs can discriminate – and have the means and motive to do so – in ways that might be difficult to stop. Opponents are right to say that enforcing neutrality rules may be difficult and error-prone. Both sides are right to say that making the wrong decision can lead to unintended side-effects and hamper the Internet’s development.

There is a good policy argument in favor of doing nothing and letting the situation develop further. The present situation, with the network neutrality issue on the table in Washington but no rules yet adopted, is in many ways ideal. ISPs, knowing that discriminating now would make regulation seem more necessary, are on their best behavior; and with no rules yet adopted we don’t have to face the difficult issues of line-drawing and enforcement. Enacting strong regulation now would risk side-effects, and passing toothless regulation now would remove the threat of litigation. If it is possible to maintain the threat of regulation while leaving the issue unresolved, time will teach us more about what regulation, if any, is needed.

Felten, *supra* note 36, at 11-12.

## X. SUGGESTED GUIDING PRINCIPLES

The FTC's statutory mission is to protect competition and consumers by safeguarding and encouraging the proper operation of the free market. The Federal Trade Commission's Internet Access Task Force has conducted a broad examination of the technical, legal, and economic issues underpinning the debate surrounding broadband connectivity competition policy. Based on this examination, as well as our experience with the operation of myriad markets throughout the economy, we identify guiding principles that policy makers should consider in evaluating options in the area of broadband Internet access. We have provided an explanation of the conduct that the antitrust and consumer protection laws already proscribe and a framework for analyzing which conduct may foster or impede competition in particular circumstances. In evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, *ex ante* restrictions in an unsettled, dynamic environment.

Section A of this Chapter discusses the promotion of competition in broadband Internet access services. Although there is disagreement as to the competitiveness of the broadband industry, both proponents and opponents of network neutrality regulation agree that more competition in this industry would benefit consumers. In Section B, we suggest that policy makers proceed with caution in evaluating calls for network neutrality regulation, based on the indeterminate effects on consumer welfare of potential conduct by broadband providers and concerns with regulation in the area of broadband Internet access. No regulation, however well-intended, is cost-free, and it may be particularly difficult to avoid unintended consequences here, where the conduct at which regulation would be directed largely has not yet occurred. In Section C, we reiterate the important role that continued federal agency oversight will have in this area. The FTC, for its part, will continue to devote substantial resources to law enforcement, consumer education, industry guidance, and competition advocacy in the important area of Internet access.

### A. Competition in Broadband Internet Access Services

Over time, competition produces the best results for consumers, providing them the lowest prices, the highest-quality products and services, and the most choices. Competition forces firms to lower their costs and prices and to improve quality, service, convenience, and other attributes that consumers value. Competition induces firms to produce the types and amounts of goods and services desired by consumers. Our free-market system fosters innovation, creativity, and entrepreneurship that are unmatched around the world.

While there is disagreement over the competitiveness of the broadband Internet access industry, there is evidence that it is moving in the right direction.<sup>757</sup> Specifically, there is evidence at least on a national scale that: (1) consumer demand for broadband is growing quickly; (2) access speeds are increasing; (3) prices (particularly speed-adjusted or quality-adjusted prices) are falling; and (4) new entrants, deploying Wi-Fi, Wi MAX,

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<sup>757</sup> See *supra* Chapter VI.B.

and other broadband technologies, are poised to challenge the incumbent cable and telephone companies. Although this is merely a high-level snapshot of a dynamic, evolving marketplace, such evidence challenges the claims by many proponents of network neutrality regulation that the broadband Internet access market is a cable-telephone duopoly that will exist for the foreseeable future and that the two primary broadband platforms do not compete meaningfully.

We nonetheless recognize that what appear to be positive national trends do not necessarily signify vigorous competition in every local broadband market in the United States. In rural markets, in particular, consumers may have relatively limited options for obtaining broadband Internet access. This Report and the findings herein do not reflect a case-by-case analysis of the state of competition in each of the localities that may represent relevant markets under the antitrust laws.

In any case, there appears to be substantial agreement on the part of both proponents and opponents of network neutrality regulation that more competition in the broadband Internet access area would benefit consumers. Thus, to the extent that policy makers are not content to wait for the market to increase competition, they should consider various ways of increasing competition in the provision of broadband Internet access. For example, several commentators have urged government action to make more spectrum available or its use more efficient.<sup>758</sup> Others have identified reform of local franchising rules as a potential means of increasing competition.<sup>759</sup> Some have suggested municipal provision of broadband Internet access as a means of introducing more competitors.<sup>760</sup> Still others have proposed revisions to the federal tax laws to promote investment in the infrastructure necessary for broadband Internet access, including access at speeds considerably higher than those generally available today.<sup>761</sup> While we take no position on these particular proposals, policy makers should consider pursuing ways to increase competition in the broadband Internet access area. To the extent that calls for regulation are based on concerns that competition is not sufficiently vigorous to protect consumers' interests, then pursuing ways to increase that competition would seem to attack the potential problem directly at its source.

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<sup>758</sup> See *supra* Chapter VI.D.

<sup>759</sup> See *supra* Chapter VI.B.

<sup>760</sup> See *supra* Chapter VI.C. Government provision of Internet access can raise competitive concerns, however. As FTC Staff explained in its recent report, *Municipal Provision of Wireless Internet Access*, the benefits to consumers of municipal involvement in wireless Internet access may vary depending on a municipality's particular factual circumstances. Accordingly, that report provides an analytical framework for policy makers considering the question of whether, and to what extent, a municipality should involve itself in the provision of wireless Internet access. See FTC STAFF, *supra* note 499.

<sup>761</sup> See *supra* Chapter IX.D.

## **B. Grounds for Proceeding with Caution**

To date, the primary policy proposals in the area of broadband Internet access include imposing some form of network neutrality regulation. In evaluating such proposals, we recommend proceeding very cautiously.

### **1. Indeterminate Consumer Welfare Effects of Potential Conduct by Broadband Providers**

Policy makers should be wary of calls for network neutrality regulation simply because we do not know what the net effects of potential conduct by broadband providers will be on consumers, including, among other things, the prices that consumers may pay for Internet access, the quality of Internet access and other services that will be offered, and the choices of content and applications that may be available to consumers in the marketplace. Similarly, we do not know what net effects regulation to proscribe such conduct would have on consumers. This is the inherent difficulty in regulating based on concerns about conduct that has not occurred, especially in a dynamic marketplace.

Some proponents of network neutrality regulation have argued that vertically integrated broadband providers possessing market power in the provision of last-mile Internet access could leverage that power in ways ultimately harmful to consumers. For example, such providers could block competing services as the provider in the *Madison River*<sup>762</sup> matter allegedly did or discriminate against their competitors' content or applications by relegating them to the proverbial "winding dirt road." Yet, the primary assumption underlying this concern (and others raised by net neutrality proponents) – that broadband providers have market power in the provision of last-mile access – is the subject of considerable debate. Absent coordination or collusion among providers, as long as consumers have one or more alternatives to which they can turn, it is difficult to imagine them accepting the blockage or elimination of content that is important to them.

Further, broadband providers have conflicting incentives relating to blockage of and discrimination against data from non-affiliated providers of content and applications.<sup>763</sup> While a broadband provider with market power may have an incentive to limit its end-user customers' access to competing content and applications, the broadband provider also may have an incentive to maximize the value of its network to end users. Blocking or discriminating against content and applications desired by the provider's customers likely would diminish the value of that network. In the abstract, it is not possible to know which of these incentives would prove stronger. Even assuming discrimination against content or applications providers took place, moreover, there remains the question – also unanswerable in the abstract – whether such discrimination would be harmful, on balance, to consumer welfare. For example, such discrimination may facilitate product differentiation, such as the provision of Internet access services

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<sup>762</sup> See *supra* notes 217 and 233.

<sup>763</sup> See *supra* Chapter IV.

designed specifically for certain population segments or other audiences with specialized preferences.

Data discrimination often is discussed in the context of vertical integration by broadband providers into the provision of content and applications. Such integration raises the various issues involving incentives to discriminate discussed above. Vertical integration, however, also provides potential benefits to competition and consumers. For example, the potential to earn additional profits from selling its content and applications to more customers likely would increase the vertically integrated firm's incentives to build out its network and invest in technology to increase the types and/or amount of content that it can offer.

Further, as is the case with data discrimination, it is impossible to determine in the abstract whether allowing content and applications providers (or even end users) to pay broadband providers for prioritized data transmission will be beneficial or harmful to consumers.<sup>764</sup> Such prioritization may provide benefits to broadband providers, content and applications providers, and end users. Prioritization may allocate resources to their highest-valued uses by, for example, allowing content and applications providers that value higher-quality transmission services, such as VoIP or online gaming providers, to pay broadband providers for such services. Prioritization may enable broadband providers to obtain income streams from content and applications providers and other users of broadband networks besides the broadband providers' own customers, resulting in increased investment and innovation in such networks. Prioritization may aid innovation in applications or content, such as streaming video and other real-time applications, that require higher-quality transmission to operate effectively. Prioritization may provide a dimension for both content and applications providers and broadband providers to differentiate their offerings, to the benefit of competition and consumers. Prioritization also may lower prices for less affluent end users, whose access fees could be partially subsidized by prioritization revenues, much like advertising-supported e-mail services now provide free e-mail accounts.

Nonetheless, proponents of network neutrality regulation have raised concerns regarding potential adverse effects of data prioritization. For example, it could create entry barriers for new or less affluent content and applications providers – that may not be able to afford prioritization services – to disseminate their offerings successfully, resulting in a diminution in innovation in content and applications. Prioritization could result in increased transaction costs resulting from the potential need for content and applications providers to negotiate with multiple broadband providers over prioritization arrangements. Thus, the frequently cited example of college students founding successful Web sites in their dorm rooms may become impossible if these students also would have to reach carriage arrangements with numerous broadband providers before they could reach end users. Prioritization also could lead to the intentional or passive degradation of non-prioritized data delivery over broadband networks. That is, the use of prioritization could create incentives for broadband providers to focus all or most of their

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<sup>764</sup> See *supra* Chapter V.



investment and innovation in the priority portions of their networks, to the detriment of the non-priority portions of such networks. Prioritization could enable exclusive deals for priority that, if combined with inadequate delivery of non-priority data, would hinder the traditional ability of every end user to reach every content and applications provider through a single Internet access agreement. As with data discrimination, we are unable to determine in the abstract the net effect on consumer welfare of the various forms of data prioritization that may be pursued in the marketplace.

Further reason for policy makers to proceed with caution in the area of broadband Internet access is the existence of several open questions that likely will be answered by either the operation of the current marketplace or the evolution of complicated technologies. These questions include, but are not limited to, the following:

- What is the feasibility of broadband providers engaging in data discrimination, including the outright blockage of data from certain content and applications providers?
- Would consumers be able to detect such data discrimination?
- What would be the consumer response to such data discrimination?
- How much demand will there be on the part of content and applications providers for data prioritization?
- What is the feasibility of effective data prioritization throughout the many networks comprising the Internet?
- Would allowing broadband providers to practice data prioritization necessarily result in the degradation of non-prioritized data delivery?
- What Internet access speeds, including upload and download speeds, will consumers demand?
- When will the capacity limitations of the networks comprising the Internet result in unmanageable or unacceptable levels of congestion?
- If that point is reached, what will be the most efficient response thereto: data prioritization, capacity increases, a combination of these, or some as yet unknown technological innovation?

The eventual answers to these questions may give policy makers key information about the net effects on consumer welfare arising from the conduct and business arrangements that network neutrality regulation would prohibit or limit.

## **2. Concerns with Regulation**

The other ground for proceeding with caution in evaluating calls for network neutrality regulation is the potentially adverse and unintended effects of regulation

generally – whether it is enacted in the area of broadband Internet access or any other area. Industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, despite the good intentions of their proponents. Even if regulation does not have adverse effects on consumer welfare in the short term, it may nonetheless be welfare-reducing in the long term, particularly in terms of product and service innovation. For example, prohibitions of certain business conduct, such as vertical integration into content and applications or the offering of prioritization services by broadband providers, may not have immediate effects on consumer welfare, but could result in a long-term decline in investment and innovation in broadband networks. Broadband providers that cannot differentiate their products or gain new revenue streams may have reduced incentives to upgrade their infrastructure.

Further, broad regulatory schemes almost certainly will have unintended consequences, some of which may not be known until far into the future. After all, even the most carefully considered legislation is likely to have unforeseen effects. In the broadband Internet context, regulation that nominally seeks to protect innovation in content and applications by prohibiting broadband providers from charging for prioritized delivery over their networks actually could erect barriers to new content and applications that require higher-quality data transmission. A new entrant in the streaming video market, for example, might prefer to purchase a certain quality of service from broadband providers, rather than investing in the server capacity and other resources necessary to provide that level of service on its own. Once a regulatory regime is in place, moreover, it may be difficult or impossible to undo its effects.

Two aspects of the broadband Internet access industry heighten the concerns raised by regulation generally. First, the broadband industry is a relatively young and evolving one. As discussed above, there are indications that it is moving in the direction of more – not less – competition.<sup>765</sup> In particular, there is evidence that new entrants employing wireless and other technologies are beginning to challenge the incumbent wireline providers (*i.e.*, the cable and telephone companies). Second, to date we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers. Policy makers should be wary of enacting regulation solely to prevent prospective harm to consumer welfare, particularly given the indeterminate effects on such welfare of potential conduct by broadband providers and the law enforcement structures that already exist.

Policy makers also should consider the feasibility of undoing the effects of data discrimination, prioritization, and other conduct and business arrangements, about which network neutrality proponents raise concerns, if it is later determined that enforcement under current law has been inadequate and the effects on consumer welfare of such conduct and arrangements turn out to be on balance (or even primarily) harmful. That is, policy makers considering a wait-and-see approach also should consider whether legislative or regulatory action could effectively counteract business arrangements and

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<sup>765</sup> See *supra* Chapter VI.B.

network design decisions if the consumer harms from a non-neutral network are later deemed clearly to outweigh the consumer benefits. Although we take no position regarding the technical, operational, or commercial feasibility of reversing or changing course in some manner at a later date, this is a relevant consideration for policy makers evaluating calls for network neutrality regulation.

### C. Continued Agency Oversight

The federal antitrust agencies, the FTC and the Department of Justice, and the Federal Communications Commission have jurisdiction to address broadband Internet access, with each playing an important role in protecting competition and consumers in this area.<sup>766</sup> These federal agencies are prepared to address issues that may arise in the broadband area.

Further, as a byproduct of the ongoing debate over network neutrality, the agencies have a heightened awareness of the potential consumer harms from certain conduct by, and business arrangements involving, broadband providers. Perhaps equally important is the fact that many consumers are now aware of such issues. Consumers – particularly online consumers – have a powerful collective voice that should not be ignored by businesses. In the area of broadband Internet access, consumers have revealed a strong preference for the current open access to Internet content and applications.

The FTC has been involved in the Internet access area for over a decade and will continue to be involved in the evolving area of broadband access. The FTC Act is sufficiently flexible to allow the FTC to enforce the antitrust and consumer protection laws in most industries, including those, such as broadband Internet access, involving new and ever-changing technologies. The fundamental principles of antitrust and consumer protection law and economics that we have applied for years are as relevant to the broadband industry as they are to other industries in our economy. Another significant feature of the FTC Act is its grounding in *ex post*, fact- and market-specific analysis of conduct and business arrangements, rather than *ex ante*, industry-wide regulation. In other words, in enforcing the antitrust and consumer protection laws, the FTC generally conducts detailed, after-the-fact analyses of conduct and business arrangements to determine if they harm consumer welfare, rather than issuing broad regulatory directives.

The FTC will continue to devote substantial resources to maintaining competition and protecting consumers from deceptive or unfair acts or practices in the area of broadband Internet access, using a variety of tools. The FTC, for example, will continue to enforce the antitrust laws in evaluating conduct and business arrangements involving broadband access. As explained above,<sup>767</sup> because the various conduct and business arrangements at issue in the broadband area have both procompetitive and

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<sup>766</sup> See *supra* Chapters II and IX.A.

<sup>767</sup> See *supra* Chapter VII.

anticompetitive potential, the FTC would carefully analyze the net effect of particular conduct or arrangements on consumer welfare, rather than challenge them as per se illegal.

The FTC also will continue to enforce the consumer protection laws in the area of broadband Internet access. Such enforcement will remain crucial to fostering competition in the broadband area – with or without the enactment of some form of network neutrality regulation. Important questions involving the clear and conspicuous disclosure of material terms of broadband Internet access remain, particularly in the event that broadband providers engage in data discrimination, prioritization, or other traffic-shaping practices discussed above.<sup>768</sup>

Finally, the FTC's Broadband Connectivity Competition Policy Workshop and this Report exemplify some of the diverse resources the agency may bring to bear on Internet access issues, in addition to specific law enforcement actions. The Workshop and Report reflect the agency's interest in and commitment to developing competition and consumer protection policy. The agency also expends and will continue to expend considerable efforts at consumer education,<sup>769</sup> industry guidance,<sup>770</sup> and competition advocacy<sup>771</sup> in the important area of Internet access.

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<sup>768</sup> See *supra* Chapters IV, V, and VIII.

<sup>769</sup> See, e.g., FTC, HIDE AND GO SEEK: FINDING THE DISCLOSURES IN "FREE" INTERNET SERVICE OFFERS (2001), available at <http://www.ftc.gov/bcp/online/pubs/alerts/freeispalrt.shtm>.

<sup>770</sup> See, e.g., FTC, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING (2000), available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.shtm>.

<sup>771</sup> See, e.g., FTC STAFF, *supra* note 499.

## **APPENDIX 1 – BROADBAND CONNECTIVITY COMPETITION POLICY WORKSHOP PARTICIPANTS**

Michael Altschul	Senior Vice President and General Counsel, CTIA – The Wireless Association
Gary Bachula	Vice President for External Relations, Internet2
Daniel Brenner	Senior Vice President, Law and Regulatory Policy, National Cable & Telecommunications Association
Tod Cohen	Vice President and Deputy General Counsel, Government Relations, eBay
Alan Davidson	Washington Policy Counsel, Google
Joseph Farrell	Professor, University of California, Berkeley
Harold Feld	Senior Vice President, Media Access Project
George S. Ford	Chief Economist, Phoenix Center for Advanced Legal & Economic Public Policy Studies
Alfred E. Kahn	Professor Emeritus, Cornell University
Jeannine Kenney	Senior Policy Analyst, Consumers Union
William Lehr	Research Associate, Computer Science and Artificial Intelligence Laboratory, Massachusetts Institute of Technology
Thomas M. Lenard	Senior Fellow and Senior Vice President for Research, The Progress & Freedom Foundation
Christopher Libertelli	Senior Director of Governmental and Regulatory Affairs, Skype Limited
Walter B. McCormick, Jr.	President & CEO, United States Telecom Association
Paul Misener	Vice President for Global Public Policy, Amazon.com
Timothy J. Muris	Professor, George Mason University School of Law
Jon M. Peha	Professor, Carnegie Mellon University

Robert Pepper	Senior Managing Director, Global Advanced Technology, Cisco Systems
Christopher Putala	Executive Vice President, Public Policy, EarthLink
Gregory L. Rosston	Deputy Director, Stanford Institute for Economic Policy Research
John Ryan	Senior Vice President and Assistant General Counsel for Commercial and Public Policy, Level 3 Communications
Marius Schwartz	Professor, Georgetown University
J. Gregory Sidak	Visiting Professor, Georgetown University Law Center; Criterion Economics
David Sohn	Staff Counsel, Center for Democracy & Technology
Gigi B. Sohn	President, Public Knowledge
John Thorne	Senior Vice President and Deputy General Counsel, Verizon Communications
Barbara Tulipane	President & CEO, Electronic Retailing Association
Scott Wallsten	Senior Fellow and Director, Communications Policy Studies, The Progress & Freedom Foundation
Joseph W. Waz, Jr.	Vice President, External Affairs and Public Policy Counsel, Comcast
Philip J. Weiser	Professor, University of Colorado at Boulder
Simon Wilkie	Professor, University of Southern California Law School
Christopher Wolf	Co-Chairman, Hands off the Internet
Timothy Wu	Professor, Columbia University Law School
Ronald B. Yokubaitis	Chairman, Data Foundry
Christopher S. Yoo	Professor, Vanderbilt University Law School

## APPENDIX 2 – GLOSSARY OF FREQUENTLY USED ACRONYMS

3G	Third-Generation Wireless Communications Technology
AOL	America Online
ARPANET	Advanced Research Projects Agency Network
BPL	Broadband over Powerlines
DARPA	Defense Advanced Research Projects Agency
DOJ	Department of Justice
DSL	Digital Subscriber Line
EU	European Union
FCC	Federal Communications Commission
FTC	Federal Trade Commission
FTP	File Transfer Protocol
HTTP	Hypertext Transfer Protocol
IPTV	Internet Protocol Television
ISP	Internet Service Provider
Kbps	Kilobits Per Second
Mbps	Megabits Per Second
NSF	National Science Foundation
NSFNET	National Science Foundation Network
NTIA	National Telecommunications and Information Administration
OECD	Organization for Economic Co-operation and Development
P2P	Peer-to-Peer
QoS	Quality of Service
SMTP	Simple Mail Transfer Protocol
TCP/IP	Transmission Control Protocol / Internet Protocol suite
TELNET	TELEtype NETwork
VoIP	Voice over Internet Protocol
VPN	Virtual Private Network
The Web	The World Wide Web
Wi-Fi	Wireless Fidelity
Wi MAX	Worldwide Interoperability for Microwave Access



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# ATTACHMENT 9

S 215 IS

110th CONGRESS

1st Session

**S. 215**

To amend the Communications Act of 1934 to ensure net neutrality.

**IN THE SENATE OF THE UNITED STATES****January 9, 2007**

Mr. DORGAN (for himself, Ms. SNOWE, Mr. KERRY, Mrs. BOXER, Mr. HARKIN, Mr. LEAHY, Mrs. CLINTON, Mr. OBAMA, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

**A BILL**

To amend the Communications Act of 1934 to ensure net neutrality.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Internet Freedom Preservation Act'.

**SEC. 2. INTERNET NEUTRALITY.**

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by adding at the end the following:

**`SEC. 12. INTERNET NEUTRALITY.**

`(a) Duty of Broadband Service Providers- With respect to any broadband service offered to the public, each broadband service provider shall--

`(1) not block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content, application, or service made available via the Internet;

` (2) not prevent or obstruct a user from attaching or using any device to the network of such broadband service provider, only if such device does not physically damage or substantially degrade the use of such network by other subscribers;

` (3) provide and make available to each user information about such user's access to the Internet, and the speed, nature, and limitations of such user's broadband service;

` (4) enable any content, application, or service made available via the Internet to be offered, provided, or posted on a basis that--

    ` (A) is reasonable and nondiscriminatory, including with respect to quality of service, access, speed, and bandwidth;

    ` (B) is at least equivalent to the access, speed, quality of service, and bandwidth that such broadband service provider offers to affiliated content, applications, or services made available via the public Internet into the network of such broadband service provider; and

    ` (C) does not impose a charge on the basis of the type of content, applications, or services made available via the Internet into the network of such broadband service provider;

` (5) only prioritize content, applications, or services accessed by a user that is made available via the Internet within the network of such broadband service provider based on the type of content, applications, or services and the level of service purchased by the user, without charge for such prioritization; and

` (6) not install or utilize network features, functions, or capabilities that impede or hinder compliance with this section.

` (b) Certain Management and Business-Related Practices- Nothing in this section shall be construed to prohibit a broadband service provider from engaging in any activity, provided that such activity is not inconsistent with the requirements of subsection (a), including--

    ` (1) protecting the security of a user's computer on the network of such broadband service provider; or managing such network in a manner that does not distinguish based on the source or ownership of content, application, or service;

    ` (2) offering directly to each user broadband service that does not distinguish based on the source or ownership of content, application, or service, at different prices based on defined levels of bandwidth or the

actual quantity of data flow over a user's connection;

` (3) offering consumer protection services (including parental controls for indecency or unwanted content, software for the prevention of unsolicited commercial electronic messages, or other similar capabilities), if each user is provided clear and accurate advance notice of the ability of such user to refuse or disable individually provided consumer protection capabilities;

` (4) handling breaches of the terms of service offered by such broadband service provider by a subscriber, provided that such terms of service are not inconsistent with the requirements of subsection (a); or

` (5) where otherwise required by law, to prevent any violation of Federal or State law.

` (c) Exception- Nothing in this section shall apply to any service regulated under title VI, regardless of the physical transmission facilities used to provide or transmit such service.

` (d) Stand-Alone Broadband Service- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service offered by such broadband service provider, to purchase any cable service, telecommunications service, or IP-enabled voice service.

` (e) Implementation- Not later than 180 days after the date of enactment of the Internet Freedom Preservation Act, the Commission shall prescribe rules to implement this section that--

` (1) permit any aggrieved person to file a complaint with the Commission concerning any violation of this section; and

` (2) establish enforcement and expedited adjudicatory review procedures consistent with the objectives of this section, including the resolution of any complaint described in paragraph (1) not later than 90 days after such complaint was filed, except for good cause shown.

` (f) Enforcement-

` (1) IN GENERAL- The Commission shall enforce compliance with this section under title V, except that--

` (A) no forfeiture liability shall be determined under section 503(b) against any person unless such person receives the notice required by section 503(b)(3) or section 503(b)(4); and

` (B) the provisions of section 503(b)(5) shall not apply.

`(2) SPECIAL ORDERS- In addition to any other remedy provided under this Act, the Commission may issue any appropriate order, including an order directing a broadband service provider--

`(A) to pay damages to a complaining party for a violation of this section or the regulations hereunder; or

`(B) to enforce the provisions of this section.

`(g) Definitions- In this section, the following definitions shall apply:

`(1) AFFILIATED- The term `affiliated' includes--

`(A) a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person; or

`(B) a person that has a contract or other arrangement with a content, applications, or service provider relating to access to or distribution of such content, applications, or service.

`(2) BROADBAND SERVICE- The term `broadband service' means a 2-way transmission that--

`(A) connects to the Internet regardless of the physical transmission facilities used; and

`(B) transmits information at an average rate of at least 200 kilobits per second in at least 1 direction.

`(3) BROADBAND SERVICE PROVIDER- The term `broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, whether provided for a fee or for free.

`(4) IP-ENABLED VOICE SERVICE- The term `IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol, for a fee (whether part of a bundle of services or separately) with interconnection capability such that service can originate traffic to, and terminate traffic from, the public switched telephone network.

`(5) USER- The term `user' means any residential or business subscriber who, by way of a broadband service, takes and utilizes Internet services, whether provided for a fee, in exchange for an explicit

benefit, or for free.'.

### **SEC. 3. REPORT ON DELIVERY OF CONTENT, APPLICATIONS, AND SERVICES.**

Not later than 270 days after the date of enactment of this Act, and annually thereafter, the Federal Communications Commission shall transmit a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives on the--

- (1) ability of providers of content, applications, or services to transmit and send such information into and over broadband networks;
- (2) ability of competing providers of transmission capability to transmit and send such information into and over broadband networks;
- (3) price, terms, and conditions for transmitting and sending such information into and over broadband networks;
- (4) number of entities that transmit and send information into and over broadband networks; and
- (5) state of competition among those entities that transmit and send information into and over broadband networks.

*END*

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**S.215**

**Title:** A bill to amend the Communications Act of 1934 to ensure net neutrality.

**Sponsor:** [Sen Dorgan, Byron L.](#) [ND] (introduced 1/9/2007)      [Cosponsors](#) (10)

**Latest Major Action:** 1/9/2007 Referred to Senate committee. Status: Read twice and referred to the Committee on Commerce, Science, and Transportation.

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**SUMMARY AS OF:**

1/9/2007--Introduced.

Internet Freedom Preservation Act - Amends the Communications Act of 1934 to establish certain Internet neutrality duties for broadband service providers (providers), including not interfering with, or discriminating against, the ability of any person to use broadband service in a lawful manner. Allows providers to engage in activities in furtherance of certain management and business-related practices, such as protecting network security and offering consumer protection services such as parental controls.

Prohibits a provider from requiring a subscriber, as a condition on the purchase of broadband service, to purchase any cable service, telecommunications service, or IP-enabled voice service.

Requires a report from the Federal Communications Commission (FCC) to specified congressional committees on provider delivery of broadband content, applications, and services.

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**MAJOR ACTIONS:**

\*\*\*NONE\*\*\*

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**ALL ACTIONS:**

**1/9/2007:**

Sponsor introductory remarks on measure. (CR [S286-287](#))

**1/9/2007:**

Read twice and referred to the Committee on Commerce, Science, and Transportation. (text of measure as introduced: CR [S287-288](#))

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**TITLE(S):** (*italics indicate a title for a portion of a bill*)

\*\*\*NONE\*\*\*

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**COSPONSORS(10), ALPHABETICAL** [followed by Cosponsors withdrawn]: (Sort: by date)

<u>Sen Boxer, Barbara</u> [CA] - 1/9/2007	<u>Sen Clinton, Hillary Rodham</u> [NY] - 1/9/2007
<u>Sen Dodd, Christopher J.</u> [CT] - 12/7/2007	<u>Sen Harkin, Tom</u> [IA] - 1/9/2007
<u>Sen Kerry, John F.</u> [MA] - 1/9/2007	<u>Sen Leahy, Patrick J.</u> [VT] - 1/9/2007
<u>Sen Obama, Barack</u> [IL] - 1/9/2007	<u>Sen Sanders, Bernard</u> [VT] - 1/12/2007
<u>Sen Snowe, Olympia J.</u> [ME] - 1/9/2007	<u>Sen Wyden, Ron</u> [OR] - 1/9/2007

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**COMMITTEE(S):**

**Committee/Subcommittee: Activity:**

Senate Commerce, Science,  
and Transportation      Referral, In Committee

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**RELATED BILL DETAILS:**

\*\*\*NONE\*\*\*

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**AMENDMENT(S):**

\*\*\*NONE\*\*\*

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- 1 . Communications Opportunity, Promotion, and Enhancement Act of 2006 (Introduced in House)[[H.R.5252.IH](#)]
- 2 . Communications Opportunity, Promotion, and Enhancement Act of 2006 (Reported in House)[[H.R.5252.RH](#)]
- 3 . Communications Opportunity, Promotion, and Enhancement Act of 2006 (Engrossed as Agreed to or Passed by House)[[H.R.5252.EH](#)]
- 4 . Communications Opportunity, Promotion, and Enhancement Act of 2006 (Referred to Senate Committee after being Received from House)[[H.R.5252.RFS](#)]
- 5 . Communications Opportunity, Promotion, and Enhancement Act of 2006 (Reported in Senate)[[H.R.5252.RS](#)]

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HR 5252 IH

109th CONGRESS

2d Session

**H. R. 5252**

To promote the deployment of broadband networks and services.

**IN THE HOUSE OF REPRESENTATIVES**

**May 1, 2006**

Mr. BARTON of Texas (for himself, Mr. RUSH, Mr. UPTON, Mr. PICKERING, Mr. STEARNS, Mr. BUYER, Mrs. BLACKBURN, Mr. GILLMOR, Mr. SHADEGG, Mr. RADANOVICH, Mr. ROGERS of Michigan, Mr. FERGUSON, Mr. NORWOOD, Mr. WHITFIELD, Mr. SHIMKUS, Mrs. MYRICK, and Mr. BURGESS) introduced the following bill; which was referred to the Committee on Energy and Commerce

**A BILL**

To promote the deployment of broadband networks and services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) Short Title- This Act may be cited as the 'Communications Opportunity, Promotion, and Enhancement Act of 2006'.

(b) Table of Contents-

Sec. 1. Short title; table of contents.

**TITLE I--NATIONAL CABLE FRANCHISING**

Sec. 101. National cable franchising.

Sec. 102. Definitions.

Sec. 103. Monitoring and reporting.

## **TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

Sec. 201. Enforcement of broadband policy statement.

## **TITLE III--VOIP/911**

Sec. 301. Emergency services; interconnection.

## **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

Sec. 401. Government authority to provide services.

## **TITLE V--BROADBAND SERVICE**

Sec. 501. Stand-alone broadband service.

Sec. 502. Study of interference potential of broadband over power line systems.

## **TITLE VI--SEAMLESS MOBILITY**

Sec. 601. Development of seamless mobility.

## **TITLE I--NATIONAL CABLE FRANCHISING**

### **SEC. 101. NATIONAL CABLE FRANCHISING.**

(a) Amendment- Part III of title VI of the Communications Act of 1934 (47 U.S.C. 541 et seq.) is amended by adding at the end the following new section:

### **SEC. 630. NATIONAL CABLE FRANCHISING.**

(a) National Franchises-

(1) ELECTION- A person or group that is eligible under subsection (d) may elect to obtain a national franchise under this section as authority to provide cable service in a franchise area in lieu of any other authority under Federal, State, or local law to provide cable service in such franchise area. A person or group may not provide cable service under the authority of this section in a franchise area unless such person or group has a franchise under this section that is effective with respect to such franchise area. A franchising authority may not require any person or group that has a national franchise under this section in effect with respect to a franchise area to obtain a franchise under section 621 or any other law to provide cable service in such franchise area.

` (2) CERTIFICATION- To obtain a national franchise under this section as authority to provide cable service in a franchise area, a person or group shall--

` (A) file with the Commission a certification for a national franchise containing the information required by paragraph (3) with respect to such franchise area, if such person or group has not previously obtained a national franchise; or

` (B) file with the Commission a subsequent certification for additional franchise areas containing the information required by paragraph (3) with respect to such additional franchise areas, if such person or group has previously obtained a national franchise.

` (3) CONTENTS OF CERTIFICATION- Such certification shall be in such form as the Commission shall require by regulation and shall contain--

` (A) the name under which such person or group is offering or intends to offer cable service;

` (B) the names and business addresses of the directors and principal executive officers, or the persons performing similar functions, of such person or group;

` (C) the location of such person or group's principal business office;

` (D) the name, business address, electronic mail address, and telephone and fax number of such person or group's local agent;

` (E) a declaration by such person or group that such person or group is eligible under subsection (d) to obtain a national franchise under this section;

` (F) an identification of each franchise area in which such person or group intends to offer cable service pursuant to such certification, which franchise area shall be--

` (i) the entirety of a franchise area in which a cable operator is, on the date of the filing of such certification, authorized to provide cable service under section 621 or any other law (including this section); or

` (ii) a contiguous geographic area that covers the entirety of the jurisdiction of a unit of general local government, except that--

` (I) if the geographic area within the jurisdiction of such

unit of general local government contains a franchise area in which a cable operator is, on such date, authorized to provide cable service under section 621 or any other law, the contiguous geographic area identified in the certification under this clause as a franchise area shall not include the area contained in the franchise area of such cable operator; and

`(II) if such contiguous geographic area includes areas that are, respectively, within the jurisdiction of different franchising authorities, the certification shall specify each such area as a separate franchise area;

`(G) a declaration that such person or group transmitted, or will transmit on the day of filing such declaration, a copy of such certification to the franchising authority for each franchise area for which such person or group is filing a certification to offer cable service under this section;

`(H) a declaration by the person or group that the person or group will comply with the rights-of-way requirements of the franchising authority under subsection (f); and

`(I) a declaration by the person or group that--

`(i) the person or group will comply with all Commission consumer protection and customer service rules under section 632(b) and subsection (g) of this section; and

`(ii) the person or group agrees that such standards may be enforced by the Commission or by the franchising authority in accordance with subsection (g) of this section.

`(4) LOCAL NOTIFICATION; PRESERVATION OF OPPORTUNITY TO NEGOTIATE-

`(A) COPY TO FRANCHISING AUTHORITY- On the day of filing any certification under paragraph (2)(A) or (B) for a franchise area, the person or group shall transmit a copy of such certification to the franchising authority for such area.

`(B) NEGOTIATED FRANCHISE AGREEMENTS PERMITTED- Nothing in this section shall prevent a person or group from negotiating a franchise agreement or any other authority to provide cable service in a franchise area under section 621 or any other law. Upon entry into any such negotiated franchise agreement, such negotiated franchise agreement shall apply in lieu of any national franchise

held by that person or group under this section for such franchise area.

` (5) UPDATING OF CERTIFICATIONS- A person or group that files a certification under this section shall update any information contained in such certification that is no longer accurate and correct.

` (6) PUBLIC AVAILABILITY OF CERTIFICATIONS- The Commission shall provide for the public availability on the Commission's Internet website or other electronic facility of all current certifications filed under this section.

` (b) Effectiveness; Duration-

` (1) EFFECTIVENESS- A national franchise under this section shall be effective with respect to any franchise area 30 days after the date of the filing of a completed certification under subsection (a)(2)(A) or (B) that applies to such franchise area.

` (2) DURATION-

` (A) IN GENERAL- A franchise under this section that applies to a franchise area shall be effective for that franchise area for a term of 10 years.

` (B) RENEWAL- A franchise under this section for a franchise area shall be renewed automatically upon expiration of the 10-year period described in subparagraph (A).

` (C) PUBLIC HEARING- At the request of a franchising authority in a franchise area, a cable operator authorized under this section to provide cable service in such franchise area shall, within the last year of the 10-year period applicable under subparagraph (A) to the cable operator's franchise for such franchise area, participate in a public hearing on the cable operator's performance in the franchise area, including the cable operator's compliance with the requirements of this title. The hearing shall afford the public the opportunity to participate for the purpose of identifying cable-related community needs and interests and assessing the operator's performance. The cable operator shall provide notice to its subscribers of the hearing at least 30 days prior to the hearing.

` (D) REVOCATION- A franchise under this section for a franchise area may be revoked by the Commission--

` (i) for willful or repeated violation of any Federal or State law, or any Commission regulation, relating to the provision of

cable service in such franchise area;

` (ii) for false statements or material omissions knowingly made in any filing with the Commission relating to the provision of cable service in such franchise area;

` (iii) for willful or repeated violation of the rights-of-way management laws or regulations of any franchising authority in such franchise area relating to the provision of cable service in such franchise area; or

` (iv) for willful or repeated violation of the antidiscrimination requirement of subsection (h) with respect to such franchise area.

` (E) NOTICE- The Commission shall send a notice of such revocation to each franchising authority with jurisdiction over the franchise areas for which the cable operator's franchise was revoked.

` (F) REINSTATEMENT- After a revocation under subparagraph (D) of a franchise for a franchise area of any person or group , the Commission may refuse to accept for filing a new certification for authority of such person or group to provide cable service under this section in such franchise area until the Commission determines that the basis of such revocation has been remedied.

` (G) RETURN TO LOCAL FRANCHISING IF CABLE COMPETITION CEASES-

` (i) If only one cable operator is providing cable service in a franchise area, and that cable operator obtained a national franchise for such franchise area under subsection (d)(2), the franchising authority for such franchise area may file a petition with the Commission requesting that the Commission terminate such national franchise for such franchise area.

` (ii) The Commission shall provide public notice and opportunity to comment on such petition. If it finds that the requirements of clause (i) are satisfied, the Commission shall issue an order granting such petition. Such order shall take effect one year from the date of such grant, if no other cable operator offers cable service in such area during that one year. If another cable operator does offer cable service in such franchise area during that one year, the Commission shall rescind such order and dismiss such petition.



` (iii) A cable operator whose national franchise is terminated for such franchise area under this subparagraph may obtain new authority to provide cable service in such franchise area under this section, section 621, or any other law, if and when eligible.

` (c) Requirements of National Franchise- A national franchise shall contain the following requirements:

` (1) FRANCHISE FEE- A cable operator authorized under this section to provide cable service in a franchise area shall pay to the franchising authority in such franchise area a franchise fee of up to 5 percent (as determined by the franchising authority) of such cable operator's gross revenues from the provision of cable service under this section in such franchise area. Such payment shall be assessed and collected in a manner consistent with section 622 and the definition of gross revenues in this section.

` (2) PEG/I-NET REQUIREMENTS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the requirements of subsection (e).

` (3) RIGHTS-OF-WAY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the rights-of-way requirements of the franchising authority under subsection (f).

` (4) CONSUMER PROTECTION AND CUSTOMER SERVICE STANDARDS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the consumer protection and customer service standards established by the Commission under section 632(b).

` (5) CHILD PORNOGRAPHY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the regulations on child pornography promulgated pursuant to subsection (i).

` (d) Eligibility for National Franchises- The following persons or groups are eligible to obtain a national franchise under this section:

` (1) COMMENCEMENT OF SERVICE AFTER ENACTMENT- A person or group that is not providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a national franchise under this section to provide cable service in such franchise area.

` (2) EXISTING PROVIDERS OF CABLE SERVICE- A person or group that is providing cable service in a franchise area on the date of enactment of

this section under section 621 or any other law may obtain a franchise under this section to provide cable service in such franchise area if, on the date that the national franchise becomes effective, another person or group is providing cable service under this section, section 621, or any other law in such franchise area.

`(e) Public, Educational, and Governmental Use-

`(1) IN GENERAL- Subject to paragraph (3), a cable operator with a national franchise for a franchise area under this section shall provide channel capacity for public, educational, and governmental use that is not less than the channel capacity required of the cable operator with the most subscribers in such franchise area on the effective date of such national franchise. If there is no other cable operator in such franchise area on the effective date of such national franchise, or there is no other cable operator in such franchise area on such date that is required to provide channel capacity for public, educational, and governmental use, the cable operator shall provide the amount of channel capacity for such use as determined by Commission rule.

`(2) PEG AND I-NET FINANCIAL SUPPORT- A cable operator with a national franchise under this section for a franchise area shall pay an amount equal to 1 percent of the cable operator's gross revenues (as such term is defined in this section) in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)). Such payment shall be assessed and collected in a manner consistent with section 622, including the authority of the cable operator to designate that portion of a subscriber's bill attributable to such payment. A cable operator that provided cable service in a franchise area on the date of enactment of this section and that obtains a national franchise under this section shall continue to provide any institutional network that it was required to provide in such franchise area under section 621 or any other law. Notwithstanding section 621(b)(3)(D), a franchising authority may not require a cable operator franchised under this section to construct a new institutional network.

`(3) ADJUSTMENT- Every 10 years after the commencement of a franchise under this section for a franchise area, a franchising authority may require a cable operator authorized under such franchise to increase the channel capacity designated for public, educational, or governmental use, and the channel capacity designated for such use on any institutional networks required under paragraph (2). Such increase shall not exceed the higher of--

`(A) one channel; or

`(B) 10 percent of the public, educational, or governmental channel capacity required of that operator prior to the increase.

`(4) TRANSMISSION AND PRODUCTION OF PROGRAMMING-

`(A) A cable operator franchised under this section shall ensure that all subscribers receive any public, educational, or governmental programming carried by the cable operator within the subscriber's franchise area.

`(B) The production of any programming provided under this subsection shall be the responsibility of the franchising authority.

`(C) A cable operator franchised under this section shall be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another cable operator under subparagraph (D), to the cable operator's subscribers, of any public, educational, or governmental programming produced by or for the franchising authority and carried by the cable operator pursuant to this section.

`(D) Unless two cable operators otherwise agree to the terms for interconnection and cost sharing, such cable operators shall comply with regulations prescribed by the Commission providing for--

`(i) the interconnection between two cable operators in a franchise area for transmission of public, educational, or governmental programming, without material deterioration in signal quality or functionality; and

`(ii) the reasonable allocation of the costs of such interconnection between such cable operators.

`(E) A cable operator shall display the program information for public, educational, or governmental programming carried under this subsection in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The cable operator shall not omit such public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area.

`(f) Rights-of-Way-

`(1) AUTHORITY TO USE- Any franchise under this section for a franchise area shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is

within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure that--

` (A) the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

` (B) the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

` (C) the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

` (2) MANAGEMENT OF PUBLIC RIGHTS-OF-WAY- Nothing in this Act affects the authority of a State or local government (including a franchising authority) over a person or group in their capacity as a cable operator with a franchise under this section to manage, on a reasonable, competitively neutral, and non-discriminatory basis, the public rights-of-way, and easements that have been dedicated for compatible uses. A State or local government (including a franchising authority) may, on a reasonable, competitively neutral, and non-discriminatory basis--

` (A) impose charges for such management; and

` (B) require compliance with such management, such charges, and paragraphs (1)(A), (B), and (C).

` (g) Consumer Protection and Customer Service-

` (1) NATIONAL STANDARDS- Notwithstanding section 632(d), no State or local law (including any regulation) shall impose on a cable operator franchised under this section any consumer protection or customer service requirements other than consumer protection or customer service requirements of general applicability.

` (2) PROCEEDING- Within 120 days after the date of enactment of this section, the Commission shall issue a report and order that updates for cable operators franchised under this section the national consumer protection and customer service rules under section 632(b), taking into consideration the national nature of a franchise under this section and the role of State and local governments in enforcing, but not creating, consumer protection and customer service standards for cable operators franchised under this section.

` (3) REQUIREMENTS OF NEW RULES-

` (A) Such rules shall, in addition to the requirements of section 632 (b), address, with specificity, no less than the following consumer protection and customer service issues:

` (i) Billing, billing disputes, and discontinuation of service, including when and how any late fees may be assessed (but not the amount of such fees).

` (ii) Loss of service or service quality.

` (iii) Changes in channel lineups or other cable services and features.

` (iv) Availability of parental control options.

` (B) Such rules shall require forfeiture penalties or customer rebates, or both, as determined by the Commission, that may be imposed for violations of such Commission rules in a franchise area, and shall provide for increased forfeiture penalties or customer rebates, or both, for repeated violations of the standards in such rules.

` (C) The Commission's rules shall also establish procedures by which any forfeiture penalty assessed by the Commission under this subsection shall be paid by the cable operator directly to the franchising authority.

` (D) The Commission shall report to the Congress no less than once a year--

` (i) on complaints filed, and penalties imposed, under this subsection; and

` (ii) on any new consumer protection or customer service issues arising under this subsection.

` (E) The Commission's rules established under this subsection shall be revised as needed.

` (4) COMPLAINTS- Any person may file a complaint with respect to a violation of the regulations prescribed under section 632(b) in a franchise area by a cable operator franchised under this section--

` (A) with the franchising authority in such area; or

` (B) with the Commission.

` (5) LOCAL FRANCHISING ORDERS REQUIRING COMPLIANCE- In a proceeding commenced with a franchising authority on such a complaint, a franchising authority may issue an order requiring compliance with any of such regulations prescribed by the Commission, but a franchising authority may not create any new standard or regulation, or expand upon or modify the Commission's standards or regulations.

` (6) ACCESS TO RECORDS- In such a proceeding, the franchising authority may issue an order requiring the filing of any contract, agreement, or arrangement between the subscriber and the provider, or any other data, documents, or records, directly related to the alleged violation.

` (7) COMMISSION REMEDIES; APPEALS- Unless appealed to the Commission, an order of a franchising authority under this subsection shall be enforced by the Commission. Any such appeal shall be resolved by the Commission within 30 days after receipt of the appeal by the Commission.

` (8) COST OF FRANCHISING AUTHORITY ORDERS- A franchising authority may charge a provider of cable service under this section a nominal fee to cover the costs of issuing such orders.

` (h) Antidiscrimination-

` (1) PROHIBITION- A cable operator with a national franchise under this section to provide cable service in a franchise area shall not deny access to its cable service to any group of potential residential cable service subscribers in such franchise area because of the income of that group.

` (2) ENFORCEMENT-

` (A) COMPLAINT- If a franchising authority in a franchise area has reasonable cause to believe that a cable operator is in violation of this subsection with respect to such franchise area, the franchising authority may, after complying with subparagraph (B), file a complaint with the Commission alleging such violation.

` (B) NOTICE BY FRANCHISING AUTHORITY- Before filing a complaint with the Commission under subparagraph (A), a franchising authority--

` (i) shall give notice of each alleged violation to the cable operator;

` (ii) shall provide a period of not less than 30 days for the cable operator to respond to such allegations; and

` (iii) during such period, may require the cable operator to submit a written response stating the reasons why the operator has not violated this subsection.

` (C) BIENNIAL REPORT- A cable operator with a national franchise under this section for a franchise area, not later than 180 days after the effective date of such national franchise, and biennially thereafter, shall submit a report to the Commission and the franchising authority in the franchise area--

` (i) identifying the geographic areas in the franchise area where the cable operator offers cable service; and

` (ii) describing the cable operator's progress in extending cable service to other areas in the franchise area.

` (D) NOTICE BY COMMISSION- Upon receipt of a complaint under this paragraph alleging a violation of this subsection by a cable operator, the Commission shall give notice of the complaint to the cable operator.

` (E) INVESTIGATION- In investigating a complaint under this paragraph, the Commission may require a cable operator to disclose to the Commission such information and documents as the Commission deems necessary to determine whether the cable operator is in compliance with this subsection. The Commission shall maintain the confidentiality of any information or document collected under this subparagraph.

` (F) DEADLINE FOR RESOLUTION OF COMPLAINTS- Not more than 60 days after the Commission receives a complaint under this paragraph, the Commission shall issue a determination with respect to each violation alleged in the complaint.

` (G) DETERMINATION- If the Commission determines (in response to a complaint under this paragraph or on its own initiative) that a cable operator with a franchise under this section to provide cable service in a franchise area has denied access to its cable service to a group of potential residential cable service subscribers in such franchise area because of the income of that group, the Commission shall ensure that the cable operator extends access to that group within a reasonable period of time.

` (H) REMEDIES-

` (i) IN GENERAL- This subsection shall be enforced by the Commission under titles IV and V.

` (ii) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation of this subsection shall be \$500,000 for each day of the violation.

` (iii) PAYMENT OF PENALTIES TO FRANCHISING AUTHORITY- The Commission shall order any cable operator subject to a forfeiture penalty under this subsection to pay the penalty directly to the franchising authority involved.

` (i) Child Pornography- Not later than 180 days after the date of enactment of this section, the Commission shall promulgate regulations to require a cable operator with a national franchise under this section to prevent the distribution of child pornography (as such term is defined in section 254(h)(7)(F)) over its network.

` (j) Leased Access- The provisions of section 612(i) regarding the carriage of programming from a qualified minority programming source or from any qualified educational programming source shall apply to a cable operator franchised under this section to provide cable service in a franchise area.

` (k) Applicability of Other Provisions- The following sections shall not apply in a franchise area to a person or group franchised under this section in such franchise area, or confer any authority to regulate or impose obligations on such person or group: Sections 611(a), 611(b), 611(c), 613(a), 617, 621 (other than subsections (b)(3)(A), (b)(3)(B), (b)(3)(C), and (c)), 624(b), 624(c), 624(h), 625, 626, 627, and 632(a).

` (l) Emergency Alerts- Nothing in this Act shall be construed to prohibit a State or local government from accessing the emergency alert system of a cable operator with a franchise under this section in the area served by the State or local government to transmit local or regional emergency alerts.

` (m) Reporting, Records, and Audits-

` (1) REPORTING- A cable operator with a franchise under this section to provide cable service in a franchise area shall make such periodic reports to the Commission and the franchising authority for such franchise area as the Commission may require to verify compliance with the fee obligations of subsections (c)(1) and (e)(2).

` (2) AVAILABILITY OF BOOKS AND RECORDS- Upon request under paragraph (3) by a franchising authority for a franchise area, and upon request by the Commission, a cable operator with a national franchise



for such franchise area shall make available its books and records to periodic audit by such franchising authority or the Commission, respectively.

` (3) FRANCHISING AUTHORITY AUDIT PROCEDURE- A franchising authority may, upon reasonable written request, but no more than once in any 12-month period, review the business records of such cable operator to the extent reasonably necessary to ensure payment of the fees required by subsections (c)(1) and (e)(2). Such review may include the methodology used by such cable operator to assign portions of the revenue from cable service that may be bundled or functionally integrated with other services, capabilities, or applications. Such review shall be conducted in accordance with procedures established by the Commission.

` (4) COST RECOVERY-

` (A) To the extent that the review under paragraph (3) identifies an underpayment of an amount meeting the minimum percentage specified in subparagraph (B) of the fee required under subsections (c)(1) and (e)(2) for the period of review, the cable operator shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party, as determined by the Commission, with respect to such fee. The costs of any contingency fee arrangement between the franchising authority and the independent reviewer shall not be subject to reimbursement.

` (B) The Commission shall determine by rule the minimum percentage underpayment that requires cost reimbursement under subparagraph (A).

` (5) LIMITATION- Any fee that is not reviewed by a franchising authority within 3 years after it is paid or remitted shall not be subject to later review by the franchising authority under this subsection and shall be deemed accepted in full payment by the franchising authority.

` (n) Access to Programming for Shared Facilities-

` (1) PROHIBITION- A cable programming vendor in which a cable operator has an attributable interest shall not deny a cable operator with a national franchise under this section access to video programming solely because such cable operator uses a headend for its cable system that is also used, under a shared ownership or leasing agreement, as the headend for another cable system.

` (2) DEFINITION- The term `cable programming vendor' means a

person engaged in the production, creation, or wholesale distribution for sale of video programming which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.

`(o) Gross Revenues- As used in this section:

`(1) IN GENERAL- Subject to paragraphs (2) and (3), the term `gross revenues' means all consideration of any kind or nature, including cash, credits, property, and in-kind contributions (services or goods) received by the cable operator from the provision of cable service within the franchise area.

`(2) INCLUDED ITEMS- Subject to paragraph (3), the term `gross revenues' shall include the following:

`(A) all charges and fees paid by subscribers for the provision of cable service, including fees attributable to cable service when sold individually or as part of a package or bundle, or functionally integrated, with services other than cable service;

`(B) any franchise fee imposed on the cable operator that is passed on to subscribers;

`(C) compensation received by the cable operator for promotion or exhibition of any products or services over the cable service, such as on `home shopping' or similar programming;

`(D) revenue received by the cable operator as compensation for carriage of video programming or other programming service on that operator's cable service;

`(E) all revenue derived from the cable operator's cable service pursuant to compensation arrangements for advertising; and

`(F) any advertising commissions paid to an affiliated third party for cable services advertising.

`(3) EXCLUDED ITEMS- The term `gross revenues' shall not include the following:

`(A) any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt;

`(B) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset by subparagraph (A) and to the extent such refund, rebate, credit, or discount is attributable to the cable service;

` (C) subject to paragraph (4), any revenues received by the cable operator or its affiliates from the provision of services or capabilities other than cable service, including telecommunications services, Internet access services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with cable service;

` (D) any revenues received by the cable operator or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;

` (E) any amounts attributable to the provision of cable service to customers at no charge, including the provision of such service to public institutions without charge;

` (F) any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a Federal, State, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility user taxes;

` (G) any forgone revenue from the provision of cable service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue;

` (H) sales of capital assets or surplus equipment;

` (I) reimbursement by programmers of marketing costs actually incurred by the cable operator for the introduction of new programming; and

` (J) the sale of cable services for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto.

` (4) FUNCTIONALLY INTEGRATED SERVICES- In the case of a cable service that is bundled or integrated functionally with other services, capabilities, or applications, the portion of the cable operator's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the cable operator can reasonably identify the division or exclusion of such revenue from its books and records that are kept in the regular course of business.

` (5) AFFILIATE REVENUE- Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of such

revenue as revenue of the affiliate has the effect (whether intentional or unintentional) of evading the payment of franchise fees which would otherwise be paid for cable service.

`(6) AFFECT ON OTHER LAW- Nothing in this section is intended to limit a franchising authority's rights pursuant to section 622(h).

`(p) Additional Definitions- For purposes of this section:

`(1) CABLE OPERATOR- The term `cable operator' has the meaning provided in section 602(5) except that such term also includes a person or group with a national franchise under this section.

`(2) FRANCHISE FEE-

`(A) The term `franchise fee' includes any fee or assessment of any kind imposed by a franchising authority or other governmental entity on a person or group providing cable service in a franchise area under this section, or on a subscriber of such person or group, or both, solely because of their status as such.

`(B) The term `franchise fee' does not include--

`(i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and a person or group providing cable service in a franchise area under this section (or the services of such person or group) but not including a fee or assessment which is unduly discriminatory against such person or group or the subscribers of such person or group);

`(ii) any fee assessed under subsection (e)(2) for support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f));

`(iii) requirements or charges under subsection (f)(2) for the management of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

`(iv) any fee imposed under title 17, United States Code.

`(3) INTERNET ACCESS SERVICE- The term `Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet.

`(4) UNIT OF GENERAL LOCAL GOVERNMENT- The term `unit of general

local government' means--

`(A) a county, township, city, or political subdivision of a county, township, or city;

`(B) the District of Columbia; or

`(C) the recognized governing body of an Indian tribe or Alaskan Native village that carries out substantial governmental duties and powers.'.

(b) Implementing Regulations- The Federal Communications Commission shall prescribe regulations to implement the amendment made by subsection (a) within 120 days after the date of enactment of this Act.

## **SEC. 102. DEFINITIONS.**

Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended--

(1) in paragraph (4), by inserting before the semicolon at the end the following: `, or its equivalent as determined by the Commission';

(2) in paragraph (5)(A), by inserting `(regardless of whether such person or group provides such service separately or combined with a telecommunications service or information service)' after `over a cable system'; and

(3) by striking paragraph (6) and inserting the following:

`(6) the term `cable service' means--

`(A)(i) the one-way transmission to subscribers of (I) video programming, or (II) other programming service; and

`(ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service; or

`(B) the transmission to subscribers of video programming or other programming service provided through wireline facilities located at least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of--

`(i) a commercial mobile service (as such term is defined in section 332(d)); or

(ii) an Internet access service (as such term is defined in section 630(p)).

### **SEC. 103. MONITORING AND REPORTING.**

(a) Report on Cable Service Deployment- The Federal Communications Commission shall, commencing not later than one year after the date of enactment of this Act, issue a report annually on the deployment of cable service. In its report, the Commission shall describe in detail--

(1) with respect to deployment by new cable operators--

(A) the progress of deployment of such service within the telephone service area of cable operators, if the operator is also an incumbent local exchange carrier, including a comparison with the progress of deployment of broadband services not defined as cable services within such telephone service area;

(B) the number of franchise areas in which such service is being deployed and offered;

(C) where such service is not being deployed and offered; and

(D) the number and locations of franchise areas in which the cable operator is serving only a portion of the franchise area, and the extent of such service within the franchise area;

(2) the number and locations of franchise areas in which a cable operator with a franchise under section 621 of the Communications Act of 1934 (47 U.S.C. 541) on the date of enactment of this Act withdraws service from any portion of the franchise area for which it previously offered service, and the extent of such withdrawal of service within the franchise area;

(3) the rates generally charged for cable service;

(4) the rates charged by overlapping, competing multichannel video programming distributors and by competing cable operators for comparable service or cable service;

(5) the average household income of those franchise areas or portions of franchise areas where cable services is being offered, and the average household income of those franchise areas, or portions of franchise areas, where cable service is not being offered;

(6) the proportion of rural households to urban households, as defined by the Bureau of the Census, in those franchise areas or portions of

franchise areas where cable service is being offered, and the proportion of rural households to urban households in those franchise areas or portions of franchise areas where cable service is not being offered, including a State-by-State breakdown of such data and a comparison with the overall ratio of rural and urban households in each State; and

(7) a comparison of the services and rates in areas served by national franchisees under section 630 of the Communications Act of 1934 (as added by section 101 of this Act) and the services and rates in other areas.

(b) Cable Operator Reports- The Federal Communications Commission is authorized--

(1) to require cable operators to report to the Commission all of the information that the Commission needs to compile the report required by this section; and

(2) to require cable operators to file the same information with the relevant franchising authorities and State commissions.

## **TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

### **SEC. 201. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is amended by adding at the end the following new section:

### **SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

(a) Authority- The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein.

(b) Enforcement-

(1) IN GENERAL- This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

(2) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be \$500,000 for each violation.

(3) ADJUDICATORY AUTHORITY- The Commission shall have exclusive

authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

`(4) LIMITATION- Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).

`(c) Study- Within 180 days after the date of enactment of this section, the Commission shall conduct, and submit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, a study regarding whether the objectives of the broadband policy statement and the principles incorporated therein are being achieved.

`(d) Definition- For purposes of this section, the term `Commission's broadband policy statement' means the policy statement adopted on August 5, 2005, and issued on September 23, 2005, In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, and other Matters (FCC 05-151; CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52).`.

### **TITLE III--VOIP/911**

#### **SEC. 301. EMERGENCY SERVICES; INTERCONNECTION.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 715 (as added by section 201 of this Act) the following new sections:

#### **`SEC. 716. EMERGENCY SERVICES.**



` (a) 911 and E-911 Services-

` (1) IN GENERAL- Each VOIP service provider has a duty to ensure that 911 and E-911 services are provided to subscribers of VOIP services.

` (2) USE OF EXISTING REGULATIONS- A VOIP service provider that complies with the Commission's regulations requiring providers of VOIP service to supply 911 and E911 capabilities to their customers (Report and Order in WC Docket Nos. 04-36 and 05-196) and that are in effect on the date of enactment of this section shall be considered to be in compliance with the requirements of this section, other than subsection (c), until such regulations are modified or superseded by subsequent regulations.

` (b) Non-Discriminatory Access to Capabilities-

` (1) ACCESS- Each incumbent local exchange carrier (as such term is defined in section 251(h)) or government entity with ownership or control of the necessary E-911 infrastructure shall provide any requesting VOIP service provider with nondiscriminatory access to such infrastructure. Such carrier or entity shall provide access to the infrastructure at just and reasonable, nondiscriminatory rates, terms, and conditions. Such access shall be consistent with industry standards established by the National Emergency Number Association or other applicable industry standards organizations.

` (2) ENFORCEMENT- The Commission or a State commission may enforce the requirements of this subsection and the Commission's regulations thereunder. A VOIP service provider may obtain access to such infrastructure pursuant to section 717 by asserting the rights described in such section.

` (c) New Customers- A VOIP service provider shall make 911 service available to new customers within a reasonable time in accordance with the following requirements:

` (1) CONNECTION TO SELECTIVE ROUTER- For all new customers not within the geographic areas where a VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider, or its third party vendor, shall have no more than 30 days from the date the VOIP provider has acquired a customer to order service providing connectivity to the selective router so that 911 service, or E911 service where the PSAP is capable of receiving and processing such information, can be provided through the selective router.

` (2) INTERIM SERVICE- For all new customers not within the geographic

areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide 911 service through--

`(A) an arrangement mutually agreed to by the VOIP service provider and the PSAP or PSAP governing authority; or

`(B) an emergency response center with national call routing capabilities.

Such service shall be provided 24 hours a day from the date a VOIP service provider has acquired a customer until the VOIP service provider can provide 911 service to the geographically appropriate PSAP.

`(3) NOTICE- Before providing service to any new customer not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide such customer with clear notice that 911 service will be available only as described in paragraph (2).

`(4) RESTRICTION ON ACQUISITION OF NEW CUSTOMERS- A VOIP service provider may not acquire new customers within a geographic area served by a selective router if, within 180 days of first acquiring a new customer in the area served by the selective router, the VOIP service provider does not provide 911 service, or E911 service where the PSAP is capable of receiving and processing such information, to the geographically appropriate PSAP for all existing customers served by the selective router.

`(5) ENFORCEMENT: NO FIRST WARNINGS- Paragraph (5) of section 503(b) shall not apply to the assessment of forfeiture penalties for violations of this subsection or the regulations thereunder.

`(d) State Authority- Nothing in this Act or any Commission regulation or order shall prevent the imposition on or collection from a VOIP service provider, of any fee or charge specifically designated or presented as dedicated by a State, political subdivision thereof, or Indian tribe on an equitable, and non-discriminatory basis for the support of 911 and E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 and E-911 services or enhancements of such services.

`(e) Feasibility- In establishing requirements or obligations under subsections (a) and (b), the Commission shall ensure that such standards impose requirements or obligations on VOIP service providers and entities with ownership or control of necessary E-911 infrastructure that the Commission determines are technologically and operationally feasible. In determining the

requirements and obligations that are technologically and operationally feasible, the Commission shall take into consideration available industry technological and operational standards.

`(f) Progress Reports- To the extent that the Commission concludes that it is not technologically or operationally feasible for VOIP service providers to comply with E-911 requirements or obligations, then the Commission shall submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the progress in attaining and deploying E-911 service. Such reports shall be submitted semiannually until the Commission concludes that it is technologically and operationally feasible for all VOIP service providers to comply with E-911 requirements and obligations. Such reports may include any recommendations the Commission considers appropriate to encourage the migration of emergency services to TCP/IP protocol or other advanced services.

`(g) Access to Information- The Commission shall have the authority to compile a list of PSAP contact information, testing procedures, and classes and types of services supported by PSAPs, or other information concerning the necessary E-911 infrastructure, for the purpose of assisting providers in complying with the requirements of this section.

`(h) Emergency Routing Number Administrator- Within 30 days after the date of enactment of this section, the Federal Communications Commission shall establish an emergency routing number administrator to enable VOIP service providers to acquire non-dialable pseudo-automatic number identification numbers for 9-1-1 routing purposes on a national scale. The Commission may adopt such rules and practices as are necessary to guide such administrator in the fair and expeditious assignment of these numbers.

`(i) Emergency Response Systems-

`(1) NOTICE PRIOR TO INSTALLATION OR NUMBER ACTIVATION OF VOIP SERVICE- Prior to installation or number activation of VOIP service for a customer, a VOIP service provider shall provide clear and conspicuous notice to the customer that--

`(A) such customer should arrange with his or her emergency response system provider, if any, to test such system after installation;

`(B) such customer should notify his or her emergency response system provider after VOIP service is installed; and

`(C) a battery backup is required for customer premises equipment installed in connection with the VOIP service in order for the

signaling of such system to function in the event of a power outage.

`(2) DEFINITION- In this subsection:

`(A) The term `emergency response system' means an alarm or security system, or personal security or medical monitoring system, that is connected to an emergency response center by means of a telecommunications carrier or VOIP service provider.

`(B) The term `emergency response center' means an entity that monitors transmissions from an emergency response system.

`(j) Migration to IP-Enabled Emergency Network-

`(1) NATIONAL REPORT- No more than 18 months after the date of the enactment of this section, the National 911 Implementation and Coordination Office shall develop a report to Congress on migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen activated emergency communications.

`(2) CONTENTS OF REPORT- The report required by paragraph (1) shall-

`(A) outline the potential benefits of such a migration;

`(B) identify barriers that must be overcome and funding mechanisms to address those barriers;

`(C) include a proposed timetable, an outline of costs and potential savings;

`(D) provide recommendations on specific legislative language;

`(E) provide recommendations on any legislative changes, including updating definitions, to facilitate a national IP-enabled emergency network; and

`(F) assess, collect, and analyze the experiences of the PSAPs and related public safety authorities who are conducting trial deployments of IP-enabled emergency networks as of the date of enactment of this section.

`(3) CONSULTATION- In developing the report required by paragraph (1), the Office shall consult with representatives of the public safety community, technology and telecommunications providers, and others it deems appropriate.

`(k) Implementation-

`(1) DEADLINE- The Commission shall prescribe regulations to implement this section within 120 days after the date of enactment of this section.

`(2) LIMITATION- Nothing in this section shall be construed to permit the Commission to issue regulations that require or impose a specific technology or technological standard.

`(l) Definitions- For purposes of this section:

`(1) VOIP SERVICE- The term `VOIP service' means a service that--

`(A) provides real-time 2-way voice communications transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol (including when the voice communication is converted to or from TCP/IP protocol by the VOIP service provider and transmitted to the subscriber without use of circuit switching), for a fee;

`(B) is offered to the public, or such classes of users as to be effectively available to the public (whether part of a bundle of services or separately); and

`(C) has the capability so that the service can originate traffic to, and terminate traffic from, the public switched telephone network.

`(2) VOIP SERVICE PROVIDER- The term `VOIP service provider' means any person who provides or offers to provide a VOIP service.

`(3) NECESSARY E-911 INFRASTRUCTURE- The term `necessary E-911 infrastructure' means the selective routers, selective router databases, automatic location information databases, master street address guides, trunk lines between selective routers and PSAPs, trunk lines between automatic location information databases and PSAPs, and other 911 and E-911 equipment, facilities, databases, interfaces, and related capabilities specified by the Commission.

`(4) NON-DIALABLE PSEUDO-AUTOMATIC NUMBER IDENTIFICATION NUMBER- The term `non-dialable pseudo-automatic number identification number' means a number, consisting of the same number of digits as numbers used for automatic number identification, that is not a North American Numbering Plan telephone directory number and that may be used in place of an automatic number identification number to convey special meaning. The special meaning assigned to the non-dialable pseudo-automatic number identification number is determined

by nationally standard agreements, or by individual agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.

## **SEC. 717. RIGHTS AND OBLIGATIONS OF VOIP SERVICE PROVIDERS.**

### **(a) In General-**

**(1) FACILITIES-BASED VOIP SERVICE PROVIDERS-** A facilities-based VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights.

**(2) VOIP SERVICE PROVIDERS-** A VOIP service provider that is not a facilities-based VOIP service provider shall have only the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251(b), 251(e), and 252, if the provider elects to assert such rights.

**(3) CLARIFYING TREATMENT OF VOIP SERVICE-** A telecommunications carrier may use interconnection, services, and network elements obtained pursuant to sections 251 and 252 from an incumbent local exchange carrier (as such term is defined in section 251(h)) to exchange VOIP service traffic with such incumbent local exchange carrier regardless of the provider originating such VOIP service traffic, including an affiliate of such telecommunications carrier.

**(b) Disabled Access-** A VOIP service provider or a manufacturer of VOIP service equipment shall have the same rights, duties, and obligations as a telecommunications carrier or telecommunications equipment manufacturer, respectively, under sections 225, 255, and 710 of the Act. Within 1 year after the date of enactment of this Act, the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, shall prescribe such regulations as are necessary to implement this section. In implementing this subsection, the Commission shall consider whether a VOIP service provider or manufacturer of VOIP service equipment primarily markets such service or equipment as a substitute for telecommunications service, telecommunications equipment, customer premises equipment, or telecommunications relay services.

### **(c) Definitions-** For purposes of this section:

**(1) FACILITIES-BASED VOIP SERVICE PROVIDER-** The term 'facilities-based VOIP service provider' means an entity that provides VOIP service over a physical facility that terminates at the end user's location and

which such entity or an affiliate owns or over which such entity or affiliate has exclusive use. An entity or affiliate shall be considered a facilities-based VOIP service provider only in those geographic areas where such terminating physical facilities are located.

`(2) VOIP SERVICE PROVIDER; VOIP SERVICE- The terms `VOIP service provider' and `VOIP service' have the meanings given such terms by section 716(j)).'.

#### **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

### **SEC. 401. GOVERNMENT AUTHORITY TO PROVIDE SERVICES.**

(a) In General- Neither the Communications Act of 1934 nor any State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider of telecommunications service, information service, or cable service (as such terms are defined in sections 3 and 602 of such Act) from providing such services to any person or entity.

(b) Competition Neutrality- Any State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that is, owns, controls, or is otherwise affiliated with a public provider of telecommunications service, information service, or cable service shall not grant any preference or advantage to any such provider. Such entity shall apply its ordinances, rules, and policies, including those relating to the use of public rights-of-way, permitting, performance bonding, and reporting without discrimination in favor of any such provider as compared to other providers of such services.

(c) Compliance With Other Laws not Affected- Nothing in this section shall exempt a public provider from any law or regulation that applies to providers of telecommunications service, information service, or cable service.

(d) Report- Not later than 1 year after the date of the enactment of this Act, the Federal Communications Commission shall submit to the Congress a report on the status of the provision of telecommunications service, information service, and cable service by States and political subdivisions thereof.

(e) Definition of Public Provider- For purposes of this section, the term `public provider' means a State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that provides telecommunications service, information service, or cable service, or any entity that is owned, controlled, or is otherwise affiliated with such State or political subdivision thereof, or agency, authority, or instrumentality of a State or political subdivision thereof.

**TITLE V--BROADBAND SERVICE****SEC. 501. STAND-ALONE BROADBAND SERVICE.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 717 (as added by section 301 of this Act) the following new section:

**` SEC. 718. STAND-ALONE BROADBAND SERVICE.**

` (a) Prohibition- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service the provider offers, to purchase any cable service, telecommunications service, or VOIP service offered by the provider.

` (b) Definitions- In this section:

` (1) The term `broadband service' means a two-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction.

` (2) The term `broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, by whatever technology and whether provided for a fee, in exchange for an explicit benefit, or for free.

` (3) The term `VOIP service' has the meaning given such term by section 716(j).'

**SEC. 502. STUDY OF INTERFERENCE POTENTIAL OF BROADBAND OVER POWER LINE SYSTEMS.**

Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall conduct, and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a study of the interference potential of broadband over power line systems.

**TITLE VI--SEAMLESS MOBILITY****SEC. 601. DEVELOPMENT OF SEAMLESS MOBILITY.**

(a) Streamlined Review-

(1) The Commission shall further the development of seamless mobility.



(2) Within 120 days after the date of enactment of this Act, the Commission shall implement a process for streamlined review and authorization of multi-mode devices that permit communication across multiple Internet protocol-enabled broadband platforms, facilities, and networks.

(b) Study- The Commission shall undertake an inquiry to identify barriers to the achievement of seamless mobility. Within 180 days after the date of enactment of this Act, the Commission shall report to the Congress on its findings and its recommendations for steps to eliminate those barriers.

(c) Definitions- For purposes of this section, the term 'seamless mobility' means the ability of a communications device to select between and utilize multiple Internet protocol-enabled technology platforms, facilities, and networks in a real-time manner to provide a unified service.

END

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HR 5252 RH

**Union Calendar No. 259**

109th CONGRESS

2d Session

**H. R. 5252**

[Report No. 109-470]

To promote the deployment of broadband networks and services.

**IN THE HOUSE OF REPRESENTATIVES**

**May 1, 2006**

Mr. BARTON of Texas introduced the following bill; which was referred to the Committee on Energy and Commerce

**May 17, 2006**

Additional sponsors: Mr. BASS, Mr. FOSSELLA, Mrs. BONO, Mr. HALL, Mr. WYNN, Mr. MEEKS of New York, Mr. THOMPSON of Mississippi, Mr. BUTTERFIELD, Mr. SCOTT of Georgia, Mr. CLAY, Mr. CROWLEY, Mr. WILSON of South Carolina, Mr. BAKER, Mr. OXLEY, Mr. BOYD, Mr. LEWIS of Kentucky, Mr. JEFFERSON, Mr. ALEXANDER, Mr. CLYBURN, Mr. LINCOLN DIAZ-BALART of Florida, Mr. BONNER, Mr. SPRATT, Mr. EVERETT, Mr. BROWN of South Carolina, Mr. HASTINGS of Florida, Mr. FOLEY, Mr. MEEK of Florida, Mr. MILLER of Florida, Mr. WEXLER, Mr. WICKER, Mr. MARIO DIAZ-BALART of Florida, Mr. FEENEY, Mr. ROGERS of Alabama, Mr. BACA, Mr. DAVIS of Tennessee, Mr. BARROW, Mr. HAYES, Mr. MACK, and Mr. BISHOP of Georgia

**May 17, 2006**

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

**A BILL**

To promote the deployment of broadband networks and services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) Short Title- This Act may be cited as the 'Communications Opportunity, Promotion, and Enhancement Act of 2006'.

(b) Table of Contents-

Sec. 1. Short title; table of contents.

## **TITLE I--NATIONAL CABLE FRANCHISING**

Sec. 101. National cable franchising.

Sec. 102. Definitions.

Sec. 103. Monitoring and reporting.

## **TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

Sec. 201. Enforcement of broadband policy statement.

## **TITLE III--VOIP/911**

Sec. 301. Emergency services; interconnection.

## **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

Sec. 401. Government authority to provide services.

## **TITLE V--BROADBAND SERVICE**

Sec. 501. Stand-alone broadband service.

Sec. 502. Study of interference potential of broadband over power line systems.

## **TITLE VI--SEAMLESS MOBILITY**

Sec. 601. Development of seamless mobility.

## **TITLE I--NATIONAL CABLE FRANCHISING**

### **SEC. 101. NATIONAL CABLE FRANCHISING.**

(a) Amendment- Part III of title VI of the Communications Act of 1934 (47 U.S.C. 541 et seq.) is amended by adding at the end the following new

section:

**SEC. 630. NATIONAL CABLE FRANCHISING.**

**(a) National Franchises-**

(1) ELECTION- A person or group that is eligible under subsection (d) may elect to obtain a national franchise under this section as authority to provide cable service in a franchise area in lieu of any other authority under Federal, State, or local law to provide cable service in such franchise area. A person or group may not provide cable service under the authority of this section in a franchise area unless such person or group has a franchise under this section that is effective with respect to such franchise area. A franchising authority may not require any person or group that has a national franchise under this section in effect with respect to a franchise area to obtain a franchise under section 621 or any other law to provide cable service in such franchise area.

(2) CERTIFICATION- To obtain a national franchise under this section as authority to provide cable service in a franchise area, a person or group shall--

(A) file with the Commission a certification for a national franchise containing the information required by paragraph (3) with respect to such franchise area, if such person or group has not previously obtained a national franchise; or

(B) file with the Commission a subsequent certification for additional franchise areas containing the information required by paragraph (3) with respect to such additional franchise areas, if such person or group has previously obtained a national franchise.

(3) CONTENTS OF CERTIFICATION- Such certification shall be in such form as the Commission shall require by regulation and shall contain--

(A) the name under which such person or group is offering or intends to offer cable service;

(B) the names and business addresses of the directors and principal executive officers, or the persons performing similar functions, of such person or group;

(C) the location of such person or group's principal business office;

(D) the name, business address, electronic mail address, and telephone and fax number of such person or group's local agent;

`(E) a declaration by such person or group that such person or group is eligible under subsection (d) to obtain a national franchise under this section;

`(F) an identification of each franchise area in which such person or group intends to offer cable service pursuant to such certification, which franchise area shall be--

    `(i) the entirety of a franchise area in which a cable operator is, on the date of the filing of such certification, authorized to provide cable service under section 621 or any other law (including this section); or

    `(ii) a contiguous geographic area that covers the entirety of the jurisdiction of a unit of general local government, except that--

        `(I) if the geographic area within the jurisdiction of such unit of general local government contains a franchise area in which a cable operator is, on such date, authorized to provide cable service under section 621 or any other law, the contiguous geographic area identified in the certification under this clause as a franchise area shall not include the area contained in the franchise area of such cable operator; and

        `(II) if such contiguous geographic area includes areas that are, respectively, within the jurisdiction of different franchising authorities, the certification shall specify each such area as a separate franchise area;

`(G) a declaration that such person or group transmitted, or will transmit on the day of filing such declaration, a copy of such certification to the franchising authority for each franchise area for which such person or group is filing a certification to offer cable service under this section;

`(H) a declaration by the person or group that the person or group will comply with the rights-of-way requirements of the franchising authority under subsection (f); and

`(I) a declaration by the person or group that--

    `(i) the person or group will comply with all Commission consumer protection and customer service rules under section 632(b) and subsection (g) of this section; and

`(ii) the person or group agrees that such standards may be enforced by the Commission or by the franchising authority in accordance with subsection (g) of this section.

`(4) LOCAL NOTIFICATION; PRESERVATION OF OPPORTUNITY TO NEGOTIATE-

`(A) COPY TO FRANCHISING AUTHORITY- On the day of filing any certification under paragraph (2)(A) or (B) for a franchise area, the person or group shall transmit a copy of such certification to the franchising authority for such area.

`(B) NEGOTIATED FRANCHISE AGREEMENTS PERMITTED- Nothing in this section shall prevent a person or group from negotiating a franchise agreement or any other authority to provide cable service in a franchise area under section 621 or any other law. Upon entry into any such negotiated franchise agreement, such negotiated franchise agreement shall apply in lieu of any national franchise held by that person or group under this section for such franchise area.

`(5) UPDATING OF CERTIFICATIONS- A person or group that files a certification under this section shall update any information contained in such certification that is no longer accurate and correct.

`(6) PUBLIC AVAILABILITY OF CERTIFICATIONS- The Commission shall provide for the public availability on the Commission's Internet website or other electronic facility of all current certifications filed under this section.

`(b) Effectiveness; Duration-

`(1) EFFECTIVENESS- A national franchise under this section shall be effective with respect to any franchise area 30 days after the date of the filing of a completed certification under subsection (a)(2)(A) or (B) that applies to such franchise area.

`(2) DURATION-

`(A) IN GENERAL- A franchise under this section that applies to a franchise area shall be effective for that franchise area for a term of 10 years.

`(B) RENEWAL- A franchise under this section for a franchise area shall be renewed automatically upon expiration of the 10-year period described in subparagraph (A).

`(C) PUBLIC HEARING- At the request of a franchising authority in a franchise area, a cable operator authorized under this section to provide cable service in such franchise area shall, within the last year of the 10-year period applicable under subparagraph (A) to the cable operator's franchise for such franchise area, participate in a public hearing on the cable operator's performance in the franchise area, including the cable operator's compliance with the requirements of this title. The hearing shall afford the public the opportunity to participate for the purpose of identifying cable-related community needs and interests and assessing the operator's performance. The cable operator shall provide notice to its subscribers of the hearing at least 30 days prior to the hearing.

`(D) REVOCATION- A franchise under this section for a franchise area may be revoked by the Commission--

`(i) for willful or repeated violation of any Federal or State law, or any Commission regulation, relating to the provision of cable service in such franchise area;

`(ii) for false statements or material omissions knowingly made in any filing with the Commission relating to the provision of cable service in such franchise area;

`(iii) for willful or repeated violation of the rights-of-way management laws or regulations of any franchising authority in such franchise area relating to the provision of cable service in such franchise area; or

`(iv) for willful or repeated violation of the antidiscrimination requirement of subsection (h) with respect to such franchise area.

`(E) NOTICE- The Commission shall send a notice of such revocation to each franchising authority with jurisdiction over the franchise areas for which the cable operator's franchise was revoked.

`(F) REINSTATEMENT- After a revocation under subparagraph (D) of a franchise for a franchise area of any person or group, the Commission may refuse to accept for filing a new certification for authority of such person or group to provide cable service under this section in such franchise area until the Commission determines that the basis of such revocation has been remedied.

`(G) RETURN TO LOCAL FRANCHISING IF CABLE COMPETITION CEASES-

` (i) If only one cable operator is providing cable service in a franchise area, and that cable operator obtained a national franchise for such franchise area under subsection (d)(2), the franchising authority for such franchise area may file a petition with the Commission requesting that the Commission terminate such national franchise for such franchise area.

` (ii) The Commission shall provide public notice and opportunity to comment on such petition. If it finds that the requirements of clause (i) are satisfied, the Commission shall issue an order granting such petition. Such order shall take effect one year from the date of such grant, if no other cable operator offers cable service in such area during that one year. If another cable operator does offer cable service in such franchise area during that one year, the Commission shall rescind such order and dismiss such petition.

` (iii) A cable operator whose national franchise is terminated for such franchise area under this subparagraph may obtain new authority to provide cable service in such franchise area under this section, section 621, or any other law, if and when eligible.

` (c) Requirements of National Franchise- A national franchise shall contain the following requirements:

` (1) FRANCHISE FEE- A cable operator authorized under this section to provide cable service in a franchise area shall pay to the franchising authority in such franchise area a franchise fee of up to 5 percent (as determined by the franchising authority) of such cable operator's gross revenues from the provision of cable service under this section in such franchise area. Such payment shall be assessed and collected in a manner consistent with section 622 and the definition of gross revenues in this section.

` (2) PEG/I-NET REQUIREMENTS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the requirements of subsection (e).

` (3) RIGHTS-OF-WAY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the rights-of-way requirements of the franchising authority under subsection (f).

` (4) CONSUMER PROTECTION AND CUSTOMER SERVICE STANDARDS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the consumer protection and customer service standards established by the Commission under section 632(b).



` (5) CHILD PORNOGRAPHY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the regulations on child pornography promulgated pursuant to subsection (i).

` (d) Eligibility for National Franchises- The following persons or groups are eligible to obtain a national franchise under this section:

` (1) COMMENCEMENT OF SERVICE AFTER ENACTMENT- A person or group that is not providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a national franchise under this section to provide cable service in such franchise area.

` (2) EXISTING PROVIDERS OF CABLE SERVICE- A person or group that is providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a franchise under this section to provide cable service in such franchise area if, on the date that the national franchise becomes effective, another person or group is providing cable service under this section, section 621, or any other law in such franchise area.

` (e) Public, Educational, and Governmental Use-

` (1) IN GENERAL- Subject to paragraph (3), a cable operator with a national franchise for a franchise area under this section shall provide channel capacity for public, educational, and governmental use that is not less than the channel capacity required of the cable operator with the most subscribers in such franchise area on the effective date of such national franchise. If there is no other cable operator in such franchise area on the effective date of such national franchise, or there is no other cable operator in such franchise area on such date that is required to provide channel capacity for public, educational, and governmental use, the cable operator shall provide the amount of channel capacity for such use as determined by Commission rule.

` (2) PEG AND I-NET FINANCIAL SUPPORT- A cable operator with a national franchise under this section for a franchise area shall pay an amount equal to 1 percent of the cable operator's gross revenues (as such term is defined in this section) in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)). Such payment shall be assessed and collected in a manner consistent with section 622, including the authority of the cable operator to designate that portion of a subscriber's bill attributable to such payment. A cable operator that provided cable service in a franchise area on the date of enactment of this section and that obtains

a national franchise under this section shall continue to provide any institutional network that it was required to provide in such franchise area under section 621 or any other law. Notwithstanding section 621(b)(3)(D), a franchising authority may not require a cable operator franchised under this section to construct a new institutional network.

`(3) ADJUSTMENT- Every 10 years after the commencement of a franchise under this section for a franchise area, a franchising authority may require a cable operator authorized under such franchise to increase the channel capacity designated for public, educational, or governmental use, and the channel capacity designated for such use on any institutional networks required under paragraph (2). Such increase shall not exceed the higher of--

`(A) one channel; or

`(B) 10 percent of the public, educational, or governmental channel capacity required of that operator prior to the increase.

`(4) TRANSMISSION AND PRODUCTION OF PROGRAMMING-

`(A) A cable operator franchised under this section shall ensure that all subscribers receive any public, educational, or governmental programming carried by the cable operator within the subscriber's franchise area.

`(B) The production of any programming provided under this subsection shall be the responsibility of the franchising authority.

`(C) A cable operator franchised under this section shall be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another cable operator under subparagraph (D), to the cable operator's subscribers, of any public, educational, or governmental programming produced by or for the franchising authority and carried by the cable operator pursuant to this section.

`(D) Unless two cable operators otherwise agree to the terms for interconnection and cost sharing, such cable operators shall comply with regulations prescribed by the Commission providing for--

`(i) the interconnection between two cable operators in a franchise area for transmission of public, educational, or governmental programming, without material deterioration in signal quality or functionality; and

`(ii) the reasonable allocation of the costs of such

interconnection between such cable operators.

`(E) A cable operator shall display the program information for public, educational, or governmental programming carried under this subsection in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The cable operator shall not omit such public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area.

`(f) Rights-of-Way-

`(1) AUTHORITY TO USE- Any franchise under this section for a franchise area shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure that--

`(A) the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

`(B) the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

`(C) the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

`(2) MANAGEMENT OF PUBLIC RIGHTS-OF-WAY- Nothing in this Act affects the authority of a State or local government (including a franchising authority) over a person or group in their capacity as a cable operator with a franchise under this section to manage, on a reasonable, competitively neutral, and non-discriminatory basis, the public rights-of-way, and easements that have been dedicated for compatible uses. A State or local government (including a franchising authority) may, on a reasonable, competitively neutral, and non-discriminatory basis--

`(A) impose charges for such management; and

`(B) require compliance with such management, such charges, and paragraphs (1)(A), (B), and (C).

`(g) Consumer Protection and Customer Service-

`(1) NATIONAL STANDARDS- Notwithstanding section 632(d), no State or local law (including any regulation) shall impose on a cable operator franchised under this section any consumer protection or customer service requirements other than consumer protection or customer service requirements of general applicability.

`(2) PROCEEDING- Within 120 days after the date of enactment of this section, the Commission shall issue a report and order that updates for cable operators franchised under this section the national consumer protection and customer service rules under section 632(b), taking into consideration the national nature of a franchise under this section and the role of State and local governments in enforcing, but not creating, consumer protection and customer service standards for cable operators franchised under this section.

`(3) REQUIREMENTS OF NEW RULES-

`(A) Such rules shall, in addition to the requirements of section 632(b), address, with specificity, no less than the following consumer protection and customer service issues:

`(i) Billing, billing disputes, and discontinuation of service, including when and how any late fees may be assessed (but not the amount of such fees).

`(ii) Loss of service or service quality.

`(iii) Changes in channel lineups or other cable services and features.

`(iv) Availability of parental control options.

`(B) Such rules shall require forfeiture penalties or customer rebates, or both, as determined by the Commission, that may be imposed for violations of such Commission rules in a franchise area, and shall provide for increased forfeiture penalties or customer rebates, or both, for repeated violations of the standards in such rules.

`(C) The Commission's rules shall also establish procedures by which any forfeiture penalty assessed by the Commission under this subsection shall be paid by the cable operator directly to the franchising authority.

`(D) The Commission shall report to the Congress no less than

once a year--

` (i) on complaints filed, and penalties imposed, under this subsection; and

` (ii) on any new consumer protection or customer service issues arising under this subsection.

` (E) The Commission's rules established under this subsection shall be revised as needed.

` (4) COMPLAINTS- Any person may file a complaint with respect to a violation of the regulations prescribed under section 632(b) in a franchise area by a cable operator franchised under this section--

` (A) with the franchising authority in such area; or

` (B) with the Commission.

` (5) LOCAL FRANCHISING ORDERS REQUIRING COMPLIANCE- In a proceeding commenced with a franchising authority on such a complaint, a franchising authority may issue an order requiring compliance with any of such regulations prescribed by the Commission, but a franchising authority may not create any new standard or regulation, or expand upon or modify the Commission's standards or regulations.

` (6) ACCESS TO RECORDS- In such a proceeding, the franchising authority may issue an order requiring the filing of any contract, agreement, or arrangement between the subscriber and the provider, or any other data, documents, or records, directly related to the alleged violation.

` (7) COMMISSION REMEDIES; APPEALS- Unless appealed to the Commission, an order of a franchising authority under this subsection shall be enforced by the Commission. Any such appeal shall be resolved by the Commission within 30 days after receipt of the appeal by the Commission.

` (8) COST OF FRANCHISING AUTHORITY ORDERS- A franchising authority may charge a provider of cable service under this section a nominal fee to cover the costs of issuing such orders.

` (h) Antidiscrimination-

` (1) PROHIBITION- A cable operator with a national franchise under this section to provide cable service in a franchise area shall not deny access to its cable service to any group of potential residential cable service

subscribers in such franchise area because of the income of that group.

`(2) ENFORCEMENT-

`(A) COMPLAINT- If a franchising authority in a franchise area has reasonable cause to believe that a cable operator is in violation of this subsection with respect to such franchise area, the franchising authority may, after complying with subparagraph (B), file a complaint with the Commission alleging such violation.

`(B) NOTICE BY FRANCHISING AUTHORITY- Before filing a complaint with the Commission under subparagraph (A), a franchising authority--

`(i) shall give notice of each alleged violation to the cable operator;

`(ii) shall provide a period of not less than 30 days for the cable operator to respond to such allegations; and

`(iii) during such period, may require the cable operator to submit a written response stating the reasons why the operator has not violated this subsection.

`(C) BIENNIAL REPORT- A cable operator with a national franchise under this section for a franchise area, not later than 180 days after the effective date of such national franchise, and biennially thereafter, shall submit a report to the Commission and the franchising authority in the franchise area--

`(i) identifying the geographic areas in the franchise area where the cable operator offers cable service; and

`(ii) describing the cable operator's progress in extending cable service to other areas in the franchise area.

`(D) NOTICE BY COMMISSION- Upon receipt of a complaint under this paragraph alleging a violation of this subsection by a cable operator, the Commission shall give notice of the complaint to the cable operator.

`(E) INVESTIGATION- In investigating a complaint under this paragraph, the Commission may require a cable operator to disclose to the Commission such information and documents as the Commission deems necessary to determine whether the cable operator is in compliance with this subsection. The Commission shall maintain the confidentiality of any information or document

collected under this subparagraph.

`(F) DEADLINE FOR RESOLUTION OF COMPLAINTS- Not more than 60 days after the Commission receives a complaint under this paragraph, the Commission shall issue a determination with respect to each violation alleged in the complaint.

`(G) DETERMINATION- If the Commission determines (in response to a complaint under this paragraph or on its own initiative) that a cable operator with a franchise under this section to provide cable service in a franchise area has denied access to its cable service to a group of potential residential cable service subscribers in such franchise area because of the income of that group, the Commission shall ensure that the cable operator extends access to that group within a reasonable period of time.

`(H) REMEDIES-

`(i) IN GENERAL- This subsection shall be enforced by the Commission under titles IV and V.

`(ii) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation of this subsection shall be \$500,000 for each day of the violation.

`(iii) PAYMENT OF PENALTIES TO FRANCHISING AUTHORITY- The Commission shall order any cable operator subject to a forfeiture penalty under this subsection to pay the penalty directly to the franchising authority involved.

`(i) Child Pornography- Not later than 180 days after the date of enactment of this section, the Commission shall promulgate regulations to require a cable operator with a national franchise under this section to prevent the distribution of child pornography (as such term is defined in section 254(h)(7)(F)) over its network.

`(j) Leased Access- The provisions of section 612(i) regarding the carriage of programming from a qualified minority programming source or from any qualified educational programming source shall apply to a cable operator franchised under this section to provide cable service in a franchise area.

`(k) Applicability of Other Provisions- The following sections shall not apply in a franchise area to a person or group franchised under this section in such franchise area, or confer any authority to regulate or impose obligations on such person or group: Sections 611(a), 611(b), 611(c), 613(a), 617, 621 (other than subsections (b)(3)(A), (b)(3)(B), (b)(3)(C), and (c)), 624(b), 624

(c), 624(h), 625, 626, 627, and 632(a).

`(l) Emergency Alerts- Nothing in this Act shall be construed to prohibit a State or local government from accessing the emergency alert system of a cable operator with a franchise under this section in the area served by the State or local government to transmit local or regional emergency alerts.

`(m) Reporting, Records, and Audits-

`(1) REPORTING- A cable operator with a franchise under this section to provide cable service in a franchise area shall make such periodic reports to the Commission and the franchising authority for such franchise area as the Commission may require to verify compliance with the fee obligations of subsections (c)(1) and (e)(2).

`(2) AVAILABILITY OF BOOKS AND RECORDS- Upon request under paragraph (3) by a franchising authority for a franchise area, and upon request by the Commission, a cable operator with a national franchise for such franchise area shall make available its books and records to periodic audit by such franchising authority or the Commission, respectively.

`(3) FRANCHISING AUTHORITY AUDIT PROCEDURE- A franchising authority may, upon reasonable written request, but no more than once in any 12-month period, review the business records of such cable operator to the extent reasonably necessary to ensure payment of the fees required by subsections (c)(1) and (e)(2). Such review may include the methodology used by such cable operator to assign portions of the revenue from cable service that may be bundled or functionally integrated with other services, capabilities, or applications. Such review shall be conducted in accordance with procedures established by the Commission.

`(4) COST RECOVERY-

`(A) To the extent that the review under paragraph (3) identifies an underpayment of an amount meeting the minimum percentage specified in subparagraph (B) of the fee required under subsections (c)(1) and (e)(2) for the period of review, the cable operator shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party, as determined by the Commission, with respect to such fee. The costs of any contingency fee arrangement between the franchising authority and the independent reviewer shall not be subject to reimbursement.

`(B) The Commission shall determine by rule the minimum



percentage underpayment that requires cost reimbursement under subparagraph (A).

` (5) LIMITATION- Any fee that is not reviewed by a franchising authority within 3 years after it is paid or remitted shall not be subject to later review by the franchising authority under this subsection and shall be deemed accepted in full payment by the franchising authority.

` (n) Access to Programming for Shared Facilities-

` (1) PROHIBITION- A cable programming vendor in which a cable operator has an attributable interest shall not deny a cable operator with a national franchise under this section access to video programming solely because such cable operator uses a headend for its cable system that is also used, under a shared ownership or leasing agreement, as the headend for another cable system.

` (2) DEFINITION- The term ` cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of video programming which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.

` (o) Gross Revenues- As used in this section:

` (1) IN GENERAL- Subject to paragraphs (2) and (3), the term ` gross revenues' means all consideration of any kind or nature, including cash, credits, property, and in-kind contributions (services or goods) received by the cable operator from the provision of cable service within the franchise area.

` (2) INCLUDED ITEMS- Subject to paragraph (3), the term ` gross revenues' shall include the following:

` (A) all charges and fees paid by subscribers for the provision of cable service, including fees attributable to cable service when sold individually or as part of a package or bundle, or functionally integrated, with services other than cable service;

` (B) any franchise fee imposed on the cable operator that is passed on to subscribers;

` (C) compensation received by the cable operator for promotion or exhibition of any products or services over the cable service, such as on ` home shopping' or similar programming;

` (D) revenue received by the cable operator as compensation for carriage of video programming or other programming service on

that operator's cable service;

`(E) all revenue derived from the cable operator's cable service pursuant to compensation arrangements for advertising; and

`(F) any advertising commissions paid to an affiliated third party for cable services advertising.

`(3) EXCLUDED ITEMS- The term 'gross revenues' shall not include the following:

`(A) any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt;

`(B) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset by subparagraph (A) and to the extent such refund, rebate, credit, or discount is attributable to the cable service;

`(C) subject to paragraph (4), any revenues received by the cable operator or its affiliates from the provision of services or capabilities other than cable service, including telecommunications services, Internet access services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with cable service;

`(D) any revenues received by the cable operator or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;

`(E) any amounts attributable to the provision of cable service to customers at no charge, including the provision of such service to public institutions without charge;

`(F) any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a Federal, State, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility user taxes;

`(G) any forgone revenue from the provision of cable service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue;

`(H) sales of capital assets or surplus equipment;

` (I) reimbursement by programmers of marketing costs actually incurred by the cable operator for the introduction of new programming; and

` (J) the sale of cable services for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto.

` (4) FUNCTIONALLY INTEGRATED SERVICES- In the case of a cable service that is bundled or integrated functionally with other services, capabilities, or applications, the portion of the cable operator's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the cable operator can reasonably identify the division or exclusion of such revenue from its books and records that are kept in the regular course of business.

` (5) AFFILIATE REVENUE- Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of such revenue as revenue of the affiliate has the effect (whether intentional or unintentional) of evading the payment of franchise fees which would otherwise be paid for cable service.

` (6) AFFECT ON OTHER LAW- Nothing in this section is intended to limit a franchising authority's rights pursuant to section 622(h).

` (p) Additional Definitions- For purposes of this section:

` (1) CABLE OPERATOR- The term `cable operator' has the meaning provided in section 602(5) except that such term also includes a person or group with a national franchise under this section.

` (2) FRANCHISE FEE-

` (A) The term `franchise fee' includes any fee or assessment of any kind imposed by a franchising authority or other governmental entity on a person or group providing cable service in a franchise area under this section, or on a subscriber of such person or group, or both, solely because of their status as such.

` (B) The term `franchise fee' does not include--

` (i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and a person or group providing cable service in a franchise area under this section (or the services of such person or group) but not including a fee or assessment which is unduly discriminatory against such person or group or the

subscribers of such person or group);

`(ii) any fee assessed under subsection (e)(2) for support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f));

`(iii) requirements or charges under subsection (f)(2) for the management of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

`(iv) any fee imposed under title 17, United States Code.

`(3) INTERNET ACCESS SERVICE- The term `Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet.

`(4) UNIT OF GENERAL LOCAL GOVERNMENT- The term `unit of general local government' means--

`(A) a county, township, city, or political subdivision of a county, township, or city;

`(B) the District of Columbia; or

`(C) the recognized governing body of an Indian tribe or Alaskan Native village that carries out substantial governmental duties and powers.'.

(b) Implementing Regulations- The Federal Communications Commission shall prescribe regulations to implement the amendment made by subsection (a) within 120 days after the date of enactment of this Act.

## **SEC. 102. DEFINITIONS.**

Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended--

(1) in paragraph (4), by inserting before the semicolon at the end the following: `, or its equivalent as determined by the Commission';

(2) in paragraph (5)(A), by inserting `(regardless of whether such person or group provides such service separately or combined with a telecommunications service or information service)' after `over a cable system'; and

(3) by striking paragraph (6) and inserting the following:

`(6) the term `cable service' means--

`(A)(i) the one-way transmission to subscribers of (I) video programming, or (II) other programming service; and

`(ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service; or

`(B) the transmission to subscribers of video programming or other programming service provided through wireline facilities located at least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of--

`(i) a commercial mobile service (as such term is defined in section 332(d)); or

`(ii) an Internet access service (as such term is defined in section 630(p)).'.

## **SEC. 103. MONITORING AND REPORTING.**

(a) Report on Cable Service Deployment- The Federal Communications Commission shall, commencing not later than one year after the date of enactment of this Act, issue a report annually on the deployment of cable service. In its report, the Commission shall describe in detail--

(1) with respect to deployment by new cable operators--

(A) the progress of deployment of such service within the telephone service area of cable operators, if the operator is also an incumbent local exchange carrier, including a comparison with the progress of deployment of broadband services not defined as cable services within such telephone service area;

(B) the number of franchise areas in which such service is being deployed and offered;

(C) where such service is not being deployed and offered; and

(D) the number and locations of franchise areas in which the cable operator is serving only a portion of the franchise area, and the extent of such service within the franchise area;

(2) the number and locations of franchise areas in which a cable

operator with a franchise under section 621 of the Communications Act of 1934 (47 U.S.C. 541) on the date of enactment of this Act withdraws service from any portion of the franchise area for which it previously offered service, and the extent of such withdrawal of service within the franchise area;

(3) the rates generally charged for cable service;

(4) the rates charged by overlapping, competing multichannel video programming distributors and by competing cable operators for comparable service or cable service;

(5) the average household income of those franchise areas or portions of franchise areas where cable services is being offered, and the average household income of those franchise areas, or portions of franchise areas, where cable service is not being offered;

(6) the proportion of rural households to urban households, as defined by the Bureau of the Census, in those franchise areas or portions of franchise areas where cable service is being offered, and the proportion of rural households to urban households in those franchise areas or portions of franchise areas where cable service is not being offered, including a State-by-State breakdown of such data and a comparison with the overall ratio of rural and urban households in each State; and

(7) a comparison of the services and rates in areas served by national franchisees under section 630 of the Communications Act of 1934 (as added by section 101 of this Act) and the services and rates in other areas.

(b) Cable Operator Reports- The Federal Communications Commission is authorized--

(1) to require cable operators to report to the Commission all of the information that the Commission needs to compile the report required by this section; and

(2) to require cable operators to file the same information with the relevant franchising authorities and State commissions.

## **TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

### **SEC. 201. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is amended by adding at the end the following new section:

**SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

(a) Authority- The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein.

(b) Enforcement-

(1) IN GENERAL- This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

(2) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be \$500,000 for each violation.

(3) ADJUDICATORY AUTHORITY- The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

(4) LIMITATION- Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).

(c) Study- Within 180 days after the date of enactment of this section, the Commission shall conduct, and submit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, a study regarding whether the objectives of the broadband policy statement and the principles incorporated therein are being achieved.

`(d) Definition- For purposes of this section, the term `Commission's broadband policy statement' means the policy statement adopted on August 5, 2005, and issued on September 23, 2005, In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, and other Matters (FCC 05-151; CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52).'

### **TITLE III--VOIP/911**

#### **SEC. 301. EMERGENCY SERVICES; INTERCONNECTION.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 715 (as added by section 201 of this Act) the following new sections:

#### **`SEC. 716. EMERGENCY SERVICES.**

`(a) 911 and E-911 Services-

`(1) IN GENERAL- Each VOIP service provider has a duty to ensure that 911 and E-911 services are provided to subscribers of VOIP services.

`(2) USE OF EXISTING REGULATIONS- A VOIP service provider that complies with the Commission's regulations requiring providers of VOIP service to supply 911 and E911 capabilities to their customers (Report and Order in WC Docket Nos. 04-36 and 05-196) and that are in effect on the date of enactment of this section shall be considered to be in compliance with the requirements of this section, other than subsection (c), until such regulations are modified or superseded by subsequent regulations.

`(b) Non-Discriminatory Access to Capabilities-

`(1) ACCESS- Each incumbent local exchange carrier (as such term is defined in section 251(h)) or government entity with ownership or control of the necessary E-911 infrastructure shall provide any requesting VOIP service provider with nondiscriminatory access to such infrastructure. Such carrier or entity shall provide access to the infrastructure at just and reasonable, nondiscriminatory rates, terms, and conditions. Such access shall be consistent with industry standards established by the National Emergency Number Association or other applicable industry standards organizations.

`(2) ENFORCEMENT- The Commission or a State commission may enforce the requirements of this subsection and the Commission's regulations thereunder. A VOIP service provider may obtain access to



such infrastructure pursuant to section 717 by asserting the rights described in such section.

`(c) New Customers- A VOIP service provider shall make 911 service available to new customers within a reasonable time in accordance with the following requirements:

`(1) CONNECTION TO SELECTIVE ROUTER- For all new customers not within the geographic areas where a VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider, or its third party vendor, shall have no more than 30 days from the date the VOIP provider has acquired a customer to order service providing connectivity to the selective router so that 911 service, or E911 service where the PSAP is capable of receiving and processing such information, can be provided through the selective router.

`(2) INTERIM SERVICE- For all new customers not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide 911 service through--

`(A) an arrangement mutually agreed to by the VOIP service provider and the PSAP or PSAP governing authority; or

`(B) an emergency response center with national call routing capabilities.

Such service shall be provided 24 hours a day from the date a VOIP service provider has acquired a customer until the VOIP service provider can provide 911 service to the geographically appropriate PSAP.

`(3) NOTICE- Before providing service to any new customer not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide such customer with clear notice that 911 service will be available only as described in paragraph (2).

`(4) RESTRICTION ON ACQUISITION OF NEW CUSTOMERS- A VOIP service provider may not acquire new customers within a geographic area served by a selective router if, within 180 days of first acquiring a new customer in the area served by the selective router, the VOIP service provider does not provide 911 service, or E911 service where the PSAP is capable of receiving and processing such information, to the geographically appropriate PSAP for all existing customers served by the selective router.

` (5) ENFORCEMENT: NO FIRST WARNINGS- Paragraph (5) of section 503(b) shall not apply to the assessment of forfeiture penalties for violations of this subsection or the regulations thereunder.

` (d) State Authority- Nothing in this Act or any Commission regulation or order shall prevent the imposition on or collection from a VOIP service provider, of any fee or charge specifically designated or presented as dedicated by a State, political subdivision thereof, or Indian tribe on an equitable, and non-discriminatory basis for the support of 911 and E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 and E-911 services or enhancements of such services.

` (e) Feasibility- In establishing requirements or obligations under subsections (a) and (b), the Commission shall ensure that such standards impose requirements or obligations on VOIP service providers and entities with ownership or control of necessary E-911 infrastructure that the Commission determines are technologically and operationally feasible. In determining the requirements and obligations that are technologically and operationally feasible, the Commission shall take into consideration available industry technological and operational standards.

` (f) Progress Reports- To the extent that the Commission concludes that it is not technologically or operationally feasible for VOIP service providers to comply with E-911 requirements or obligations, then the Commission shall submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the progress in attaining and deploying E-911 service. Such reports shall be submitted semiannually until the Commission concludes that it is technologically and operationally feasible for all VOIP service providers to comply with E-911 requirements and obligations. Such reports may include any recommendations the Commission considers appropriate to encourage the migration of emergency services to TCP/IP protocol or other advanced services.

` (g) Access to Information- The Commission shall have the authority to compile a list of PSAP contact information, testing procedures, and classes and types of services supported by PSAPs, or other information concerning the necessary E-911 infrastructure, for the purpose of assisting providers in complying with the requirements of this section.

` (h) Emergency Routing Number Administrator- Within 30 days after the date of enactment of this section, the Federal Communications Commission shall establish an emergency routing number administrator to enable VOIP service providers to acquire non-dialable pseudo-automatic number identification numbers for 9-1-1 routing purposes on a national scale. The Commission may adopt such rules and practices as are necessary to guide such administrator

in the fair and expeditious assignment of these numbers.

`(i) Emergency Response Systems-

`(1) NOTICE PRIOR TO INSTALLATION OR NUMBER ACTIVATION OF VOIP SERVICE- Prior to installation or number activation of VOIP service for a customer, a VOIP service provider shall provide clear and conspicuous notice to the customer that--

`(A) such customer should arrange with his or her emergency response system provider, if any, to test such system after installation;

`(B) such customer should notify his or her emergency response system provider after VOIP service is installed; and

`(C) a battery backup is required for customer premises equipment installed in connection with the VOIP service in order for the signaling of such system to function in the event of a power outage.

`(2) DEFINITION- In this subsection:

`(A) The term `emergency response system' means an alarm or security system, or personal security or medical monitoring system, that is connected to an emergency response center by means of a telecommunications carrier or VOIP service provider.

`(B) The term `emergency response center' means an entity that monitors transmissions from an emergency response system.

`(j) Migration to IP-Enabled Emergency Network-

`(1) NATIONAL REPORT- No more than 18 months after the date of the enactment of this section, the National 911 Implementation and Coordination Office shall develop a report to Congress on migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen activated emergency communications.

`(2) CONTENTS OF REPORT- The report required by paragraph (1) shall-

`(A) outline the potential benefits of such a migration;

`(B) identify barriers that must be overcome and funding mechanisms to address those barriers;

`(C) include a proposed timetable, an outline of costs and potential

savings;

`(D) provide recommendations on specific legislative language,

`(E) provide recommendations on any legislative changes, including updating definitions, to facilitate a national IP-enabled emergency network; and

`(F) assess, collect, and analyze the experiences of the PSAPs and related public safety authorities who are conducting trial deployments of IP-enabled emergency networks as of the date of enactment of this section.

`(3) CONSULTATION- In developing the report required by paragraph (1), the Office shall consult with representatives of the public safety community, technology and telecommunications providers, and others it deems appropriate.

`(k) Implementation-

`(1) DEADLINE- The Commission shall prescribe regulations to implement this section within 120 days after the date of enactment of this section.

`(2) LIMITATION- Nothing in this section shall be construed to permit the Commission to issue regulations that require or impose a specific technology or technological standard.

`(l) Definitions- For purposes of this section:

`(1) VOIP SERVICE- The term `VOIP service' means a service that--

`(A) provides real-time 2-way voice communications transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol (including when the voice communication is converted to or from TCP/IP protocol by the VOIP service provider and transmitted to the subscriber without use of circuit switching), for a fee;

`(B) is offered to the public, or such classes of users as to be effectively available to the public (whether part of a bundle of services or separately); and

`(C) has the capability so that the service can originate traffic to, and terminate traffic from, the public switched telephone network.

`(2) VOIP SERVICE PROVIDER- The term `VOIP service provider' means

any person who provides or offers to provide a VOIP service.

` (3) NECESSARY E-911 INFRASTRUCTURE- The term `necessary E-911 infrastructure' means the selective routers, selective router databases, automatic location information databases, master street address guides, trunk lines between selective routers and PSAPs, trunk lines between automatic location information databases and PSAPs, and other 911 and E-911 equipment, facilities, databases, interfaces, and related capabilities specified by the Commission.

` (4) NON-DIALABLE PSEUDO-AUTOMATIC NUMBER IDENTIFICATION NUMBER- The term `non-dialable pseudo-automatic number identification number' means a number, consisting of the same number of digits as numbers used for automatic number identification, that is not a North American Numbering Plan telephone directory number and that may be used in place of an automatic number identification number to convey special meaning. The special meaning assigned to the non-dialable pseudo-automatic number identification number is determined by nationally standard agreements, or by individual agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.

## **` SEC. 717. RIGHTS AND OBLIGATIONS OF VOIP SERVICE PROVIDERS.**

` (a) In General-

` (1) FACILITIES-BASED VOIP SERVICE PROVIDERS- A facilities-based VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights.

` (2) VOIP SERVICE PROVIDERS- A VOIP service provider that is not a facilities-based VOIP service provider shall have only the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251(b), 251(e), and 252, if the provider elects to assert such rights.

` (3) CLARIFYING TREATMENT OF VOIP SERVICE- A telecommunications carrier may use interconnection, services, and network elements obtained pursuant to sections 251 and 252 from an incumbent local exchange carrier (as such term is defined in section 251(h)) to exchange VOIP service traffic with such incumbent local exchange carrier regardless of the provider originating such VOIP service traffic, including an affiliate of such telecommunications carrier.

`(b) Disabled Access- A VOIP service provider or a manufacturer of VOIP service equipment shall have the same rights, duties, and obligations as a telecommunications carrier or telecommunications equipment manufacturer, respectively, under sections 225, 255, and 710 of the Act. Within 1 year after the date of enactment of this Act, the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, shall prescribe such regulations as are necessary to implement this section. In implementing this subsection, the Commission shall consider whether a VOIP service provider or manufacturer of VOIP service equipment primarily markets such service or equipment as a substitute for telecommunications service, telecommunications equipment, customer premises equipment, or telecommunications relay services.

`(c) Definitions- For purposes of this section:

`(1) FACILITIES-BASED VOIP SERVICE PROVIDER- The term `facilities-based VOIP service provider' means an entity that provides VOIP service over a physical facility that terminates at the end user's location and which such entity or an affiliate owns or over which such entity or affiliate has exclusive use. An entity or affiliate shall be considered a facilities-based VOIP service provider only in those geographic areas where such terminating physical facilities are located.

`(2) VOIP SERVICE PROVIDER; VOIP SERVICE- The terms `VOIP service provider' and `VOIP service' have the meanings given such terms by section 716(j).'

#### **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

##### **SEC. 401. GOVERNMENT AUTHORITY TO PROVIDE SERVICES.**

(a) In General- Neither the Communications Act of 1934 nor any State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider of telecommunications service, information service, or cable service (as such terms are defined in sections 3 and 602 of such Act) from providing such services to any person or entity.

(b) Competition Neutrality- Any State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that is, owns, controls, or is otherwise affiliated with a public provider of telecommunications service, information service, or cable service shall not grant any preference or advantage to any such provider. Such entity shall apply its ordinances, rules, and policies, including those relating to the use of public rights-of-way, permitting, performance bonding, and reporting without discrimination in favor of any such provider as compared to other providers of such services.

(c) Compliance With Other Laws not Affected- Nothing in this section shall exempt a public provider from any law or regulation that applies to providers of telecommunications service, information service, or cable service.

(d) Report- Not later than 1 year after the date of the enactment of this Act, the Federal Communications Commission shall submit to the Congress a report on the status of the provision of telecommunications service, information service, and cable service by States and political subdivisions thereof.

(e) Definition of Public Provider- For purposes of this section, the term 'public provider' means a State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that provides telecommunications service, information service, or cable service, or any entity that is owned, controlled, or is otherwise affiliated with such State or political subdivision thereof, or agency, authority, or instrumentality of a State or political subdivision thereof.

## **TITLE V--BROADBAND SERVICE**

### **SEC. 501. STAND-ALONE BROADBAND SERVICE.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 717 (as added by section 301 of this Act) the following new section:

### **SEC. 718. STAND-ALONE BROADBAND SERVICE.**

(a) Prohibition- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service the provider offers, to purchase any cable service, telecommunications service, or VOIP service offered by the provider.

(b) Definitions- In this section:

(1) The term 'broadband service' means a two-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction.

(2) The term 'broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, by whatever technology and whether provided for a fee, in exchange for an explicit benefit, or for free.

(3) The term 'VOIP service' has the meaning given such term by

section 716(j). '

## **SEC. 502. STUDY OF INTERFERENCE POTENTIAL OF BROADBAND OVER POWER LINE SYSTEMS.**

Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall conduct, and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a study of the interference potential of broadband over power line systems.

### **TITLE VI--SEAMLESS MOBILITY**

## **SEC. 601. DEVELOPMENT OF SEAMLESS MOBILITY.**

(a) Streamlined Review-

(1) The Commission shall further the development of seamless mobility.

(2) Within 120 days after the date of enactment of this Act, the Commission shall implement a process for streamlined review and authorization of multi-mode devices that permit communication across multiple Internet protocol-enabled broadband platforms, facilities, and networks.

(b) Study- The Commission shall undertake an inquiry to identify barriers to the achievement of seamless mobility. Within 180 days after the date of enactment of this Act, the Commission shall report to the Congress on its findings and its recommendations for steps to eliminate those barriers.

(c) Definitions- For purposes of this section, the term 'seamless mobility' means the ability of a communications device to select between and utilize multiple Internet protocol-enabled technology platforms, facilities, and networks in a real-time manner to provide a unified service.

Union Calendar No. 259

109th CONGRESS

2d Session

**H. R. 5252**

**[Report No. 109-470]**

**A BILL**



To promote the deployment of broadband networks and services.

**May 17, 2006**

**Committed to the Committee of the Whole House on the State of the  
Union and ordered to be printed**

*END*

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HR 5252 EH

109th CONGRESS

2d Session

**H. R. 5252**

**AN ACT**

To promote the deployment of broadband networks and services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) Short Title- This Act may be cited as the 'Communications Opportunity, Promotion, and Enhancement Act of 2006'.

(b) Table of Contents-

Sec. 1. Short title; table of contents.

**TITLE I--NATIONAL CABLE FRANCHISING**

Sec. 101. National cable franchising.

Sec. 102. Definitions.

Sec. 103. Monitoring and reporting.

Sec. 104. Rule of construction.

**TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

Sec. 201. Enforcement of broadband policy statement.

**TITLE III--VOIP/911**

Sec. 301. Emergency services; interconnection.

Sec. 302. Compensation and contribution.

## **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

Sec. 401. Government authority to provide services.

## **TITLE V--BROADBAND SERVICE**

Sec. 501. Stand-alone broadband service.

Sec. 502. Study of interference potential of broadband over power line systems.

## **TITLE VI--SEAMLESS MOBILITY**

Sec. 601. Development of seamless mobility.

## **TITLE I--NATIONAL CABLE FRANCHISING**

### **SEC. 101. NATIONAL CABLE FRANCHISING.**

(a) Amendment- Part III of title VI of the Communications Act of 1934 (47 U.S.C. 541 et seq.) is amended by adding at the end the following new section:

### **SEC. 630. NATIONAL CABLE FRANCHISING.**

(a) National Franchises-

(1) ELECTION- A person or group that is eligible under subsection (d) may elect to obtain a national franchise under this section as authority to provide cable service in a franchise area in lieu of any other authority under Federal, State, or local law to provide cable service in such franchise area. A person or group may not provide cable service under the authority of this section in a franchise area unless such person or group has a franchise under this section that is effective with respect to such franchise area. A franchising authority may not require any person or group that has a national franchise under this section in effect with respect to a franchise area to obtain a franchise under section 621 or any other law to provide cable service in such franchise area.

(2) CERTIFICATION- To obtain a national franchise under this section as authority to provide cable service in a franchise area, a person or group shall--

(A) file with the Commission a certification for a national franchise containing the information required by paragraph (3) with respect to such franchise area, if such person or group has not previously

obtained a national franchise; or

` (B) file with the Commission a subsequent certification for additional franchise areas containing the information required by paragraph (3) with respect to such additional franchise areas, if such person or group has previously obtained a national franchise.

` (3) CONTENTS OF CERTIFICATION- Such certification shall be in such form as the Commission shall require by regulation and shall contain--

` (A) the name under which such person or group is offering or intends to offer cable service;

` (B) the names and business addresses of the directors and principal executive officers, or the persons performing similar functions, of such person or group;

` (C) the location of such person or group's principal business office;

` (D) the name, business address, electronic mail address, and telephone and fax number of such person or group's local agent;

` (E) a declaration by such person or group that such person or group is eligible under subsection (d) to obtain a national franchise under this section;

` (F) an identification of each franchise area in which such person or group seeks authority to offer cable service pursuant to such certification, which franchise area shall be--

` (i) the entirety of a franchise area in which a cable operator is, on the date of the filing of such certification, authorized to provide cable service under section 621 or any other law (including this section); or

` (ii) a geographic area that covers the entirety of the jurisdiction of a unit of general local government, except that--

` (I) if the geographic area overlaps with a franchise area in which a cable operator is, on such date, authorized to provide cable service under section 621 or any other law, the geographic area identified in the certification under this clause as a franchise area shall not include the overlapping area; and

` (II) if such geographic area includes areas that are, respectively, within the jurisdiction of different franchising

authorities, the certification shall specify each such area as a separate franchise area;

` (G) a declaration that such person or group transmitted, or will transmit on the day of filing such declaration, a copy of such certification to the franchising authority for each franchise area for which such person or group is filing a certification for authority to offer cable service under this section;

` (H) a declaration by the person or group that the person or group will comply with the rights-of-way requirements of the franchising authority in accordance with subsection (f); and

` (I) a declaration by the person or group that--

` (i) the person or group will comply with all Commission consumer protection and customer service rules under section 632(b) (including the rules adopted under section 632(b) pursuant to subsection (g) of this section); and

` (ii) the person or group agrees that such standards may be enforced by the Commission or by the franchising authority in accordance with subsection (g) of this section.

` (4) LOCAL NOTIFICATION; PRESERVATION OF OPPORTUNITY TO NEGOTIATE-

` (A) COPY TO FRANCHISING AUTHORITY- On the day of filing any certification under paragraph (2)(A) or (B) for a franchise area, the person or group shall transmit a copy of such certification to the franchising authority for such area.

` (B) NEGOTIATED FRANCHISE AGREEMENTS PERMITTED- Nothing in this section shall prevent a person or group from negotiating a franchise agreement or any other authority to provide cable service in a franchise area under section 621 or any other law. Upon entry into any such negotiated franchise agreement, such negotiated franchise agreement shall apply in lieu of any national franchise held by that person or group under this section for such franchise area.

` (5) UPDATING OF CERTIFICATIONS- A person or group with a certification under this section shall update any information contained in such certification that is no longer accurate and correct.

` (6) PUBLIC AVAILABILITY OF CERTIFICATIONS- The Commission shall provide for the public availability on the Commission's Internet website

or other electronic facility of all current certifications filed under this section.

`(b) Effectiveness; Duration-

`(1) EFFECTIVENESS- A national franchise under this section shall be effective with respect to any franchise area 30 days after the date of the filing of a completed certification under subsection (a)(2)(A) or (B) that applies to such franchise area.

`(2) DURATION-

`(A) IN GENERAL- A franchise under this section that applies to a franchise area shall be effective for that franchise area for a term of 10 years.

`(B) RENEWAL- A franchise under this section for a franchise area shall be renewed automatically upon expiration of the 10-year period described in subparagraph (A).

`(C) PUBLIC HEARING- At the request of a franchising authority in a franchise area, a cable operator authorized under this section to provide cable service in such franchise area shall, within the last year of the 10-year period applicable under subparagraph (A) to the cable operator's franchise for such franchise area, participate in a public hearing on the cable operator's performance in the franchise area, including the cable operator's compliance with the requirements of this title. The hearing shall afford the public the opportunity to participate for the purpose of identifying cable-related community needs and interests and assessing the operator's performance. The cable operator shall provide notice to its subscribers of the hearing at least 30 days prior to the hearing. The Commission shall by rule specify the methods by which a franchising authority shall notify a cable operator of the hearing for which its participation is required under this subparagraph.

`(D) REVOCATION- A franchise under this section for a franchise area may be revoked by the Commission--

`(i) for willful or repeated violation of any Federal or State law, or any Commission regulation, relating to the provision of cable service in such franchise area;

`(ii) for false statements or material omissions knowingly made in any filing with the Commission relating to the provision of cable service in such franchise area;

` (iii) for willful or repeated violation of the rights-of-way management laws or regulations of any franchising authority in such franchise area relating to the provision of cable service in such franchise area; or

` (iv) for willful or repeated violation of the antidiscrimination requirement of subsection (h) with respect to such franchise area.

` (E) NOTICE- The Commission shall send a notice of such revocation to each franchising authority with jurisdiction over the franchise areas for which the cable operator's franchise was revoked.

` (F) REINSTATEMENT- After a revocation under subparagraph (D) of a franchise for a franchise area of any person or group , the Commission may refuse to accept for filing a new certification for authority of such person or group to provide cable service under this section in such franchise area until the Commission determines that the basis of such revocation has been remedied.

` (G) RETURN TO LOCAL FRANCHISING IF CABLE COMPETITION CEASES-

` (i) If only one cable operator is providing cable service in a franchise area, and that cable operator obtained a national franchise for such franchise area under subsection (d)(2), the franchising authority for such franchise area may file a petition with the Commission requesting that the Commission terminate such national franchise for such franchise area.

` (ii) The Commission shall provide public notice and opportunity to comment on such petition. If it finds that the requirements of clause (i) are satisfied, the Commission shall issue an order granting such petition. Such order shall take effect one year from the date of such grant, if no other cable operator offers cable service in such area during that one year. If another cable operator does offer cable service in such franchise area during that one year, the Commission shall rescind such order and dismiss such petition.

` (iii) A cable operator whose national franchise is terminated for such franchise area under this subparagraph may obtain new authority to provide cable service in such franchise area under this section, section 621, or any other law, if and when eligible.

`(c) Requirements of National Franchise- A national franchise shall contain the following requirements:

`(1) FRANCHISE FEE- A cable operator authorized under this section to provide cable service in a franchise area shall pay to the franchising authority in such franchise area a franchise fee of up to 5 percent (as determined by the franchising authority) of such cable operator's gross revenues from the provision of cable service under this section in such franchise area. Such payment shall be assessed and collected in a manner consistent with section 622 and the definitions of gross revenues and franchise fee in this section.

`(2) PEG/I-NET REQUIREMENTS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the requirements of subsection (e).

`(3) RIGHTS-OF-WAY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the rights-of-way requirements of the franchising authority under subsection (f).

`(4) CONSUMER PROTECTION AND CUSTOMER SERVICE STANDARDS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the consumer protection and customer service standards established by the Commission under section 632(b).

`(5) CHILD PORNOGRAPHY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the regulations on child pornography promulgated pursuant to subsection (i).

`(d) Eligibility for National Franchises- The following persons or groups are eligible to obtain a national franchise under this section:

`(1) COMMENCEMENT OF SERVICE AFTER ENACTMENT- A person or group that is not providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a national franchise under this section to provide cable service in such franchise area.

`(2) EXISTING PROVIDERS OF CABLE SERVICE- A person or group that is providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a franchise under this section to provide cable service in such franchise area if, on the date that the national franchise becomes effective, another person or group is providing cable service under this section, section 621, or any other law in such franchise area.



`(e) Public, Educational, and Governmental Use-

`(1) IN GENERAL- Subject to paragraph (3), a cable operator with a national franchise for a franchise area under this section shall provide channel capacity for public, educational, and governmental use that is not less than the channel capacity required of the cable operator with the most subscribers in such franchise area on the effective date of such national franchise. If there is no other cable operator in such franchise area on the effective date of such national franchise, or there is no other cable operator in such franchise area on such date that is required to provide channel capacity for public, educational, and governmental use, the cable operator shall provide the amount of channel capacity for such use as determined by Commission rule.

`(2) PEG AND I-NET FINANCIAL SUPPORT- A cable operator with a national franchise under this section for a franchise area shall pay an amount equal to 1 percent of the cable operator's gross revenues (as such term is defined in this section) in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)). Such payment shall be assessed and collected in a manner consistent with section 622, including the authority of the cable operator to designate that portion of a subscriber's bill attributable to such payment. A cable operator that provided cable service in a franchise area on the date of enactment of this section and that obtains a national franchise under this section shall continue to provide any institutional network that it was required to provide on the day before its national franchise became effective in such franchise area under section 621 or any other law. Notwithstanding section 621(b)(3)(D), a franchising authority may not require a cable operator franchised under this section to construct a new institutional network.

`(3) ADJUSTMENT- Every 10 years after the commencement of a franchise under this section for a franchise area, a franchising authority may require a cable operator authorized under such franchise to increase the channel capacity designated for public, educational, or governmental use, and the channel capacity designated for such use on any institutional networks required under paragraph (2). Such increase shall not exceed the higher of--

`(A) one channel; or

`(B) 10 percent of the public, educational, or governmental channel capacity required of that operator prior to the increase.

`(4) TRANSMISSION AND PRODUCTION OF PROGRAMMING-

` (A) A cable operator franchised under this section shall ensure that any public, educational, or governmental programming carried by the cable operator under this section within a franchise area is available to all of its subscribers in such franchise area.

` (B) The production of any programming provided under this subsection shall be the responsibility of the franchising authority.

` (C) A cable operator franchised under this section shall be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another cable operator under subparagraph (D), to the cable operator's subscribers, of any public, educational, or governmental programming produced by or for the franchising authority and carried by the cable operator pursuant to this section.

` (D) Unless two cable operators otherwise agree to the terms for interconnection and cost sharing, such cable operators shall, if at least one of the operators is providing cable service in the franchise area pursuant to a franchise under this section, comply with regulations prescribed by the Commission providing for--

` (i) the interconnection between two cable operators in a franchise area for transmission of public, educational, or governmental programming, without material deterioration in signal quality or functionality; and

` (ii) the reasonable allocation of the costs of such interconnection between such cable operators.

` (E) A cable operator shall display the program information for public, educational, or governmental programming carried under this subsection in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The cable operator shall not omit such public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area.

` (f) Rights-of-Way-

` (1) AUTHORITY TO USE- Any franchise under this section for a franchise area shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure that--

` (A) the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

` (B) the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

` (C) the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

` (2) MANAGEMENT OF PUBLIC RIGHTS-OF-WAY- Nothing in this section affects the authority of a State or local government (including a franchising authority) over a person or group in their capacity as a cable operator with a franchise under this section to manage, on a reasonable, competitively neutral, and non-discriminatory basis, the public rights-of-way, and easements that have been dedicated for compatible uses. A State or local government (including a franchising authority) may, on a reasonable, competitively neutral, and non-discriminatory basis--

` (A) impose charges for such management; and

` (B) require compliance with such management, such charges, and paragraphs (1)(A), (B), and (C).

` (g) Consumer Protection and Customer Service-

` (1) NATIONAL STANDARDS- Notwithstanding section 632(d), no State or local law (including any regulation) shall impose on a cable operator franchised under this section any consumer protection or customer service requirements other than consumer protection or customer service requirements of general applicability.

` (2) PROCEEDING- Within 120 days after the date of enactment of this section, the Commission shall issue a report and order that updates for cable operators franchised under this section the national consumer protection and customer service rules under section 632(b), taking into consideration the national nature of a franchise under this section and the role of State and local governments in enforcing, but not creating, consumer protection and customer service standards for cable operators franchised under this section.

` (3) REQUIREMENTS OF NEW RULES-

` (A) Such rules shall, in addition to the requirements of section 632

(b), address, with specificity, no less than the following consumer protection and customer service issues:

- ` (i) Billing, billing disputes, and discontinuation of service, including when and how any late fees may be assessed (but not the amount of such fees).

- ` (ii) Loss of service or service quality.

- ` (iii) Changes in channel lineups or other cable services and features.

- ` (iv) Availability of parental control options.

` (B) The Commission's revised consumer protection rules shall provide for forfeiture penalties, or customer rebates, refunds or credits, or both, and shall establish forfeiture, rebate, refund, and credit guidelines with respect to violations of such rules. Such guidelines shall--

- ` (i) provide for increased forfeiture penalties for repeated violations of the standards in such rules; and

- ` (ii) establish procedures by which any forfeiture penalty assessed by the Commission under this subsection shall be paid by the cable operator directly to the franchising authority affected by the violation.

` (4) COMPLAINTS-

` (A) IN GENERAL- Any person may file a complaint with respect to an alleged violation of the Commission's revised consumer protection rules in a franchise area by a cable operator franchised under this section--

- ` (i) with the franchising authority in such area; or

- ` (ii) with the Commission.

` (B) LOCAL FRANCHISING AUTHORITY PROCEDURE- On its own motion or at the request of any person, a franchising authority for a franchise area may--

- ` (i) initiate its own complaint proceeding with respect to such an alleged violation; or

- ` (ii) file a complaint with the Commission regarding such an

alleged violation.

` (C) TIMING- The Commission or the franchising authority conducting a proceeding under this paragraph shall render a decision on any complaint filed under this paragraph within 90 days of its filing.

` (5) LOCAL FRANCHISING ORDERS-

` (A) REQUIRING COMPLIANCE- In a proceeding commenced by a franchising authority, a franchising authority may issue an order requiring compliance with the Commission's revised consumer protection rules, but a franchising authority may not create any new standard or regulation, or expand upon or modify the Commission's revised consumer protection rules.

` (B) ACCESS TO RECORDS- In such a proceeding, the franchising authority may issue an order requiring the filing of any data, documents, or records (including any contract, agreement, or arrangement between the subscriber and the cable operator) that are directly related to the alleged violation.

` (C) COST OF FRANCHISING AUTHORITY ORDERS- A franchising authority may charge a cable operator franchised under this section a nominal fee to cover the costs of issuing orders under this paragraph.

` (6) COMMISSION REMEDIES; APPEALS-

` (A) REMEDIES- An order of a franchising authority under this subsection shall be enforced by the Commission under this Act if--

` (i) the order is not appealed to the Commission;

` (ii) the Commission does not agree to grant review during the 30-day period described in subparagraph (B); or

` (iii) the order is sustained on appeal by the Commission.

` (B) APPEALS- Any party may file a notice of appeal of an order of a franchising authority under this subsection with the Commission, and shall transmit a copy of such notice to the other parties to the franchising authority proceeding. Such appeal shall be deemed denied at the end of the 30-day period beginning on the date of the filing unless the Commission agrees within such period to grant review of the appeal.

` (C) TIMING- After the filing of a notice of appeal under subparagraph (B), if such notice is not denied by operation of such subparagraph, the Commission shall render a decision within 90 days of such filing.

` (7) ANNUAL REPORT-

` (A) IN GENERAL- Not later than 1 year after the date of enactment of this section, and annually thereafter, the Commission shall submit a report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the implementation of this subsection, including the following:

` (i) The number of complaints filed with franchising authorities under clause (4)(A)(i).

` (ii) Any trends concerning complaints, such as increases in the number of particular types of complaints or in new types of complaints.

` (iii) The timeliness of the response of such franchising authorities and the results of the complaints filed with such franchising authorities, if not appealed to the Commission.

` (iv) The number of complaints filed with the Commission under clause (4)(A)(ii).

` (v) The number of appeals filed with the Commission under paragraph (6)(B) and the number of such appeals which the Commission agreed to hear.

` (vi) The timeliness of the Commission's responses to such complaints and appeals.

` (vii) The results of such complaints and appeals filed with the Commission.

` (B) SUBMISSION OF INFORMATION BY FRANCHISING AUTHORITIES- The Commission may request franchising authorities to submit information about the complaints filed with the franchising authorities under subparagraph (4)(A)(i), including the number of such complaints and the timeliness of the response and the results of such complaints.

` (8) DEFINITION- For purposes of this subsection, the term 'Commission's revised consumer protection rules' means the national

consumer protection and customer service rules under section 632(b) as revised by the Commission pursuant to paragraph (2) of this subsection.

`(h) Antidiscrimination-

`(1) PROHIBITION- A cable operator with a national franchise under this section to provide cable service in a franchise area shall not deny access to its cable service to any group of potential residential cable service subscribers in such franchise area because of the income of that group.

`(2) ENFORCEMENT-

`(A) COMPLAINT- If a franchising authority in a franchise area has reasonable cause to believe that a cable operator is in violation of this subsection with respect to such franchise area, the franchising authority may, after complying with subparagraph (B), file a complaint with the Commission alleging such violation.

`(B) NOTICE BY FRANCHISING AUTHORITY- Before filing a complaint with the Commission under subparagraph (A), a franchising authority--

`(i) shall give notice of each alleged violation to the cable operator;

`(ii) shall provide a period of not less than 30 days for the cable operator to respond to such allegations; and

`(iii) during such period, may require the cable operator to submit a written response stating the reasons why the operator has not violated this subsection.

`(C) BIENNIAL REPORT- A cable operator with a national franchise under this section for a franchise area, not later than 180 days after the effective date of such national franchise, and biennially thereafter, shall submit a report to the Commission and the franchising authority in the franchise area--

`(i) identifying the geographic areas in the franchise area where the cable operator offers cable service; and

`(ii) describing the cable operator's progress in extending cable service to other areas in the franchise area.

`(D) NOTICE BY COMMISSION- Upon receipt of a complaint under this paragraph alleging a violation of this subsection by a cable operator, the Commission shall give notice of the complaint to the

cable operator.

`(E) INVESTIGATION- In investigating a complaint under this paragraph, the Commission may require a cable operator to disclose to the Commission such information and documents as the Commission deems necessary to determine whether the cable operator is in compliance with this subsection. The Commission shall maintain the confidentiality of any information or document collected under this subparagraph.

`(F) DEADLINE FOR RESOLUTION OF COMPLAINTS- Not more than 60 days after the Commission receives a complaint under this paragraph, the Commission shall issue a determination with respect to each violation alleged in the complaint.

`(G) DETERMINATION- If the Commission determines (in response to a complaint under this paragraph or on its own initiative) that a cable operator with a franchise under this section to provide cable service in a franchise area has denied access to its cable service to a group of potential residential cable service subscribers in such franchise area because of the income of that group, the Commission shall ensure that the cable operator extends access to that group within a reasonable period of time.

`(H) REMEDIES-

`(i) IN GENERAL- This subsection shall be enforced by the Commission under titles IV and V.

`(ii) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation of this subsection shall be \$750,000 for each day of the violation.

`(iii) PAYMENT OF PENALTIES TO FRANCHISING AUTHORITY- The Commission shall order any cable operator subject to a forfeiture penalty under this subsection to pay the penalty directly to the franchising authority involved.

`(i) Child Pornography- Not later than 180 days after the date of enactment of this section, the Commission shall promulgate regulations to require a cable operator with a national franchise under this section to prevent the distribution of child pornography (as such term is defined in section 254(h)(7)(F)) over its network.

`(j) Leased Access- The provisions of section 612(i) regarding the carriage of programming from a qualified minority programming source or from any



qualified educational programming source shall apply to a cable operator franchised under this section to provide cable service in a franchise area.

`(k) Applicability of Other Provisions- The provisions of this title that apply to a cable operator shall apply in a franchise area to a person or group with a national franchise under this section to provide cable service in such franchise area, except that the following sections shall not apply in a franchise area to a person or group franchised under this section in such franchise area, or confer any authority to regulate or impose obligations on such person or group in such franchise area: Sections 611(a), 611(b), 611(c), 613(a), 617, 621 (other than subsections (b)(3)(A), (b)(3)(B), (b)(3)(C), and (c)), 624(b), 624(c), 624(h), 625, 626, 627, and 632(a).

`(l) Emergency Alerts- Nothing in this section shall be construed to prohibit a State or local government from accessing the emergency alert system of a cable operator with a franchise under this section in the area served by the State or local government to transmit local or regional emergency alerts.

`(m) Reporting, Records, and Audits-

`(1) REPORTING- A cable operator with a franchise under this section to provide cable service in a franchise area shall make such periodic reports to the Commission and the franchising authority for such franchise area as the Commission may require to verify compliance with the fee obligations of subsections (c)(1) and (e)(2).

`(2) AVAILABILITY OF BOOKS AND RECORDS- Upon request under paragraph (3) by a franchising authority for a franchise area, and upon request by the Commission, a cable operator with a national franchise for such franchise area shall make available its books and records to periodic audit by such franchising authority or the Commission, respectively.

`(3) FRANCHISING AUTHORITY AUDIT PROCEDURE- A franchising authority may, upon reasonable written request, but no more than once in any 12-month period, review the business records of such cable operator to the extent reasonably necessary to ensure payment of the fees required by subsections (c)(1) and (e)(2). Such review may include the methodology used by such cable operator to assign portions of the revenue from cable service that may be bundled or functionally integrated with other services, capabilities, or applications. Such review shall be conducted in accordance with procedures established by the Commission.

`(4) COST RECOVERY-

`(A) To the extent that the review under paragraph (3) identifies an

underpayment of an amount meeting the minimum percentage specified in subparagraph (B) of the fee required under subsection (c)(1) or (e)(2) for the period of review, the cable operator shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party, as determined by the Commission, with respect to such fee. The costs of any contingency fee arrangement between the franchising authority and the independent reviewer shall not be subject to reimbursement.

`(B) The Commission shall determine by rule the minimum percentage underpayment that requires cost reimbursement under subparagraph (A).

`(5) LIMITATION- Any fee that is not reviewed by a franchising authority within 3 years after it is paid or remitted shall not be subject to later review by the franchising authority under this subsection and shall be deemed accepted in full payment by the franchising authority.

`(6) FEE DISPUTE RESOLUTION-

`(A) COMPLAINT- A franchising authority or a cable operator may file a complaint at the Commission to resolve a dispute between such authority and operator with respect to the amount of any fee required under subsection (c)(1) or (e)(2) if--

`(i) the franchising authority or the cable operator provides the other entity written notice of such dispute; and

`(ii) the franchising authority and the cable operator have not resolved the dispute within 90 calendar days after receipt of such notice.

`(B) MEETINGS- Within 30 calendar days after receipt of notice of a dispute provided pursuant to subparagraph (A)(i), representatives of the franchising authority and the cable operator, with authority to resolve the dispute, shall meet to attempt to resolve the dispute.

`(C) LIMITATION- A complaint under subparagraph (A) shall be filed not later than 3 years after the end of the period to which the disputed amount relates, unless such time is extended by written agreement between the franchising authority and cable operator.

`(D) RESOLUTION- The Commission shall issue an order resolving any complaint filed under subparagraph (A) within 90 days of filing.

`(n) Access to Programming for Shared Facilities-

` (1) PROHIBITION- A cable programming vendor in which a cable operator has an attributable interest shall not deny a cable operator with a national franchise under this section access to video programming solely because such cable operator with a national franchise uses a headend for its cable system that is also used, under a shared ownership or leasing agreement, as the headend for another cable system.

` (2) DEFINITION- The term ` cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of video programming which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.

` (o) Gross Revenues- As used in this section:

` (1) IN GENERAL- Subject to paragraphs (2) and (3), the term ` gross revenues' means all consideration of any kind or nature, including cash, credits, property, and in-kind contributions (services or goods) received by the cable operator from the provision of cable service within the franchise area.

` (2) INCLUDED ITEMS- Subject to paragraph (3), the term ` gross revenues' shall include the following:

` (A) all charges and fees paid by subscribers for the provision of cable service, including fees attributable to cable service when sold individually or as part of a package or bundle, or functionally integrated, with services other than cable service;

` (B) any franchise fee imposed on the cable operator that is passed on to subscribers;

` (C) compensation received by the cable operator for promotion or exhibition of any products or services over the cable service, such as on ` home shopping' or similar programming;

` (D) revenue received by the cable operator as compensation for carriage of video programming or other programming service on that operator's cable service;

` (E) all revenue derived from the cable operator's cable service pursuant to compensation arrangements for advertising; and

` (F) any advertising commissions paid to an affiliated third party for cable services advertising.

` (3) EXCLUDED ITEMS- The term ` gross revenues' shall not include the following:

` (A) any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt;

` (B) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset by subparagraph (A) and to the extent such refund, rebate, credit, or discount is attributable to the cable service;

` (C) subject to paragraph (4), any revenues received by the cable operator or its affiliates from the provision of services or capabilities other than cable service, including telecommunications services, Internet access services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with cable service;

` (D) any revenues received by the cable operator or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;

` (E) any amounts attributable to the provision of cable service to customers at no charge, including the provision of such service to public institutions without charge;

` (F) any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a Federal, State, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility user taxes;

` (G) any forgone revenue from the provision of cable service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue;

` (H) sales of capital assets or surplus equipment;

` (I) reimbursement by programmers of marketing costs actually incurred by the cable operator for the introduction of new programming; and

` (J) the sale of cable services for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto.

` (4) FUNCTIONALLY INTEGRATED SERVICES- In the case of a cable service that is bundled or integrated functionally with other services,

capabilities, or applications, the portion of the cable operator's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the cable operator can reasonably identify the division or exclusion of such revenue from its books and records that are kept in the regular course of business.

` (5) AFFILIATE REVENUE- Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of such revenue as revenue of the affiliate has the effect (whether intentional or unintentional) of evading the payment of franchise fees which would otherwise be paid for cable service.

` (6) AFFECT ON OTHER LAW- Nothing in this section is intended to limit a franchising authority's rights pursuant to section 622(h).

` (p) Additional Definitions- For purposes of this section:

` (1) CABLE OPERATOR- The term 'cable operator' has the meaning provided in section 602(5) except that such term also includes a person or group with a national franchise under this section.

` (2) FRANCHISE FEE-

` (A) The term 'franchise fee' includes any fee or assessment of any kind imposed by a franchising authority or other governmental entity on a person or group providing cable service in a franchise area under this section, or on a subscriber of such person or group, or both, solely because of their status as such.

` (B) The term 'franchise fee' does not include--

` (i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and a person or group providing cable service in a franchise area under this section (or the services of such person or group) but not including a fee or assessment which is unduly discriminatory against such person or group or the subscribers of such person or group);

` (ii) any fee assessed under subsection (e)(2) for support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f));

` (iii) requirements or charges under subsection (f)(2) for the management of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

`(iv) any fee imposed under title 17, United States Code.

`(3) INTERNET ACCESS SERVICE- The term `Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet.

`(4) UNIT OF GENERAL LOCAL GOVERNMENT- The term `unit of general local government' means--

`(A) a county, township, city, or political subdivision of a county, township, or city;

`(B) the District of Columbia; or

`(C) the recognized governing body of an Indian tribe or Alaskan Native village that carries out substantial governmental duties and powers.'.

(b) Implementing Regulations- The Federal Communications Commission shall prescribe regulations to implement the amendment made by subsection (a) within 120 days after the date of enactment of this Act.

## **SEC. 102. DEFINITIONS.**

Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended--

(1) in paragraph (4), by inserting before the semicolon at the end the following: `, or its equivalent as determined by the Commission';

(2) in paragraph (5)(A), by inserting `(regardless of whether such person or group provides such service separately or combined with a telecommunications service or information service)' after `over a cable system';

(3) by striking paragraph (6) and inserting the following:

`(6) the term `cable service' means--

`(A)(i) the one-way transmission to subscribers of (I) video programming, or (II) other programming service; and

`(ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service; or

`(B) the transmission to subscribers of video programming or other programming service provided through wireline facilities located at

least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of--

`(i) a commercial mobile service (as such term is defined in section 332(d)); or

`(ii) an Internet access service (as such term is defined in section 630(p));';

(4) in paragraph (7)(D), by inserting after 'section 653 of this title' the following; 'except in a franchise area in which such system is used to provide cable service under a national franchise pursuant to section 630';

(5) in paragraph (9)--

(A) by inserting '(A)' after 'means'; and

(B) by inserting before the semicolon at the end the following: `; and (B) a national franchise that is effective under section 630 on the basis of a certification with the Commission'; and

(6) in paragraph (10), by inserting before the semicolon at the end the following: `, but does not include the Commission with respect to a national franchise under section 630'.

### **SEC. 103. MONITORING AND REPORTING.**

(a) Report on Cable Service Deployment- The Federal Communications Commission shall, commencing not later than one year after the date of enactment of this Act, issue a report annually on the deployment of cable service pursuant to the amendments made by this title. In its report, the Commission shall describe in detail--

(1) with respect to deployment by new cable operators--

(A) the progress of deployment of such service within the telephone service area of cable operators, if the operator is also an incumbent local exchange carrier, including a comparison with the progress of deployment of broadband services not defined as cable services within such telephone service area;

(B) the number of franchise areas in which such service is being deployed and offered;

- (C) where such service is not being deployed and offered; and
- (D) the number and locations of franchise areas in which the cable operator is serving only a portion of the franchise area, and the extent of such service within the franchise area;
- (2) the number and locations of franchise areas in which a cable operator with a franchise under section 621 of the Communications Act of 1934 (47 U.S.C. 541) on the date of enactment of this Act withdraws service from any portion of the franchise area for which it previously offered service, and the extent of such withdrawal of service within the franchise area;
- (3) the rates generally charged for cable service;
- (4) the rates charged by overlapping, competing multichannel video programming distributors and by competing cable operators for comparable service or cable service;
- (5) the average household income of those franchise areas or portions of franchise areas where cable services is being offered, and the average household income of those franchise areas, or portions of franchise areas, where cable service is not being offered;
- (6) the proportion of rural households to urban households, as defined by the Bureau of the Census, in those franchise areas or portions of franchise areas where cable service is being offered, and the proportion of rural households to urban households in those franchise areas or portions of franchise areas where cable service is not being offered, including a State-by-State breakdown of such data and a comparison with the overall ratio of rural and urban households in each State; and
- (7) a comparison of the services and rates in areas served by national franchisees under section 630 of the Communications Act of 1934 (as added by section 101 of this Act) and the services and rates in other areas.

(b) Cable Operator Reports- The Federal Communications Commission is authorized--

- (1) to require cable operators to report to the Commission all of the information that the Commission needs to compile the report required by this section; and
- (2) to require cable operators to file the same information with the relevant franchising authorities and State commissions.



**SEC. 104. RULE OF CONSTRUCTION.**

Nothing in this Act or the amendments made by this Act shall affect the application or interpretation of section 224 of the Communications Act of 1934 (47 U.S.C. 224).

**TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT****SEC. 201. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is amended by adding at the end the following new section:

**SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

(a) Authority- The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein.

(b) Enforcement-

(1) IN GENERAL- This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

(2) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be \$500,000 for each violation.

(3) ADJUDICATORY AUTHORITY- The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

` (4) LIMITATION- Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).

` (c) Study- Within 180 days after the date of enactment of this section, the Commission shall conduct, and submit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, a study regarding whether the objectives of the broadband policy statement and the principles incorporated therein are being achieved.

` (d)(1) Rule of Construction- Nothing in this section shall be construed to modify, impair, or supersede the applicability of the antitrust laws or the jurisdiction of the district courts of the United States to hear claims arising under the antitrust laws.

` (2) Definition of Antitrust Laws- The term 'antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12 (a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

` (e) Definition- For purposes of this section, the term 'Commission's broadband policy statement' means the policy statement adopted on August 5, 2005, and issued on September 23, 2005, In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, and other Matters (FCC 05-151; CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52).'

### **TITLE III--VOIP/911**

#### **SEC. 301. EMERGENCY SERVICES; INTERCONNECTION.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 715 (as added by section 201 of this Act) the following new sections:

#### **` SEC. 716. EMERGENCY SERVICES.**

` (a) 911 and E-911 Services-

` (1) IN GENERAL- Each VOIP service provider has a duty to ensure that 911 and E-911 services are provided to subscribers of VOIP services.

` (2) USE OF EXISTING REGULATIONS- A VOIP service provider that complies with the Commission's regulations requiring providers of VOIP service to supply 911 and E911 capabilities to their customers (Report and Order in WC Docket Nos. 04-36 and 05-196) and that are in effect on the date of enactment of this section shall be considered to be in compliance with the requirements of this section, other than subsection (c), until such regulations are modified or superseded by subsequent regulations.

` (b) Non-Discriminatory Access to Capabilities-

` (1) ACCESS- Each incumbent local exchange carrier (as such term is defined in section 251(h)) or government entity with ownership or control of the necessary E-911 infrastructure shall provide any requesting VOIP service provider with nondiscriminatory access to such infrastructure. Such carrier or entity shall provide access to the infrastructure at just and reasonable, nondiscriminatory rates, terms, and conditions. Such access shall be consistent with industry standards established by the National Emergency Number Association or other applicable industry standards organizations.

` (2) ENFORCEMENT- The Commission or a State commission may enforce the requirements of this subsection and the Commission's regulations thereunder. A VOIP service provider may obtain access to such infrastructure pursuant to section 717 by asserting the rights described in such section.

` (c) New Customers- A VOIP service provider shall make 911 service available to new customers within a reasonable time in accordance with the following requirements:

` (1) CONNECTION TO SELECTIVE ROUTER- For all new customers not within the geographic areas where a VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider, or its third party vendor, shall have no more than 30 days from the date the VOIP provider has acquired a customer to order service providing connectivity to the selective router so that 911 service, or E911 service where the PSAP is capable of receiving and processing such information, can be provided through the selective router.

` (2) INTERIM SERVICE- For all new customers not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide 911 service through--

` (A) an arrangement mutually agreed to by the VOIP service

provider and the PSAP or PSAP governing authority; or

` (B) an emergency response center with national call routing capabilities.

Such service shall be provided 24 hours a day from the date a VOIP service provider has acquired a customer until the VOIP service provider can provide 911 service to the geographically appropriate PSAP.

` (3) NOTICE- Before providing service to any new customer not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide such customer with clear notice that 911 service will be available only as described in paragraph (2).

` (4) RESTRICTION ON ACQUISITION OF NEW CUSTOMERS- A VOIP service provider may not acquire new customers within a geographic area served by a selective router if, within 180 days of first acquiring a new customer in the area served by the selective router, the VOIP service provider does not provide 911 service, or E911 service where the PSAP is capable of receiving and processing such information, to the geographically appropriate PSAP for all existing customers served by the selective router.

` (5) ENFORCEMENT: NO FIRST WARNINGS- Paragraph (5) of section 503(b) shall not apply to the assessment of forfeiture penalties for violations of this subsection or the regulations thereunder.

` (d) State Authority- Nothing in this Act or any Commission regulation or order shall prevent the imposition on or collection from a VOIP service provider, of any fee or charge specifically designated or presented as dedicated by a State, political subdivision thereof, or Indian tribe on an equitable, and non-discriminatory basis for the support of 911 and E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 and E-911 services or enhancements of such services.

` (e) Feasibility- In establishing requirements or obligations under subsections (a) and (b), the Commission shall ensure that such standards impose requirements or obligations on VOIP service providers and entities with ownership or control of necessary E-911 infrastructure that the Commission determines are technologically and operationally feasible. In determining the requirements and obligations that are technologically and operationally feasible, the Commission shall take into consideration available industry technological and operational standards.

` (f) Progress Reports- To the extent that the Commission concludes that it is

not technologically or operationally feasible for VOIP service providers to comply with E-911 requirements or obligations, then the Commission shall submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the progress in attaining and deploying E-911 service. Such reports shall be submitted semiannually until the Commission concludes that it is technologically and operationally feasible for all VOIP service providers to comply with E-911 requirements and obligations. Such reports may include any recommendations the Commission considers appropriate to encourage the migration of emergency services to TCP/IP protocol or other advanced services.

`(g) Access to Information- The Commission shall have the authority to compile a list of PSAP contact information, testing procedures, and classes and types of services supported by PSAPs, or other information concerning the necessary E-911 infrastructure, for the purpose of assisting providers in complying with the requirements of this section.

`(h) Emergency Routing Number Administrator- Within 30 days after the date of enactment of this section, the Federal Communications Commission shall establish an emergency routing number administrator to enable VOIP service providers to acquire non-dialable pseudo-automatic number identification numbers for 9-1-1 routing purposes on a national scale. The Commission may adopt such rules and practices as are necessary to guide such administrator in the fair and expeditious assignment of these numbers.

`(i) Emergency Response Systems-

`(1) NOTICE PRIOR TO INSTALLATION OR NUMBER ACTIVATION OF VOIP SERVICE- Prior to installation or number activation of VOIP service for a customer, a VOIP service provider shall provide clear and conspicuous notice to the customer that--

`(A) such customer should arrange with his or her emergency response system provider, if any, to test such system after installation;

`(B) such customer should notify his or her emergency response system provider after VOIP service is installed; and

`(C) a battery backup is required for customer premises equipment installed in connection with the VOIP service in order for the signaling of such system to function in the event of a power outage.

`(2) DEFINITION- In this subsection:

`(A) The term 'emergency response system' means an alarm or

security system, or personal security or medical monitoring system, that is connected to an emergency response center by means of a telecommunications carrier or VOIP service provider.

`(B) The term `emergency response center' means an entity that monitors transmissions from an emergency response system.

`(j) Migration to IP-Enabled Emergency Network-

`(1) NATIONAL REPORT- No more than 18 months after the date of the enactment of this section, the National 911 Implementation and Coordination Office shall develop a report to Congress on migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen activated emergency communications.

`(2) CONTENTS OF REPORT- The report required by paragraph (1) shall-

`(A) outline the potential benefits of such a migration;

`(B) identify barriers that must be overcome and funding mechanisms to address those barriers;

`(C) include a proposed timetable, an outline of costs and potential savings;

`(D) provide recommendations on specific legislative language,

`(E) provide recommendations on any legislative changes, including updating definitions, to facilitate a national IP-enabled emergency network; and

`(F) assess, collect, and analyze the experiences of the PSAPs and related public safety authorities who are conducting trial deployments of IP-enabled emergency networks as of the date of enactment of this section.

`(3) CONSULTATION- In developing the report required by paragraph (1), the Office shall consult with representatives of the public safety community, technology and telecommunications providers, and others it deems appropriate.

`(k) Implementation-

`(1) DEADLINE- The Commission shall prescribe regulations to implement this section within 120 days after the date of enactment of this section.

`(2) LIMITATION- Nothing in this section shall be construed to permit the Commission to issue regulations that require or impose a specific technology or technological standard.

`(l) Definitions- For purposes of this section:

`(1) VOIP SERVICE- The term `VOIP service' means a service that--

`(A) provides real-time 2-way voice communications transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol (including when the voice communication is converted to or from TCP/IP protocol by the VOIP service provider and transmitted to the subscriber without use of circuit switching), for a fee or without a fee;

`(B) is offered to the public, or such classes of users as to be effectively available to the public (whether part of a bundle of services or separately); and

`(C) has the capability so that the service can originate traffic to, and terminate traffic from, the public switched telephone network.

`(2) VOIP SERVICE PROVIDER- The term `VOIP service provider' means any person who provides or offers to provide a VOIP service.

`(3) NECESSARY E-911 INFRASTRUCTURE- The term `necessary E-911 infrastructure' means the originating trucks to the selective routers, selective routers, databases (including automatic location information databases and master street address guides), trunks, or other related facilities necessary for the delivery and completion of 911 and E-911 calls, or other 911 and E-911 equipment, facilities, databases, interfaces, and related capabilities specified by the Commission.

`(4) NON-DIALABLE PSEUDO-AUTOMATIC NUMBER IDENTIFICATION NUMBER- The term `non-dialable pseudo-automatic number identification number' means a number, consisting of the same number of digits as numbers used for automatic number identification, that is not a North American Numbering Plan telephone directory number and that may be used in place of an automatic number identification number to convey special meaning. The special meaning assigned to the non-dialable pseudo-automatic number identification number is determined by nationally standard agreements, or by individual agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.

## ` SEC. 717. RIGHTS AND OBLIGATIONS OF VOIP SERVICE

**PROVIDERS.****`(a) In General-**

**`(1) FACILITIES-BASED VOIP SERVICE PROVIDERS-** A facilities-based VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights.

**`(2) VOIP SERVICE PROVIDERS-** A VOIP service provider that is not a facilities-based VOIP service provider shall have only the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251(b), 251(e), and 252, if the provider elects to assert such rights.

**`(3) CLARIFYING TREATMENT OF VOIP SERVICE-** A telecommunications carrier may use interconnection, services, and network elements obtained pursuant to sections 251 and 252 from an incumbent local exchange carrier (as such term is defined in section 251(h)) to exchange VOIP service traffic with such incumbent local exchange carrier regardless of the provider originating such VOIP service traffic, including an affiliate of such telecommunications carrier.

**`(b) Disabled Access-** A VOIP service provider or a manufacturer of VOIP service equipment shall have the same rights, duties, and obligations as a telecommunications carrier or telecommunications equipment manufacturer, respectively, under sections 225, 255, and 710 of the Act. Within 1 year after the date of enactment of this Act, the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, shall prescribe such regulations as are necessary to implement this section. In implementing this subsection, the Commission shall consider whether a VOIP service provider or manufacturer of VOIP service equipment primarily markets such service or equipment as a substitute for telecommunications service, telecommunications equipment, customer premises equipment, or telecommunications relay services.

**`(c) Definitions- For purposes of this section:**

**`(1) FACILITIES-BASED VOIP SERVICE PROVIDER-** The term 'facilities-based VOIP service provider' means an entity that provides VOIP service over a physical facility that terminates at the end user's location and which such entity or an affiliate owns or over which such entity or affiliate has exclusive use. An entity or affiliate shall be considered a facilities-based VOIP service provider only in those geographic areas where such terminating physical facilities are located.



`(2) VOIP SERVICE PROVIDER; VOIP SERVICE- The terms `VOIP service provider' and `VOIP service' have the meanings given such terms by section 716(l).'

## **SEC. 302. COMPENSATION AND CONTRIBUTION.**

(a) Rule of Construction- Nothing in this Act (including the amendments made by this Act) shall be construed to exempt a VOIP service provider from requirements imposed by the Federal Communications Commission or a State commission on all VOIP service providers to--

(1) pay appropriate compensation for the transmission of a VOIP service over the facilities and equipment of another provider; or

(2) contribute on an equitable and non-discriminatory basis to the preservation and advancement of universal service.

(b) Definitions- As used in this section--

(1) the terms `VOIP service provider' and `VOIP service' have the meanings given such terms in section 716(h) of the Communications Act of 1934, as added by section 301 of this Act; and

(2) the term `State commission' has the meaning given such term in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

## **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

### **SEC. 401. GOVERNMENT AUTHORITY TO PROVIDE SERVICES.**

(a) In General- Neither the Communications Act of 1934 nor any State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider of telecommunications service, information service, or cable service (as such terms are defined in sections 3 and 602 of such Act) from providing such services to any person or entity.

(b) Competition Neutrality- Any State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that is, owns, controls, or is otherwise affiliated with a public provider of telecommunications service, information service, or cable service shall not grant any preference or advantage to any such provider. Such entity shall apply its ordinances, rules, and policies, including those relating to the use of public rights-of-way, permitting, performance bonding, and reporting without discrimination in favor of any such provider as compared to other providers of such services.

(c) Compliance With Other Laws not Affected- Nothing in this section shall exempt a public provider from any law or regulation that applies to providers of telecommunications service, information service, or cable service.

(d) Report- Not later than 1 year after the date of the enactment of this Act, the Federal Communications Commission shall submit to the Congress a report on the status of the provision of telecommunications service, information service, and cable service by States and political subdivisions thereof.

(e) Definition of Public Provider- For purposes of this section, the term 'public provider' means a State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that provides telecommunications service, information service, or cable service, or any entity that is owned, controlled, or is otherwise affiliated with such State or political subdivision thereof, or agency, authority, or instrumentality of a State or political subdivision thereof.

## **TITLE V--BROADBAND SERVICE**

### **SEC. 501. STAND-ALONE BROADBAND SERVICE.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 717 (as added by section 301 of this Act) the following new section:

### **SEC. 718. STAND-ALONE BROADBAND SERVICE.**

(a) Prohibition- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service the provider offers, to purchase any cable service, telecommunications service, or VOIP service offered by the provider.

(b) Definitions- In this section:

(1) The term 'broadband service' means a two-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction.

(2) The term 'broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, by whatever technology and whether provided for a fee, in exchange for an explicit benefit, or for free.

(3) The term 'VOIP service' has the meaning given such term by

section 716(l).'

## **SEC. 502. STUDY OF INTERFERENCE POTENTIAL OF BROADBAND OVER POWER LINE SYSTEMS.**

Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall conduct, and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a study of the interference potential of broadband over power line systems.

### **TITLE VI--SEAMLESS MOBILITY**

## **SEC. 601. DEVELOPMENT OF SEAMLESS MOBILITY.**

(a) Streamlined Review-

(1) The Commission shall further the development of seamless mobility.

(2) Within 120 days after the date of enactment of this Act, the Commission shall implement a process for streamlined review and authorization of multi-mode devices that permit communication across multiple Internet protocol-enabled broadband platforms, facilities, and networks.

(b) Study- The Commission shall undertake an inquiry to identify barriers to the achievement of seamless mobility. Within 180 days after the date of enactment of this Act, the Commission shall report to the Congress on its findings and its recommendations for steps to eliminate those barriers.

(c) Definitions- For purposes of this section, the term 'seamless mobility' means the ability of a communications device to select between and utilize multiple Internet protocol-enabled technology platforms, facilities, and networks in a real-time manner to provide a unified service.

Passed the House of Representatives June 8, 2006.

Attest:

Clerk.

109th CONGRESS

2d Session

**H. R. 5252**

**AN ACT**

To promote the deployment of broadband networks and services.

*END*

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HR 5252 RFS

109th CONGRESS

2d Session

**H. R. 5252**

**IN THE SENATE OF THE UNITED STATES**

**June 12, 2006**

Received; read twice and referred to the Committee on Commerce, Science, and Transportation

**AN ACT**

To promote the deployment of broadband networks and services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) Short Title- This Act may be cited as the 'Communications Opportunity, Promotion, and Enhancement Act of 2006'.

(b) Table of Contents-

Sec. 1. Short title; table of contents.

**TITLE I--NATIONAL CABLE FRANCHISING**

Sec. 101. National cable franchising.

Sec. 102. Definitions.

Sec. 103. Monitoring and reporting.

Sec. 104. Rule of construction.

**TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

Sec. 201. Enforcement of broadband policy statement.

### **TITLE III--VOIP/911**

Sec. 301. Emergency services; interconnection.

Sec. 302. Compensation and contribution.

### **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

Sec. 401. Government authority to provide services.

### **TITLE V--BROADBAND SERVICE**

Sec. 501. Stand-alone broadband service.

Sec. 502. Study of interference potential of broadband over power line systems.

### **TITLE VI--SEAMLESS MOBILITY**

Sec. 601. Development of seamless mobility.

### **TITLE I--NATIONAL CABLE FRANCHISING**

#### **SEC. 101. NATIONAL CABLE FRANCHISING.**

(a) Amendment- Part III of title VI of the Communications Act of 1934 (47 U.S.C. 541 et seq.) is amended by adding at the end the following new section:

#### **SEC. 630. NATIONAL CABLE FRANCHISING.**

(a) National Franchises-

(1) ELECTION- A person or group that is eligible under subsection (d) may elect to obtain a national franchise under this section as authority to provide cable service in a franchise area in lieu of any other authority under Federal, State, or local law to provide cable service in such franchise area. A person or group may not provide cable service under the authority of this section in a franchise area unless such person or group has a franchise under this section that is effective with respect to such franchise area. A franchising authority may not require any person or group that has a national franchise under this section in effect with respect to a franchise area to obtain a franchise under section 621 or any other law to provide cable service in such franchise area.

(2) CERTIFICATION- To obtain a national franchise under this section

as authority to provide cable service in a franchise area, a person or group shall--

- ` (A) file with the Commission a certification for a national franchise containing the information required by paragraph (3) with respect to such franchise area, if such person or group has not previously obtained a national franchise; or

- ` (B) file with the Commission a subsequent certification for additional franchise areas containing the information required by paragraph (3) with respect to such additional franchise areas, if such person or group has previously obtained a national franchise.

` (3) CONTENTS OF CERTIFICATION- Such certification shall be in such form as the Commission shall require by regulation and shall contain--

- ` (A) the name under which such person or group is offering or intends to offer cable service;

- ` (B) the names and business addresses of the directors and principal executive officers, or the persons performing similar functions, of such person or group;

- ` (C) the location of such person or group's principal business office;

- ` (D) the name, business address, electronic mail address, and telephone and fax number of such person or group's local agent;

- ` (E) a declaration by such person or group that such person or group is eligible under subsection (d) to obtain a national franchise under this section;

- ` (F) an identification of each franchise area in which such person or group seeks authority to offer cable service pursuant to such certification, which franchise area shall be--

- ` (i) the entirety of a franchise area in which a cable operator is, on the date of the filing of such certification, authorized to provide cable service under section 621 or any other law (including this section); or

- ` (ii) a geographic area that covers the entirety of the jurisdiction of a unit of general local government, except that--

- ` (I) if the geographic area overlaps with a franchise area in which a cable operator is, on such date, authorized to provide cable service under section 621 or any other law,

the geographic area identified in the certification under this clause as a franchise area shall not include the overlapping area; and

` (II) if such geographic area includes areas that are, respectively, within the jurisdiction of different franchising authorities, the certification shall specify each such area as a separate franchise area;

` (G) a declaration that such person or group transmitted, or will transmit on the day of filing such declaration, a copy of such certification to the franchising authority for each franchise area for which such person or group is filing a certification for authority to offer cable service under this section;

` (H) a declaration by the person or group that the person or group will comply with the rights-of-way requirements of the franchising authority in accordance with subsection (f); and

` (I) a declaration by the person or group that--

` (i) the person or group will comply with all Commission consumer protection and customer service rules under section 632(b) (including the rules adopted under section 632(b) pursuant to subsection (g) of this section); and

` (ii) the person or group agrees that such standards may be enforced by the Commission or by the franchising authority in accordance with subsection (g) of this section.

` (4) LOCAL NOTIFICATION; PRESERVATION OF OPPORTUNITY TO NEGOTIATE-

` (A) COPY TO FRANCHISING AUTHORITY- On the day of filing any certification under paragraph (2)(A) or (B) for a franchise area, the person or group shall transmit a copy of such certification to the franchising authority for such area.

` (B) NEGOTIATED FRANCHISE AGREEMENTS PERMITTED- Nothing in this section shall prevent a person or group from negotiating a franchise agreement or any other authority to provide cable service in a franchise area under section 621 or any other law. Upon entry into any such negotiated franchise agreement, such negotiated franchise agreement shall apply in lieu of any national franchise held by that person or group under this section for such franchise area.



` (5) UPDATING OF CERTIFICATIONS- A person or group with a certification under this section shall update any information contained in such certification that is no longer accurate and correct.

` (6) PUBLIC AVAILABILITY OF CERTIFICATIONS- The Commission shall provide for the public availability on the Commission's Internet website or other electronic facility of all current certifications filed under this section.

` (b) Effectiveness; Duration-

` (1) EFFECTIVENESS- A national franchise under this section shall be effective with respect to any franchise area 30 days after the date of the filing of a completed certification under subsection (a)(2)(A) or (B) that applies to such franchise area.

` (2) DURATION-

` (A) IN GENERAL- A franchise under this section that applies to a franchise area shall be effective for that franchise area for a term of 10 years.

` (B) RENEWAL- A franchise under this section for a franchise area shall be renewed automatically upon expiration of the 10-year period described in subparagraph (A).

` (C) PUBLIC HEARING- At the request of a franchising authority in a franchise area, a cable operator authorized under this section to provide cable service in such franchise area shall, within the last year of the 10-year period applicable under subparagraph (A) to the cable operator's franchise for such franchise area, participate in a public hearing on the cable operator's performance in the franchise area, including the cable operator's compliance with the requirements of this title. The hearing shall afford the public the opportunity to participate for the purpose of identifying cable-related community needs and interests and assessing the operator's performance. The cable operator shall provide notice to its subscribers of the hearing at least 30 days prior to the hearing. The Commission shall by rule specify the methods by which a franchising authority shall notify a cable operator of the hearing for which its participation is required under this subparagraph.

` (D) REVOCATION- A franchise under this section for a franchise area may be revoked by the Commission--

` (i) for willful or repeated violation of any Federal or State law, or any Commission regulation, relating to the provision of

cable service in such franchise area;

`(ii) for false statements or material omissions knowingly made in any filing with the Commission relating to the provision of cable service in such franchise area;

`(iii) for willful or repeated violation of the rights-of-way management laws or regulations of any franchising authority in such franchise area relating to the provision of cable service in such franchise area; or

`(iv) for willful or repeated violation of the antidiscrimination requirement of subsection (h) with respect to such franchise area.

`(E) NOTICE- The Commission shall send a notice of such revocation to each franchising authority with jurisdiction over the franchise areas for which the cable operator's franchise was revoked.

`(F) REINSTATEMENT- After a revocation under subparagraph (D) of a franchise for a franchise area of any person or group , the Commission may refuse to accept for filing a new certification for authority of such person or group to provide cable service under this section in such franchise area until the Commission determines that the basis of such revocation has been remedied.

`(G) RETURN TO LOCAL FRANCHISING IF CABLE COMPETITION CEASES-

`(i) If only one cable operator is providing cable service in a franchise area, and that cable operator obtained a national franchise for such franchise area under subsection (d)(2), the franchising authority for such franchise area may file a petition with the Commission requesting that the Commission terminate such national franchise for such franchise area.

`(ii) The Commission shall provide public notice and opportunity to comment on such petition. If it finds that the requirements of clause (i) are satisfied, the Commission shall issue an order granting such petition. Such order shall take effect one year from the date of such grant, if no other cable operator offers cable service in such area during that one year. If another cable operator does offer cable service in such franchise area during that one year, the Commission shall rescind such order and dismiss such petition.

` (iii) A cable operator whose national franchise is terminated for such franchise area under this subparagraph may obtain new authority to provide cable service in such franchise area under this section, section 621, or any other law, if and when eligible.

` (c) Requirements of National Franchise- A national franchise shall contain the following requirements:

` (1) FRANCHISE FEE- A cable operator authorized under this section to provide cable service in a franchise area shall pay to the franchising authority in such franchise area a franchise fee of up to 5 percent (as determined by the franchising authority) of such cable operator's gross revenues from the provision of cable service under this section in such franchise area. Such payment shall be assessed and collected in a manner consistent with section 622 and the definitions of gross revenues and franchise fee in this section.

` (2) PEG/I-NET REQUIREMENTS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the requirements of subsection (e).

` (3) RIGHTS-OF-WAY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the rights-of-way requirements of the franchising authority under subsection (f).

` (4) CONSUMER PROTECTION AND CUSTOMER SERVICE STANDARDS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the consumer protection and customer service standards established by the Commission under section 632(b).

` (5) CHILD PORNOGRAPHY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the regulations on child pornography promulgated pursuant to subsection (i).

` (d) Eligibility for National Franchises- The following persons or groups are eligible to obtain a national franchise under this section:

` (1) COMMENCEMENT OF SERVICE AFTER ENACTMENT- A person or group that is not providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a national franchise under this section to provide cable service in such franchise area.

` (2) EXISTING PROVIDERS OF CABLE SERVICE- A person or group that is providing cable service in a franchise area on the date of enactment of

this section under section 621 or any other law may obtain a franchise under this section to provide cable service in such franchise area if, on the date that the national franchise becomes effective, another person or group is providing cable service under this section, section 621, or any other law in such franchise area.

`(e) Public, Educational, and Governmental Use-

`(1) IN GENERAL- Subject to paragraph (3), a cable operator with a national franchise for a franchise area under this section shall provide channel capacity for public, educational, and governmental use that is not less than the channel capacity required of the cable operator with the most subscribers in such franchise area on the effective date of such national franchise. If there is no other cable operator in such franchise area on the effective date of such national franchise, or there is no other cable operator in such franchise area on such date that is required to provide channel capacity for public, educational, and governmental use, the cable operator shall provide the amount of channel capacity for such use as determined by Commission rule.

`(2) PEG AND I-NET FINANCIAL SUPPORT- A cable operator with a national franchise under this section for a franchise area shall pay an amount equal to 1 percent of the cable operator's gross revenues (as such term is defined in this section) in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)). Such payment shall be assessed and collected in a manner consistent with section 622, including the authority of the cable operator to designate that portion of a subscriber's bill attributable to such payment. A cable operator that provided cable service in a franchise area on the date of enactment of this section and that obtains a national franchise under this section shall continue to provide any institutional network that it was required to provide on the day before its national franchise became effective in such franchise area under section 621 or any other law. Notwithstanding section 621(b)(3)(D), a franchising authority may not require a cable operator franchised under this section to construct a new institutional network.

`(3) ADJUSTMENT- Every 10 years after the commencement of a franchise under this section for a franchise area, a franchising authority may require a cable operator authorized under such franchise to increase the channel capacity designated for public, educational, or governmental use, and the channel capacity designated for such use on any institutional networks required under paragraph (2). Such increase shall not exceed the higher of--

`(A) one channel; or

` (B) 10 percent of the public, educational, or governmental channel capacity required of that operator prior to the increase.

` (4) TRANSMISSION AND PRODUCTION OF PROGRAMMING-

` (A) A cable operator franchised under this section shall ensure that any public, educational, or governmental programming carried by the cable operator under this section within a franchise area is available to all of its subscribers in such franchise area.

` (B) The production of any programming provided under this subsection shall be the responsibility of the franchising authority.

` (C) A cable operator franchised under this section shall be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another cable operator under subparagraph (D), to the cable operator's subscribers, of any public, educational, or governmental programming produced by or for the franchising authority and carried by the cable operator pursuant to this section.

` (D) Unless two cable operators otherwise agree to the terms for interconnection and cost sharing, such cable operators shall, if at least one of the operators is providing cable service in the franchise area pursuant to a franchise under this section, comply with regulations prescribed by the Commission providing for--

` (i) the interconnection between two cable operators in a franchise area for transmission of public, educational, or governmental programming, without material deterioration in signal quality or functionality; and

` (ii) the reasonable allocation of the costs of such interconnection between such cable operators.

` (E) A cable operator shall display the program information for public, educational, or governmental programming carried under this subsection in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The cable operator shall not omit such public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area.

` (f) Rights-of-Way-

` (1) AUTHORITY TO USE- Any franchise under this section for a

franchise area shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure that--

`(A) the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

`(B) the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

`(C) the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

`(2) MANAGEMENT OF PUBLIC RIGHTS-OF-WAY- Nothing in this section affects the authority of a State or local government (including a franchising authority) over a person or group in their capacity as a cable operator with a franchise under this section to manage, on a reasonable, competitively neutral, and non-discriminatory basis, the public rights-of-way, and easements that have been dedicated for compatible uses. A State or local government (including a franchising authority) may, on a reasonable, competitively neutral, and non-discriminatory basis--

`(A) impose charges for such management; and

`(B) require compliance with such management, such charges, and paragraphs (1)(A), (B), and (C).

`(g) Consumer Protection and Customer Service-

`(1) NATIONAL STANDARDS- Notwithstanding section 632(d), no State or local law (including any regulation) shall impose on a cable operator franchised under this section any consumer protection or customer service requirements other than consumer protection or customer service requirements of general applicability.

`(2) PROCEEDING- Within 120 days after the date of enactment of this section, the Commission shall issue a report and order that updates for cable operators franchised under this section the national consumer protection and customer service rules under section 632(b), taking into consideration the national nature of a franchise under this section and the role of State and local governments in enforcing, but not creating,

consumer protection and customer service standards for cable operators franchised under this section.

` (3) REQUIREMENTS OF NEW RULES-

` (A) Such rules shall, in addition to the requirements of section 632 (b), address, with specificity, no less than the following consumer protection and customer service issues:

` (i) Billing, billing disputes, and discontinuation of service, including when and how any late fees may be assessed (but not the amount of such fees).

` (ii) Loss of service or service quality.

` (iii) Changes in channel lineups or other cable services and features.

` (iv) Availability of parental control options.

` (B) The Commission's revised consumer protection rules shall provide for forfeiture penalties, or customer rebates, refunds or credits, or both, and shall establish forfeiture, rebate, refund, and credit guidelines with respect to violations of such rules. Such guidelines shall--

` (i) provide for increased forfeiture penalties for repeated violations of the standards in such rules; and

` (ii) establish procedures by which any forfeiture penalty assessed by the Commission under this subsection shall be paid by the cable operator directly to the franchising authority affected by the violation.

` (4) COMPLAINTS-

` (A) IN GENERAL- Any person may file a complaint with respect to an alleged violation of the Commission's revised consumer protection rules in a franchise area by a cable operator franchised under this section--

` (i) with the franchising authority in such area; or

` (ii) with the Commission.

` (B) LOCAL FRANCHISING AUTHORITY PROCEDURE- On its own motion or at the request of any person, a franchising authority for a

franchise area may--

- ` (i) initiate its own complaint proceeding with respect to such an alleged violation; or

- ` (ii) file a complaint with the Commission regarding such an alleged violation.

- ` (C) TIMING- The Commission or the franchising authority conducting a proceeding under this paragraph shall render a decision on any complaint filed under this paragraph within 90 days of its filing.

- ` (5) LOCAL FRANCHISING ORDERS-

- ` (A) REQUIRING COMPLIANCE- In a proceeding commenced by a franchising authority, a franchising authority may issue an order requiring compliance with the Commission's revised consumer protection rules, but a franchising authority may not create any new standard or regulation, or expand upon or modify the Commission's revised consumer protection rules.

- ` (B) ACCESS TO RECORDS- In such a proceeding, the franchising authority may issue an order requiring the filing of any data, documents, or records (including any contract, agreement, or arrangement between the subscriber and the cable operator) that are directly related to the alleged violation.

- ` (C) COST OF FRANCHISING AUTHORITY ORDERS- A franchising authority may charge a cable operator franchised under this section a nominal fee to cover the costs of issuing orders under this paragraph.

- ` (6) COMMISSION REMEDIES; APPEALS-

- ` (A) REMEDIES- An order of a franchising authority under this subsection shall be enforced by the Commission under this Act if--

- ` (i) the order is not appealed to the Commission;

- ` (ii) the Commission does not agree to grant review during the 30-day period described in subparagraph (B); or

- ` (iii) the order is sustained on appeal by the Commission.

- ` (B) APPEALS- Any party may file a notice of appeal of an order of a franchising authority under this subsection with the Commission,



and shall transmit a copy of such notice to the other parties to the franchising authority proceeding. Such appeal shall be deemed denied at the end of the 30-day period beginning on the date of the filing unless the Commission agrees within such period to grant review of the appeal.

` (C) TIMING- After the filing of a notice of appeal under subparagraph (B), if such notice is not denied by operation of such subparagraph, the Commission shall render a decision within 90 days of such filing.

` (7) ANNUAL REPORT-

` (A) IN GENERAL- Not later than 1 year after the date of enactment of this section, and annually thereafter, the Commission shall submit a report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the implementation of this subsection, including the following:

` (i) The number of complaints filed with franchising authorities under clause (4)(A)(i).

` (ii) Any trends concerning complaints, such as increases in the number of particular types of complaints or in new types of complaints.

` (iii) The timeliness of the response of such franchising authorities and the results of the complaints filed with such franchising authorities, if not appealed to the Commission.

` (iv) The number of complaints filed with the Commission under clause (4)(A)(ii).

` (v) The number of appeals filed with the Commission under paragraph (6)(B) and the number of such appeals which the Commission agreed to hear.

` (vi) The timeliness of the Commission's responses to such complaints and appeals.

` (vii) The results of such complaints and appeals filed with the Commission.

` (B) SUBMISSION OF INFORMATION BY FRANCHISING AUTHORITIES- The Commission may request franchising authorities to submit information about the complaints filed with the

franchising authorities under subparagraph (4)(A)(i), including the number of such complaints and the timeliness of the response and the results of such complaints.

` (8) DEFINITION- For purposes of this subsection, the term 'Commission's revised consumer protection rules' means the national consumer protection and customer service rules under section 632(b) as revised by the Commission pursuant to paragraph (2) of this subsection.

` (h) Antidiscrimination-

` (1) PROHIBITION- A cable operator with a national franchise under this section to provide cable service in a franchise area shall not deny access to its cable service to any group of potential residential cable service subscribers in such franchise area because of the income of that group.

` (2) ENFORCEMENT-

` (A) COMPLAINT- If a franchising authority in a franchise area has reasonable cause to believe that a cable operator is in violation of this subsection with respect to such franchise area, the franchising authority may, after complying with subparagraph (B), file a complaint with the Commission alleging such violation.

` (B) NOTICE BY FRANCHISING AUTHORITY- Before filing a complaint with the Commission under subparagraph (A), a franchising authority--

` (i) shall give notice of each alleged violation to the cable operator;

` (ii) shall provide a period of not less than 30 days for the cable operator to respond to such allegations; and

` (iii) during such period, may require the cable operator to submit a written response stating the reasons why the operator has not violated this subsection.

` (C) BIENNIAL REPORT- A cable operator with a national franchise under this section for a franchise area, not later than 180 days after the effective date of such national franchise, and biennially thereafter, shall submit a report to the Commission and the franchising authority in the franchise area--

` (i) identifying the geographic areas in the franchise area where the cable operator offers cable service; and

`(ii) describing the cable operator's progress in extending cable service to other areas in the franchise area.

`(D) NOTICE BY COMMISSION- Upon receipt of a complaint under this paragraph alleging a violation of this subsection by a cable operator, the Commission shall give notice of the complaint to the cable operator.

`(E) INVESTIGATION- In investigating a complaint under this paragraph, the Commission may require a cable operator to disclose to the Commission such information and documents as the Commission deems necessary to determine whether the cable operator is in compliance with this subsection. The Commission shall maintain the confidentiality of any information or document collected under this subparagraph.

`(F) DEADLINE FOR RESOLUTION OF COMPLAINTS- Not more than 60 days after the Commission receives a complaint under this paragraph, the Commission shall issue a determination with respect to each violation alleged in the complaint.

`(G) DETERMINATION- If the Commission determines (in response to a complaint under this paragraph or on its own initiative) that a cable operator with a franchise under this section to provide cable service in a franchise area has denied access to its cable service to a group of potential residential cable service subscribers in such franchise area because of the income of that group, the Commission shall ensure that the cable operator extends access to that group within a reasonable period of time.

`(H) REMEDIES-

`(i) IN GENERAL- This subsection shall be enforced by the Commission under titles IV and V.

`(ii) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation of this subsection shall be \$750,000 for each day of the violation.

`(iii) PAYMENT OF PENALTIES TO FRANCHISING AUTHORITY- The Commission shall order any cable operator subject to a forfeiture penalty under this subsection to pay the penalty directly to the franchising authority involved.

`(i) Child Pornography- Not later than 180 days after the date of enactment of this section, the Commission shall promulgate regulations to require a

cable operator with a national franchise under this section to prevent the distribution of child pornography (as such term is defined in section 254(h)(7)(F)) over its network.

`(j) Leased Access- The provisions of section 612(i) regarding the carriage of programming from a qualified minority programming source or from any qualified educational programming source shall apply to a cable operator franchised under this section to provide cable service in a franchise area.

`(k) Applicability of Other Provisions- The provisions of this title that apply to a cable operator shall apply in a franchise area to a person or group with a national franchise under this section to provide cable service in such franchise area, except that the following sections shall not apply in a franchise area to a person or group franchised under this section in such franchise area, or confer any authority to regulate or impose obligations on such person or group in such franchise area: Sections 611(a), 611(b), 611(c), 613(a), 617, 621 (other than subsections (b)(3)(A), (b)(3)(B), (b)(3)(C), and (c)), 624(b), 624(c), 624(h), 625, 626, 627, and 632(a).

`(l) Emergency Alerts- Nothing in this section shall be construed to prohibit a State or local government from accessing the emergency alert system of a cable operator with a franchise under this section in the area served by the State or local government to transmit local or regional emergency alerts.

`(m) Reporting, Records, and Audits-

`(1) REPORTING- A cable operator with a franchise under this section to provide cable service in a franchise area shall make such periodic reports to the Commission and the franchising authority for such franchise area as the Commission may require to verify compliance with the fee obligations of subsections (c)(1) and (e)(2).

`(2) AVAILABILITY OF BOOKS AND RECORDS- Upon request under paragraph (3) by a franchising authority for a franchise area, and upon request by the Commission, a cable operator with a national franchise for such franchise area shall make available its books and records to periodic audit by such franchising authority or the Commission, respectively.

`(3) FRANCHISING AUTHORITY AUDIT PROCEDURE- A franchising authority may, upon reasonable written request, but no more than once in any 12-month period, review the business records of such cable operator to the extent reasonably necessary to ensure payment of the fees required by subsections (c)(1) and (e)(2). Such review may include the methodology used by such cable operator to assign portions of the revenue from cable service that may be bundled or functionally integrated with other services, capabilities, or applications. Such review

shall be conducted in accordance with procedures established by the Commission.

`(4) COST RECOVERY-

`(A) To the extent that the review under paragraph (3) identifies an underpayment of an amount meeting the minimum percentage specified in subparagraph (B) of the fee required under subsection (c)(1) or (e)(2) for the period of review, the cable operator shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party, as determined by the Commission, with respect to such fee. The costs of any contingency fee arrangement between the franchising authority and the independent reviewer shall not be subject to reimbursement.

`(B) The Commission shall determine by rule the minimum percentage underpayment that requires cost reimbursement under subparagraph (A).

`(5) LIMITATION- Any fee that is not reviewed by a franchising authority within 3 years after it is paid or remitted shall not be subject to later review by the franchising authority under this subsection and shall be deemed accepted in full payment by the franchising authority.

`(6) FEE DISPUTE RESOLUTION-

`(A) COMPLAINT- A franchising authority or a cable operator may file a complaint at the Commission to resolve a dispute between such authority and operator with respect to the amount of any fee required under subsection (c)(1) or (e)(2) if--

`(i) the franchising authority or the cable operator provides the other entity written notice of such dispute; and

`(ii) the franchising authority and the cable operator have not resolved the dispute within 90 calendar days after receipt of such notice.

`(B) MEETINGS- Within 30 calendar days after receipt of notice of a dispute provided pursuant to subparagraph (A)(i), representatives of the franchising authority and the cable operator, with authority to resolve the dispute, shall meet to attempt to resolve the dispute.

`(C) LIMITATION- A complaint under subparagraph (A) shall be filed not later than 3 years after the end of the period to which the disputed amount relates, unless such time is extended by written

agreement between the franchising authority and cable operator.

`(D) RESOLUTION- The Commission shall issue an order resolving any complaint filed under subparagraph (A) within 90 days of filing.

`(n) Access to Programming for Shared Facilities-

`(1) PROHIBITION- A cable programming vendor in which a cable operator has an attributable interest shall not deny a cable operator with a national franchise under this section access to video programming solely because such cable operator with a national franchise uses a headend for its cable system that is also used, under a shared ownership or leasing agreement, as the headend for another cable system.

`(2) DEFINITION- The term 'cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of video programming which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers.

`(o) Gross Revenues- As used in this section:

`(1) IN GENERAL- Subject to paragraphs (2) and (3), the term 'gross revenues' means all consideration of any kind or nature, including cash, credits, property, and in-kind contributions (services or goods) received by the cable operator from the provision of cable service within the franchise area.

`(2) INCLUDED ITEMS- Subject to paragraph (3), the term 'gross revenues' shall include the following:

`(A) all charges and fees paid by subscribers for the provision of cable service, including fees attributable to cable service when sold individually or as part of a package or bundle, or functionally integrated, with services other than cable service;

`(B) any franchise fee imposed on the cable operator that is passed on to subscribers;

`(C) compensation received by the cable operator for promotion or exhibition of any products or services over the cable service, such as on 'home shopping' or similar programming;

`(D) revenue received by the cable operator as compensation for carriage of video programming or other programming service on that operator's cable service;

`(E) all revenue derived from the cable operator's cable service

pursuant to compensation arrangements for advertising; and

`(F) any advertising commissions paid to an affiliated third party for cable services advertising.

`(3) EXCLUDED ITEMS- The term `gross revenues' shall not include the following:

`(A) any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt;

`(B) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset by subparagraph (A) and to the extent such refund, rebate, credit, or discount is attributable to the cable service;

`(C) subject to paragraph (4), any revenues received by the cable operator or its affiliates from the provision of services or capabilities other than cable service, including telecommunications services, Internet access services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with cable service;

`(D) any revenues received by the cable operator or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;

`(E) any amounts attributable to the provision of cable service to customers at no charge, including the provision of such service to public institutions without charge;

`(F) any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a Federal, State, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility user taxes;

`(G) any forgone revenue from the provision of cable service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue;

`(H) sales of capital assets or surplus equipment;

`(I) reimbursement by programmers of marketing costs actually incurred by the cable operator for the introduction of new

programming; and

`(J) the sale of cable services for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto.

`(4) FUNCTIONALLY INTEGRATED SERVICES- In the case of a cable service that is bundled or integrated functionally with other services, capabilities, or applications, the portion of the cable operator's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the cable operator can reasonably identify the division or exclusion of such revenue from its books and records that are kept in the regular course of business.

`(5) AFFILIATE REVENUE- Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of such revenue as revenue of the affiliate has the effect (whether intentional or unintentional) of evading the payment of franchise fees which would otherwise be paid for cable service.

`(6) AFFECT ON OTHER LAW- Nothing in this section is intended to limit a franchising authority's rights pursuant to section 622(h).

`(p) Additional Definitions- For purposes of this section:

`(1) CABLE OPERATOR- The term 'cable operator' has the meaning provided in section 602(5) except that such term also includes a person or group with a national franchise under this section.

`(2) FRANCHISE FEE-

`(A) The term 'franchise fee' includes any fee or assessment of any kind imposed by a franchising authority or other governmental entity on a person or group providing cable service in a franchise area under this section, or on a subscriber of such person or group, or both, solely because of their status as such.

`(B) The term 'franchise fee' does not include--

`(i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and a person or group providing cable service in a franchise area under this section (or the services of such person or group) but not including a fee or assessment which is unduly discriminatory against such person or group or the subscribers of such person or group);



`(ii) any fee assessed under subsection (e)(2) for support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f));

`(iii) requirements or charges under subsection (f)(2) for the management of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

`(iv) any fee imposed under title 17, United States Code.

`(3) INTERNET ACCESS SERVICE- The term `Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet.

`(4) UNIT OF GENERAL LOCAL GOVERNMENT- The term `unit of general local government' means--

`(A) a county, township, city, or political subdivision of a county, township, or city;

`(B) the District of Columbia; or

`(C) the recognized governing body of an Indian tribe or Alaskan Native village that carries out substantial governmental duties and powers.'.

(b) Implementing Regulations- The Federal Communications Commission shall prescribe regulations to implement the amendment made by subsection (a) within 120 days after the date of enactment of this Act.

## **SEC. 102. DEFINITIONS.**

Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended--

(1) in paragraph (4), by inserting before the semicolon at the end the following: `, or its equivalent as determined by the Commission';

(2) in paragraph (5)(A), by inserting `(regardless of whether such person or group provides such service separately or combined with a telecommunications service or information service)' after `over a cable system';

(3) by striking paragraph (6) and inserting the following:

`(6) the term `cable service' means--

`(A)(i) the one-way transmission to subscribers of (I) video programming, or (II) other programming service; and

`(ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service; or

`(B) the transmission to subscribers of video programming or other programming service provided through wireline facilities located at least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of--

`(i) a commercial mobile service (as such term is defined in section 332(d)); or

`(ii) an Internet access service (as such term is defined in section 630(p));';

(4) in paragraph (7)(D), by inserting after 'section 653 of this title' the following; 'except in a franchise area in which such system is used to provide cable service under a national franchise pursuant to section 630';

(5) in paragraph (9)--

(A) by inserting '(A)' after 'means'; and

(B) by inserting before the semicolon at the end the following: `; and (B) a national franchise that is effective under section 630 on the basis of a certification with the Commission'; and

(6) in paragraph (10), by inserting before the semicolon at the end the following: `, but does not include the Commission with respect to a national franchise under section 630'.

## **SEC. 103. MONITORING AND REPORTING.**

(a) Report on Cable Service Deployment- The Federal Communications Commission shall, commencing not later than one year after the date of enactment of this Act, issue a report annually on the deployment of cable service pursuant to the amendments made by this title. In its report, the Commission shall describe in detail--

(1) with respect to deployment by new cable operators--

(A) the progress of deployment of such service within the telephone service area of cable operators, if the operator is also an incumbent local exchange carrier, including a comparison with the progress of deployment of broadband services not defined as cable services within such telephone service area;

(B) the number of franchise areas in which such service is being deployed and offered;

(C) where such service is not being deployed and offered; and

(D) the number and locations of franchise areas in which the cable operator is serving only a portion of the franchise area, and the extent of such service within the franchise area;

(2) the number and locations of franchise areas in which a cable operator with a franchise under section 621 of the Communications Act of 1934 (47 U.S.C. 541) on the date of enactment of this Act withdraws service from any portion of the franchise area for which it previously offered service, and the extent of such withdrawal of service within the franchise area;

(3) the rates generally charged for cable service;

(4) the rates charged by overlapping, competing multichannel video programming distributors and by competing cable operators for comparable service or cable service;

(5) the average household income of those franchise areas or portions of franchise areas where cable services is being offered, and the average household income of those franchise areas, or portions of franchise areas, where cable service is not being offered;

(6) the proportion of rural households to urban households, as defined by the Bureau of the Census, in those franchise areas or portions of franchise areas where cable service is being offered, and the proportion of rural households to urban households in those franchise areas or portions of franchise areas where cable service is not being offered, including a State-by-State breakdown of such data and a comparison with the overall ratio of rural and urban households in each State; and

(7) a comparison of the services and rates in areas served by national franchisees under section 630 of the Communications Act of 1934 (as added by section 101 of this Act) and the services and rates in other areas.

(b) Cable Operator Reports- The Federal Communications Commission is

authorized--

(1) to require cable operators to report to the Commission all of the information that the Commission needs to compile the report required by this section; and

(2) to require cable operators to file the same information with the relevant franchising authorities and State commissions.

## **SEC. 104. RULE OF CONSTRUCTION.**

Nothing in this Act or the amendments made by this Act shall affect the application or interpretation of section 224 of the Communications Act of 1934 (47 U.S.C. 224).

## **TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT**

### **SEC. 201. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is amended by adding at the end the following new section:

### **SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT.**

(a) Authority- The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein.

(b) Enforcement-

(1) IN GENERAL- This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act.

(2) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be \$500,000 for each violation.

(3) ADJUDICATORY AUTHORITY- The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the

Commission shall have authority to adopt an order to require the entity subject to the complaint to comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein.

`(4) LIMITATION- Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3).

`(c) Study- Within 180 days after the date of enactment of this section, the Commission shall conduct, and submit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, a study regarding whether the objectives of the broadband policy statement and the principles incorporated therein are being achieved.

`(d)(1) Rule of Construction- Nothing in this section shall be construed to modify, impair, or supersede the applicability of the antitrust laws or the jurisdiction of the district courts of the United States to hear claims arising under the antitrust laws.

`(2) Definition of Antitrust Laws- The term `antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12 (a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

`(e) Definition- For purposes of this section, the term `Commission's broadband policy statement' means the policy statement adopted on August 5, 2005, and issued on September 23, 2005, In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, and other Matters (FCC 05-151; CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52).`.

### **TITLE III--VOIP/911**

#### **SEC. 301. EMERGENCY SERVICES; INTERCONNECTION.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further

amended by adding after section 715 (as added by section 201 of this Act) the following new sections:

**SEC. 716. EMERGENCY SERVICES.**

**(a) 911 and E-911 Services-**

**(1) IN GENERAL-** Each VOIP service provider has a duty to ensure that 911 and E-911 services are provided to subscribers of VOIP services.

**(2) USE OF EXISTING REGULATIONS-** A VOIP service provider that complies with the Commission's regulations requiring providers of VOIP service to supply 911 and E911 capabilities to their customers (Report and Order in WC Docket Nos. 04-36 and 05-196) and that are in effect on the date of enactment of this section shall be considered to be in compliance with the requirements of this section, other than subsection (c), until such regulations are modified or superseded by subsequent regulations.

**(b) Non-Discriminatory Access to Capabilities-**

**(1) ACCESS-** Each incumbent local exchange carrier (as such term is defined in section 251(h)) or government entity with ownership or control of the necessary E-911 infrastructure shall provide any requesting VOIP service provider with nondiscriminatory access to such infrastructure. Such carrier or entity shall provide access to the infrastructure at just and reasonable, nondiscriminatory rates, terms, and conditions. Such access shall be consistent with industry standards established by the National Emergency Number Association or other applicable industry standards organizations.

**(2) ENFORCEMENT-** The Commission or a State commission may enforce the requirements of this subsection and the Commission's regulations thereunder. A VOIP service provider may obtain access to such infrastructure pursuant to section 717 by asserting the rights described in such section.

**(c) New Customers-** A VOIP service provider shall make 911 service available to new customers within a reasonable time in accordance with the following requirements:

**(1) CONNECTION TO SELECTIVE ROUTER-** For all new customers not within the geographic areas where a VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider, or its third party vendor, shall have no more than 30 days from the date the VOIP provider has acquired a customer

to order service providing connectivity to the selective router so that 911 service, or E911 service where the PSAP is capable of receiving and processing such information, can be provided through the selective router.

` (2) INTERIM SERVICE- For all new customers not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide 911 service through--

` (A) an arrangement mutually agreed to by the VOIP service provider and the PSAP or PSAP governing authority; or

` (B) an emergency response center with national call routing capabilities.

Such service shall be provided 24 hours a day from the date a VOIP service provider has acquired a customer until the VOIP service provider can provide 911 service to the geographically appropriate PSAP.

` (3) NOTICE- Before providing service to any new customer not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide such customer with clear notice that 911 service will be available only as described in paragraph (2).

` (4) RESTRICTION ON ACQUISITION OF NEW CUSTOMERS- A VOIP service provider may not acquire new customers within a geographic area served by a selective router if, within 180 days of first acquiring a new customer in the area served by the selective router, the VOIP service provider does not provide 911 service, or E911 service where the PSAP is capable of receiving and processing such information, to the geographically appropriate PSAP for all existing customers served by the selective router.

` (5) ENFORCEMENT: NO FIRST WARNINGS- Paragraph (5) of section 503(b) shall not apply to the assessment of forfeiture penalties for violations of this subsection or the regulations thereunder.

` (d) State Authority- Nothing in this Act or any Commission regulation or order shall prevent the imposition on or collection from a VOIP service provider, of any fee or charge specifically designated or presented as dedicated by a State, political subdivision thereof, or Indian tribe on an equitable, and non-discriminatory basis for the support of 911 and E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 and E-911 services or enhancements of such services.

`(e) Feasibility- In establishing requirements or obligations under subsections (a) and (b), the Commission shall ensure that such standards impose requirements or obligations on VOIP service providers and entities with ownership or control of necessary E-911 infrastructure that the Commission determines are technologically and operationally feasible. In determining the requirements and obligations that are technologically and operationally feasible, the Commission shall take into consideration available industry technological and operational standards.

`(f) Progress Reports- To the extent that the Commission concludes that it is not technologically or operationally feasible for VOIP service providers to comply with E-911 requirements or obligations, then the Commission shall submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the progress in attaining and deploying E-911 service. Such reports shall be submitted semiannually until the Commission concludes that it is technologically and operationally feasible for all VOIP service providers to comply with E-911 requirements and obligations. Such reports may include any recommendations the Commission considers appropriate to encourage the migration of emergency services to TCP/IP protocol or other advanced services.

`(g) Access to Information- The Commission shall have the authority to compile a list of PSAP contact information, testing procedures, and classes and types of services supported by PSAPs, or other information concerning the necessary E-911 infrastructure, for the purpose of assisting providers in complying with the requirements of this section.

`(h) Emergency Routing Number Administrator- Within 30 days after the date of enactment of this section, the Federal Communications Commission shall establish an emergency routing number administrator to enable VOIP service providers to acquire non-dialable pseudo-automatic number identification numbers for 9-1-1 routing purposes on a national scale. The Commission may adopt such rules and practices as are necessary to guide such administrator in the fair and expeditious assignment of these numbers.

`(i) Emergency Response Systems-

`(1) NOTICE PRIOR TO INSTALLATION OR NUMBER ACTIVATION OF VOIP SERVICE- Prior to installation or number activation of VOIP service for a customer, a VOIP service provider shall provide clear and conspicuous notice to the customer that--

`(A) such customer should arrange with his or her emergency response system provider, if any, to test such system after installation;



`(B) such customer should notify his or her emergency response system provider after VOIP service is installed; and

`(C) a battery backup is required for customer premises equipment installed in connection with the VOIP service in order for the signaling of such system to function in the event of a power outage.

`(2) DEFINITION- In this subsection:

`(A) The term `emergency response system' means an alarm or security system, or personal security or medical monitoring system, that is connected to an emergency response center by means of a telecommunications carrier or VOIP service provider.

`(B) The term `emergency response center' means an entity that monitors transmissions from an emergency response system.

`(j) Migration to IP-Enabled Emergency Network-

`(1) NATIONAL REPORT- No more than 18 months after the date of the enactment of this section, the National 911 Implementation and Coordination Office shall develop a report to Congress on migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen activated emergency communications.

`(2) CONTENTS OF REPORT- The report required by paragraph (1) shall-

`(A) outline the potential benefits of such a migration;

`(B) identify barriers that must be overcome and funding mechanisms to address those barriers;

`(C) include a proposed timetable, an outline of costs and potential savings;

`(D) provide recommendations on specific legislative language,

`(E) provide recommendations on any legislative changes, including updating definitions, to facilitate a national IP-enabled emergency network; and

`(F) assess, collect, and analyze the experiences of the PSAPs and related public safety authorities who are conducting trial deployments of IP-enabled emergency networks as of the date of enactment of this section.

` (3) CONSULTATION- In developing the report required by paragraph (1), the Office shall consult with representatives of the public safety community, technology and telecommunications providers, and others it deems appropriate.

` (k) Implementation-

` (1) DEADLINE- The Commission shall prescribe regulations to implement this section within 120 days after the date of enactment of this section.

` (2) LIMITATION- Nothing in this section shall be construed to permit the Commission to issue regulations that require or impose a specific technology or technological standard.

` (l) Definitions- For purposes of this section:

` (1) VOIP SERVICE- The term `VOIP service' means a service that--

` (A) provides real-time 2-way voice communications transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol (including when the voice communication is converted to or from TCP/IP protocol by the VOIP service provider and transmitted to the subscriber without use of circuit switching), for a fee or without a fee;

` (B) is offered to the public, or such classes of users as to be effectively available to the public (whether part of a bundle of services or separately); and

` (C) has the capability so that the service can originate traffic to, and terminate traffic from, the public switched telephone network.

` (2) VOIP SERVICE PROVIDER- The term `VOIP service provider' means any person who provides or offers to provide a VOIP service.

` (3) NECESSARY E-911 INFRASTRUCTURE- The term `necessary E-911 infrastructure' means the originating trucks to the selective routers, selective routers, databases (including automatic location information databases and master street address guides), trunks, or other related facilities necessary for the delivery and completion of 911 and E-911 calls, or other 911 and E-911 equipment, facilities, databases, interfaces, and related capabilities specified by the Commission.

` (4) NON-DIALABLE PSEUDO-AUTOMATIC NUMBER IDENTIFICATION NUMBER- The term `non-dialable pseudo-automatic number identification number' means a number, consisting of the same number

of digits as numbers used for automatic number identification, that is not a North American Numbering Plan telephone directory number and that may be used in place of an automatic number identification number to convey special meaning. The special meaning assigned to the non-dialable pseudo-automatic number identification number is determined by nationally standard agreements, or by individual agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system.

## **SEC. 717. RIGHTS AND OBLIGATIONS OF VOIP SERVICE PROVIDERS.**

### **(a) In General-**

**(1) FACILITIES-BASED VOIP SERVICE PROVIDERS-** A facilities-based VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights.

**(2) VOIP SERVICE PROVIDERS-** A VOIP service provider that is not a facilities-based VOIP service provider shall have only the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251(b), 251(e), and 252, if the provider elects to assert such rights.

**(3) CLARIFYING TREATMENT OF VOIP SERVICE-** A telecommunications carrier may use interconnection, services, and network elements obtained pursuant to sections 251 and 252 from an incumbent local exchange carrier (as such term is defined in section 251(h)) to exchange VOIP service traffic with such incumbent local exchange carrier regardless of the provider originating such VOIP service traffic, including an affiliate of such telecommunications carrier.

**(b) Disabled Access-** A VOIP service provider or a manufacturer of VOIP service equipment shall have the same rights, duties, and obligations as a telecommunications carrier or telecommunications equipment manufacturer, respectively, under sections 225, 255, and 710 of the Act. Within 1 year after the date of enactment of this Act, the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, shall prescribe such regulations as are necessary to implement this section. In implementing this subsection, the Commission shall consider whether a VOIP service provider or manufacturer of VOIP service equipment primarily markets such service or equipment as a substitute for telecommunications service, telecommunications equipment, customer premises equipment, or telecommunications relay services.

`(c) Definitions- For purposes of this section:

`(1) FACILITIES-BASED VOIP SERVICE PROVIDER- The term `facilities-based VOIP service provider' means an entity that provides VOIP service over a physical facility that terminates at the end user's location and which such entity or an affiliate owns or over which such entity or affiliate has exclusive use. An entity or affiliate shall be considered a facilities-based VOIP service provider only in those geographic areas where such terminating physical facilities are located.

`(2) VOIP SERVICE PROVIDER; VOIP SERVICE- The terms `VOIP service provider' and `VOIP service' have the meanings given such terms by section 716(l).'

## **SEC. 302. COMPENSATION AND CONTRIBUTION.**

(a) Rule of Construction- Nothing in this Act (including the amendments made by this Act) shall be construed to exempt a VOIP service provider from requirements imposed by the Federal Communications Commission or a State commission on all VOIP service providers to--

(1) pay appropriate compensation for the transmission of a VOIP service over the facilities and equipment of another provider; or

(2) contribute on an equitable and non-discriminatory basis to the preservation and advancement of universal service.

(b) Definitions- As used in this section--

(1) the terms `VOIP service provider' and `VOIP service' have the meanings given such terms in section 716(h) of the Communications Act of 1934, as added by section 301 of this Act; and

(2) the term `State commission' has the meaning given such term in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

## **TITLE IV--MUNICIPAL PROVISION OF SERVICES**

### **SEC. 401. GOVERNMENT AUTHORITY TO PROVIDE SERVICES.**

(a) In General- Neither the Communications Act of 1934 nor any State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider of telecommunications service, information service, or cable service (as such terms are defined in sections 3 and 602 of such Act) from providing such services to any person or entity.

(b) Competition Neutrality- Any State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that is, owns, controls, or is otherwise affiliated with a public provider of telecommunications service, information service, or cable service shall not grant any preference or advantage to any such provider. Such entity shall apply its ordinances, rules, and policies, including those relating to the use of public rights-of-way, permitting, performance bonding, and reporting without discrimination in favor of any such provider as compared to other providers of such services.

(c) Compliance With Other Laws not Affected- Nothing in this section shall exempt a public provider from any law or regulation that applies to providers of telecommunications service, information service, or cable service.

(d) Report- Not later than 1 year after the date of the enactment of this Act, the Federal Communications Commission shall submit to the Congress a report on the status of the provision of telecommunications service, information service, and cable service by States and political subdivisions thereof.

(e) Definition of Public Provider- For purposes of this section, the term 'public provider' means a State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that provides telecommunications service, information service, or cable service, or any entity that is owned, controlled, or is otherwise affiliated with such State or political subdivision thereof, or agency, authority, or instrumentality of a State or political subdivision thereof.

## **TITLE V--BROADBAND SERVICE**

### **SEC. 501. STAND-ALONE BROADBAND SERVICE.**

Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 717 (as added by section 301 of this Act) the following new section:

### **SEC. 718. STAND-ALONE BROADBAND SERVICE.**

(a) Prohibition- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service the provider offers, to purchase any cable service, telecommunications service, or VOIP service offered by the provider.

(b) Definitions- In this section:

(1) The term 'broadband service' means a two-way transmission

service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction.

`(2) The term `broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, by whatever technology and whether provided for a fee, in exchange for an explicit benefit, or for free.

`(3) The term `VOIP service' has the meaning given such term by section 716(l).'

## **SEC. 502. STUDY OF INTERFERENCE POTENTIAL OF BROADBAND OVER POWER LINE SYSTEMS.**

Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall conduct, and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a study of the interference potential of broadband over power line systems.

### **TITLE VI--SEAMLESS MOBILITY**

## **SEC. 601. DEVELOPMENT OF SEAMLESS MOBILITY.**

### **(a) Streamlined Review-**

(1) The Commission shall further the development of seamless mobility.

(2) Within 120 days after the date of enactment of this Act, the Commission shall implement a process for streamlined review and authorization of multi-mode devices that permit communication across multiple Internet protocol-enabled broadband platforms, facilities, and networks.

(b) Study- The Commission shall undertake an inquiry to identify barriers to the achievement of seamless mobility. Within 180 days after the date of enactment of this Act, the Commission shall report to the Congress on its findings and its recommendations for steps to eliminate those barriers.

(c) Definitions- For purposes of this section, the term `seamless mobility' means the ability of a communications device to select between and utilize multiple Internet protocol-enabled technology platforms, facilities, and networks in a real-time manner to provide a unified service.

Passed the House of Representatives June 8, 2006.

Attest:

KAREN L. HAAS,

Clerk.

END

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HR 5252 RS

**Calendar No. 652**

109th CONGRESS

2d Session

**H. R. 5252**

[Report No. 109-355]

**IN THE SENATE OF THE UNITED STATES**

**June 12, 2006**

Received; read twice and referred to the Committee on Commerce, Science, and Transportation

**September 29, 2006**

Reported by Mr. STEVENS, with an amendment

**[Strike out all after the enacting clause and insert the part printed in italic]**

**AN ACT**

To promote the deployment of broadband networks and services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**[Struck out->] SECTION 1. SHORT TITLE; TABLE OF CONTENTS. [<-Struck out]**

[Struck out->] (a) Short Title- This Act may be cited as the 'Communications Opportunity, Promotion, and Enhancement Act of 2006'. [<-Struck out]

[Struck out->] (b) Table of Contents- [<-Struck out]

[Struck out->] Sec. 1. Short title; table of contents. [<-



Struck out]

**[Struck out->] TITLE I--NATIONAL CABLE FRANCHISING [<-Struck out]**

[Struck out->] Sec. 101. National cable franchising. [<-Struck out]

[Struck out->] Sec. 102. Definitions. [<-Struck out]

[Struck out->] Sec. 103. Monitoring and reporting. [<-Struck out]

[Struck out->] Sec. 104. Rule of construction. [<-Struck out]

**[Struck out->] TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT  
[<-Struck out]**

[Struck out->] Sec. 201. Enforcement of broadband policy statement. [<-Struck out]

**[Struck out->] TITLE III--VOIP/911 [<-Struck out]**

[Struck out->] Sec. 301. Emergency services; interconnection. [<-Struck out]

[Struck out->] Sec. 302. Compensation and contribution. [<-Struck out]

**[Struck out->] TITLE IV--MUNICIPAL PROVISION OF SERVICES [<-Struck out]**

[Struck out->] Sec. 401. Government authority to provide services. [<-Struck out]

**[Struck out->] TITLE V--BROADBAND SERVICE [<-Struck out]**

[Struck out->] Sec. 501. Stand-alone broadband service. [<-Struck out]

[Struck out->] Sec. 502. Study of interference potential of broadband over power line systems. [<-Struck out]

**[Struck out->] TITLE VI--SEAMLESS MOBILITY [<-Struck out]**

[Struck out->] Sec. 601. Development of seamless mobility. [<-Struck out]

**[Struck out->] TITLE I--NATIONAL CABLE FRANCHISING [<-Struck out]**

**[Struck out->] SEC. 101. NATIONAL CABLE FRANCHISING. [<-Struck out]**

[Struck out->] (a) Amendment- Part III of title VI of the Communications Act of 1934 (47 U.S.C. 541 et seq.) is amended by adding at the end the following new section: [<-Struck out]

**[Struck out->] `SEC. 630. NATIONAL CABLE FRANCHISING. [<-Struck out]**

[Struck out->] `(a) National Franchises- [<-Struck out]

[Struck out->] `(1) ELECTION- A person or group that is eligible under subsection (d) may elect to obtain a national franchise under this section as authority to provide cable service in a franchise area in lieu of any other authority under Federal, State, or local law to provide cable service in such franchise area. A person or group may not provide cable service under the authority of this section in a franchise area unless such person or group has a franchise under this section that is effective with respect to such franchise area. A franchising authority may not require any person or group that has a national franchise under this section in effect with respect to a franchise area to obtain a franchise under section 621 or any other law to provide cable service in such franchise area. [<-Struck out]

[Struck out->] `(2) CERTIFICATION- To obtain a national franchise under this section as authority to provide cable service in a franchise area, a person or group shall-- [<-Struck out]

[Struck out->] `(A) file with the Commission a certification for a national franchise containing the information required by paragraph (3) with respect to such franchise area, if such person or group has not previously obtained a national franchise; or [<-Struck out]

[Struck out->] `(B) file with the Commission a subsequent certification for additional franchise areas containing the information required by paragraph (3) with respect to

such additional franchise areas, if such person or group has previously obtained a national franchise. [<-Struck out]

[Struck out->] `(3) CONTENTS OF CERTIFICATION- Such certification shall be in such form as the Commission shall require by regulation and shall contain-- [<-Struck out]

[Struck out->] `(A) the name under which such person or group is offering or intends to offer cable service; [<-Struck out]

[Struck out->] `(B) the names and business addresses of the directors and principal executive officers, or the persons performing similar functions, of such person or group; [<-Struck out]

[Struck out->] `(C) the location of such person or group's principal business office; [<-Struck out]

[Struck out->] `(D) the name, business address, electronic mail address, and telephone and fax number of such person or group's local agent; [<-Struck out]

[Struck out->] `(E) a declaration by such person or group that such person or group is eligible under subsection (d) to obtain a national franchise under this section; [<-Struck out]

[Struck out->] `(F) an identification of each franchise area in which such person or group seeks authority to offer cable service pursuant to such certification, which franchise area shall be-- [<-Struck out]

[Struck out->] `(i) the entirety of a franchise area in which a cable operator is, on the date of the filing of such certification, authorized to provide cable service under section 621 or any other law (including this section); or [<-Struck out]

[Struck out->] `(ii) a geographic area that covers the entirety of the jurisdiction of a unit of general local government, except that-- [<-Struck out]

[Struck out->] `(I) if the geographic area overlaps with a franchise area in which a cable

operator is, on such date, authorized to provide cable service under section 621 or any other law, the geographic area identified in the certification under this clause as a franchise area shall not include the overlapping area; and [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(II) if such geographic area includes areas that are, respectively, within the jurisdiction of different franchising authorities, the certification shall specify each such area as a separate franchise area; [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(G) a declaration that such person or group transmitted, or will transmit on the day of filing such declaration, a copy of such certification to the franchising authority for each franchise area for which such person or group is filing a certification for authority to offer cable service under this section; [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(H) a declaration by the person or group that the person or group will comply with the rights-of-way requirements of the franchising authority in accordance with subsection (f); and [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(I) a declaration by the person or group that-- [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(i) the person or group will comply with all Commission consumer protection and customer service rules under section 632(b) (including the rules adopted under section 632(b) pursuant to subsection (g) of this section); and [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(ii) the person or group agrees that such standards may be enforced by the Commission or by the franchising authority in accordance with subsection (g) of this section. [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(4) LOCAL NOTIFICATION; PRESERVATION OF OPPORTUNITY TO NEGOTIATE- [~~-Struck out~~]

[~~Struck out->~~] <sup>~</sup>(A) COPY TO FRANCHISING AUTHORITY- On the day of filing any certification under paragraph (2) (A) or (B) for a franchise area, the person or group shall

transmit a copy of such certification to the franchising authority for such area. [<-Struck out]

[Struck out->] `(B) NEGOTIATED FRANCHISE AGREEMENTS PERMITTED- Nothing in this section shall prevent a person or group from negotiating a franchise agreement or any other authority to provide cable service in a franchise area under section 621 or any other law. Upon entry into any such negotiated franchise agreement, such negotiated franchise agreement shall apply in lieu of any national franchise held by that person or group under this section for such franchise area. [<-Struck out]

[Struck out->] `(5) UPDATING OF CERTIFICATIONS- A person or group with a certification under this section shall update any information contained in such certification that is no longer accurate and correct. [<-Struck out]

[Struck out->] `(6) PUBLIC AVAILABILITY OF CERTIFICATIONS- The Commission shall provide for the public availability on the Commission's Internet website or other electronic facility of all current certifications filed under this section. [<-Struck out]

[Struck out->] `(b) Effectiveness; Duration- [<-Struck out]

[Struck out->] `(1) EFFECTIVENESS- A national franchise under this section shall be effective with respect to any franchise area 30 days after the date of the filing of a completed certification under subsection (a)(2)(A) or (B) that applies to such franchise area. [<-Struck out]

[Struck out->] `(2) DURATION- [<-Struck out]

[Struck out->] `(A) IN GENERAL- A franchise under this section that applies to a franchise area shall be effective for that franchise area for a term of 10 years. [<-Struck out]

[Struck out->] `(B) RENEWAL- A franchise under this section for a franchise area shall be renewed automatically upon expiration of the 10-year period described in subparagraph (A). [<-Struck out]

[Struck out->] `(C) PUBLIC HEARING- At the request of a franchising authority in a franchise area, a cable operator authorized under this section to provide cable

service in such franchise area shall, within the last year of the 10-year period applicable under subparagraph (A) to the cable operator's franchise for such franchise area, participate in a public hearing on the cable operator's performance in the franchise area, including the cable operator's compliance with the requirements of this title. The hearing shall afford the public the opportunity to participate for the purpose of identifying cable-related community needs and interests and assessing the operator's performance. The cable operator shall provide notice to its subscribers of the hearing at least 30 days prior to the hearing. The Commission shall by rule specify the methods by which a franchising authority shall notify a cable operator of the hearing for which its participation is required under this subparagraph. [~~Struck out~~]

[~~Struck out~~] `(D) REVOCATION- A franchise under this section for a franchise area may be revoked by the Commission-- [~~Struck out~~]

[~~Struck out~~] `(i) for willful or repeated violation of any Federal or State law, or any Commission regulation, relating to the provision of cable service in such franchise area; [~~Struck out~~]

[~~Struck out~~] `(ii) for false statements or material omissions knowingly made in any filing with the Commission relating to the provision of cable service in such franchise area; [~~Struck out~~]

[~~Struck out~~] `(iii) for willful or repeated violation of the rights-of-way management laws or regulations of any franchising authority in such franchise area relating to the provision of cable service in such franchise area; or [~~Struck out~~]

[~~Struck out~~] `(iv) for willful or repeated violation of the antidiscrimination requirement of subsection (h) with respect to such franchise area. [~~Struck out~~]

[~~Struck out~~] `(E) NOTICE- The Commission shall send a notice of such revocation to each franchising authority with jurisdiction over the franchise areas for which the cable operator's franchise was revoked. [~~Struck out~~]

[Struck out->] `(F) REINSTATEMENT- After a revocation under subparagraph (D) of a franchise for a franchise area of any person or group , the Commission may refuse to accept for filing a new certification for authority of such person or group to provide cable service under this section in such franchise area until the Commission determines that the basis of such revocation has been remedied. [<-Struck out]

[Struck out->] `(G) RETURN TO LOCAL FRANCHISING IF CABLE COMPETITION CEASES- [<-Struck out]

[Struck out->] `(i) If only one cable operator is providing cable service in a franchise area, and that cable operator obtained a national franchise for such franchise area under subsection (d)(2), the franchising authority for such franchise area may file a petition with the Commission requesting that the Commission terminate such national franchise for such franchise area. [<-Struck out]

[Struck out->] `(ii) The Commission shall provide public notice and opportunity to comment on such petition. If it finds that the requirements of clause (i) are satisfied, the Commission shall issue an order granting such petition. Such order shall take effect one year from the date of such grant, if no other cable operator offers cable service in such area during that one year. If another cable operator does offer cable service in such franchise area during that one year, the Commission shall rescind such order and dismiss such petition. [<-Struck out]

[Struck out->] `(iii) A cable operator whose national franchise is terminated for such franchise area under this subparagraph may obtain new authority to provide cable service in such franchise area under this section, section 621, or any other law, if and when eligible. [<-Struck out]

[Struck out->] `(c) Requirements of National Franchise- A national franchise shall contain the following requirements: [<-Struck out]

[Struck out->] `(1) FRANCHISE FEE- A cable operator authorized under this section to provide cable service in a franchise area shall pay to the franchising authority in such franchise area a franchise fee of up to 5 percent (as determined by the franchising authority) of such cable operator's gross

revenues from the provision of cable service under this section in such franchise area. Such payment shall be assessed and collected in a manner consistent with section 622 and the definitions of gross revenues and franchise fee in this section. [<-Struck out]

[Struck out->] `(2) PEG/I-NET REQUIREMENTS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the requirements of subsection (e). [<-Struck out]

[Struck out->] `(3) RIGHTS-OF-WAY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the rights-of-way requirements of the franchising authority under subsection (f). [<-Struck out]

[Struck out->] `(4) CONSUMER PROTECTION AND CUSTOMER SERVICE STANDARDS- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the consumer protection and customer service standards established by the Commission under section 632(b). [<-Struck out]

[Struck out->] `(5) CHILD PORNOGRAPHY- A cable operator authorized under this section to provide cable service in a franchise area shall comply with the regulations on child pornography promulgated pursuant to subsection (i). [<-Struck out]

[Struck out->] `(d) Eligibility for National Franchises- The following persons or groups are eligible to obtain a national franchise under this section: [<-Struck out]

[Struck out->] `(1) COMMENCEMENT OF SERVICE AFTER ENACTMENT- A person or group that is not providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a national franchise under this section to provide cable service in such franchise area. [<-Struck out]

[Struck out->] `(2) EXISTING PROVIDERS OF CABLE SERVICE- A person or group that is providing cable service in a franchise area on the date of enactment of this section under section 621 or any other law may obtain a franchise under this section to provide cable service in such franchise area if, on the date that the national franchise becomes effective, another person or group is providing cable service



under this section, section 621, or any other law in such franchise area. [<-Struck out]

[Struck out->] `(e) Public, Educational, and Governmental Use- [<-Struck out]

[Struck out->] `(1) IN GENERAL- Subject to paragraph (3), a cable operator with a national franchise for a franchise area under this section shall provide channel capacity for public, educational, and governmental use that is not less than the channel capacity required of the cable operator with the most subscribers in such franchise area on the effective date of such national franchise. If there is no other cable operator in such franchise area on the effective date of such national franchise, or there is no other cable operator in such franchise area on such date that is required to provide channel capacity for public, educational, and governmental use, the cable operator shall provide the amount of channel capacity for such use as determined by Commission rule. [<-Struck out]

[Struck out->] `(2) PEG AND I-NET FINANCIAL SUPPORT- A cable operator with a national franchise under this section for a franchise area shall pay an amount equal to 1 percent of the cable operator's gross revenues (as such term is defined in this section) in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)). Such payment shall be assessed and collected in a manner consistent with section 622, including the authority of the cable operator to designate that portion of a subscriber's bill attributable to such payment. A cable operator that provided cable service in a franchise area on the date of enactment of this section and that obtains a national franchise under this section shall continue to provide any institutional network that it was required to provide on the day before its national franchise became effective in such franchise area under section 621 or any other law. Notwithstanding section 621(b)(3)(D), a franchising authority may not require a cable operator franchised under this section to construct a new institutional network. [<-Struck out]

[Struck out->] `(3) ADJUSTMENT- Every 10 years after the commencement of a franchise under this section for a franchise area, a franchising authority may require a cable operator authorized under such franchise to increase the channel capacity designated for public, educational, or

governmental use, and the channel capacity designated for such use on any institutional networks required under paragraph (2). Such increase shall not exceed the higher of--  
[<-Struck out]

[Struck out->] `(A) one channel; or [<-Struck out]

[Struck out->] `(B) 10 percent of the public, educational, or governmental channel capacity required of that operator prior to the increase. [<-Struck out]

[Struck out->] `(4) TRANSMISSION AND PRODUCTION OF PROGRAMMING-  
[<-Struck out]

[Struck out->] `(A) A cable operator franchised under this section shall ensure that any public, educational, or governmental programming carried by the cable operator under this section within a franchise area is available to all of its subscribers in such franchise area. [<-Struck out]

[Struck out->] `(B) The production of any programming provided under this subsection shall be the responsibility of the franchising authority. [<-Struck out]

[Struck out->] `(C) A cable operator franchised under this section shall be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another cable operator under subparagraph (D), to the cable operator's subscribers, of any public, educational, or governmental programming produced by or for the franchising authority and carried by the cable operator pursuant to this section. [<-Struck out]

[Struck out->] `(D) Unless two cable operators otherwise agree to the terms for interconnection and cost sharing, such cable operators shall, if at least one of the operators is providing cable service in the franchise area pursuant to a franchise under this section, comply with regulations prescribed by the Commission providing for-- [<-Struck out]

[Struck out->] `(i) the interconnection between two cable operators in a franchise area for transmission of public, educational, or governmental programming, without material deterioration in signal quality or

functionality; and [<-Struck out]

[Struck out->] `(ii) the reasonable allocation of the costs of such interconnection between such cable operators. [<-Struck out]

[Struck out->] `(E) A cable operator shall display the program information for public, educational, or governmental programming carried under this subsection in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The cable operator shall not omit such public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area. [<-Struck out]

[Struck out->] `(f) Rights-of-Way- [<-Struck out]

[Struck out->] `(1) AUTHORITY TO USE- Any franchise under this section for a franchise area shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure that-- [<-Struck out]

[Struck out->] `(A) the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system; [<-Struck out]

[Struck out->] `(B) the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and [<-Struck out]

[Struck out->] `(C) the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator. [<-Struck out]

[Struck out->] `(2) MANAGEMENT OF PUBLIC RIGHTS-OF-WAY- Nothing in this section affects the authority of a State or local government (including a franchising authority) over a person or group in their capacity as a cable operator with a

franchise under this section to manage, on a reasonable, competitively neutral, and non-discriminatory basis, the public rights-of-way, and easements that have been dedicated for compatible uses. A State or local government (including a franchising authority) may, on a reasonable, competitively neutral, and non-discriminatory basis-- [~~Struck out~~]

[~~Struck out~~->] `(A) impose charges for such management; and [~~Struck out~~]

[~~Struck out~~->] `(B) require compliance with such management, such charges, and paragraphs (1)(A), (B), and (C). [~~Struck out~~]

[~~Struck out~~->] `(g) Consumer Protection and Customer Service- [~~Struck out~~]

[~~Struck out~~->] `(1) NATIONAL STANDARDS- Notwithstanding section 632(d), no State or local law (including any regulation) shall impose on a cable operator franchised under this section any consumer protection or customer service requirements other than consumer protection or customer service requirements of general applicability. [~~Struck out~~]

[~~Struck out~~->] `(2) PROCEEDING- Within 120 days after the date of enactment of this section, the Commission shall issue a report and order that updates for cable operators franchised under this section the national consumer protection and customer service rules under section 632(b), taking into consideration the national nature of a franchise under this section and the role of State and local governments in enforcing, but not creating, consumer protection and customer service standards for cable operators franchised under this section. [~~Struck out~~]

[~~Struck out~~->] `(3) REQUIREMENTS OF NEW RULES- [~~Struck out~~]

[~~Struck out~~->] `(A) Such rules shall, in addition to the requirements of section 632(b), address, with specificity, no less than the following consumer protection and customer service issues: [~~Struck out~~]

[~~Struck out~~->] `(i) Billing, billing disputes, and discontinuation of service, including when and how any late fees may be assessed (but not the amount of such fees). [~~Struck out~~]

[Struck out->] `(ii) Loss of service or service quality. [<-Struck out]

[Struck out->] `(iii) Changes in channel lineups or other cable services and features. [<-Struck out]

[Struck out->] `(iv) Availability of parental control options. [<-Struck out]

[Struck out->] `(B) The Commission's revised consumer protection rules shall provide for forfeiture penalties, or customer rebates, refunds or credits, or both, and shall establish forfeiture, rebate, refund, and credit guidelines with respect to violations of such rules. Such guidelines shall-- [<-Struck out]

[Struck out->] `(i) provide for increased forfeiture penalties for repeated violations of the standards in such rules; and [<-Struck out]

[Struck out->] `(ii) establish procedures by which any forfeiture penalty assessed by the Commission under this subsection shall be paid by the cable operator directly to the franchising authority affected by the violation. [<-Struck out]

[Struck out->] `(4) COMPLAINTS- [<-Struck out]

[Struck out->] `(A) IN GENERAL- Any person may file a complaint with respect to an alleged violation of the Commission's revised consumer protection rules in a franchise area by a cable operator franchised under this section-- [<-Struck out]

[Struck out->] `(i) with the franchising authority in such area; or [<-Struck out]

[Struck out->] `(ii) with the Commission. [<-Struck out]

[Struck out->] `(B) LOCAL FRANCHISING AUTHORITY PROCEDURE- On its own motion or at the request of any person, a franchising authority for a franchise area may-- [<-Struck out]

[Struck out->] `(i) initiate its own complaint proceeding with respect to such an alleged violation;

or [<-Struck out]

[Struck out->] `(ii) file a complaint with the Commission regarding such an alleged violation. [<-Struck out]

[Struck out->] `(C) TIMING- The Commission or the franchising authority conducting a proceeding under this paragraph shall render a decision on any complaint filed under this paragraph within 90 days of its filing. [<-Struck out]

[Struck out->] `(5) LOCAL FRANCHISING ORDERS- [<-Struck out]

[Struck out->] `(A) REQUIRING COMPLIANCE- In a proceeding commenced by a franchising authority, a franchising authority may issue an order requiring compliance with the Commission's revised consumer protection rules, but a franchising authority may not create any new standard or regulation, or expand upon or modify the Commission's revised consumer protection rules. [<-Struck out]

[Struck out->] `(B) ACCESS TO RECORDS- In such a proceeding, the franchising authority may issue an order requiring the filing of any data, documents, or records (including any contract, agreement, or arrangement between the subscriber and the cable operator) that are directly related to the alleged violation. [<-Struck out]

[Struck out->] `(C) COST OF FRANCHISING AUTHORITY ORDERS- A franchising authority may charge a cable operator franchised under this section a nominal fee to cover the costs of issuing orders under this paragraph. [<-Struck out]

[Struck out->] `(6) COMMISSION REMEDIES; APPEALS- [<-Struck out]

[Struck out->] `(A) REMEDIES- An order of a franchising authority under this subsection shall be enforced by the Commission under this Act if-- [<-Struck out]

[Struck out->] `(i) the order is not appealed to the Commission; [<-Struck out]

[Struck out->] `(ii) the Commission does not agree to grant review during the 30-day period described in

subparagraph (B); or [<-Struck out]

[Struck out->] `(iii) the order is sustained on appeal by the Commission. [<-Struck out]

[Struck out->] `(B) APPEALS- Any party may file a notice of appeal of an order of a franchising authority under this subsection with the Commission, and shall transmit a copy of such notice to the other parties to the franchising authority proceeding. Such appeal shall be deemed denied at the end of the 30-day period beginning on the date of the filing unless the Commission agrees within such period to grant review of the appeal. [<-Struck out]

[Struck out->] `(C) TIMING- After the filing of a notice of appeal under subparagraph (B), if such notice is not denied by operation of such subparagraph, the Commission shall render a decision within 90 days of such filing. [<-Struck out]

[Struck out->] `(7) ANNUAL REPORT- [<-Struck out]

[Struck out->] `(A) IN GENERAL- Not later than 1 year after the date of enactment of this section, and annually thereafter, the Commission shall submit a report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the implementation of this subsection, including the following: [<-Struck out]

[Struck out->] `(i) The number of complaints filed with franchising authorities under clause (4) (A) (i). [<-Struck out]

[Struck out->] `(ii) Any trends concerning complaints, such as increases in the number of particular types of complaints or in new types of complaints. [<-Struck out]

[Struck out->] `(iii) The timeliness of the response of such franchising authorities and the results of the complaints filed with such franchising authorities, if not appealed to the Commission. [<-Struck out]

[Struck out->] `(iv) The number of complaints filed with the Commission under clause (4) (A) (ii). [<-Struck out]

out]

[Struck out->] `(v) The number of appeals filed with the Commission under paragraph (6)(B) and the number of such appeals which the Commission agreed to hear. [<-Struck out]

[Struck out->] `(vi) The timeliness of the Commission's responses to such complaints and appeals. [<-Struck out]

[Struck out->] `(vii) The results of such complaints and appeals filed with the Commission. [<-Struck out]

[Struck out->] `(B) SUBMISSION OF INFORMATION BY FRANCHISING AUTHORITIES- The Commission may request franchising authorities to submit information about the complaints filed with the franchising authorities under subparagraph (4)(A)(i), including the number of such complaints and the timeliness of the response and the results of such complaints. [<-Struck out]

[Struck out->] `(8) DEFINITION- For purposes of this subsection, the term 'Commission's revised consumer protection rules' means the national consumer protection and customer service rules under section 632(b) as revised by the Commission pursuant to paragraph (2) of this subsection. [<-Struck out]

[Struck out->] `(h) Antidiscrimination- [<-Struck out]

[Struck out->] `(1) PROHIBITION- A cable operator with a national franchise under this section to provide cable service in a franchise area shall not deny access to its cable service to any group of potential residential cable service subscribers in such franchise area because of the income of that group. [<-Struck out]

[Struck out->] `(2) ENFORCEMENT- [<-Struck out]

[Struck out->] `(A) COMPLAINT- If a franchising authority in a franchise area has reasonable cause to believe that a cable operator is in violation of this subsection with respect to such franchise area, the franchising authority may, after complying with subparagraph (B), file a complaint with the Commission alleging such violation. [<-Struck out]



[Struck out->] `(B) NOTICE BY FRANCHISING AUTHORITY- Before filing a complaint with the Commission under subparagraph (A), a franchising authority-- [<-Struck out]

[Struck out->] `(i) shall give notice of each alleged violation to the cable operator; [<-Struck out]

[Struck out->] `(ii) shall provide a period of not less than 30 days for the cable operator to respond to such allegations; and [<-Struck out]

[Struck out->] `(iii) during such period, may require the cable operator to submit a written response stating the reasons why the operator has not violated this subsection. [<-Struck out]

[Struck out->] `(C) BIENNIAL REPORT- A cable operator with a national franchise under this section for a franchise area, not later than 180 days after the effective date of such national franchise, and biennially thereafter, shall submit a report to the Commission and the franchising authority in the franchise area-- [<-Struck out]

[Struck out->] `(i) identifying the geographic areas in the franchise area where the cable operator offers cable service; and [<-Struck out]

[Struck out->] `(ii) describing the cable operator's progress in extending cable service to other areas in the franchise area. [<-Struck out]

[Struck out->] `(D) NOTICE BY COMMISSION- Upon receipt of a complaint under this paragraph alleging a violation of this subsection by a cable operator, the Commission shall give notice of the complaint to the cable operator. [<-Struck out]

[Struck out->] `(E) INVESTIGATION- In investigating a complaint under this paragraph, the Commission may require a cable operator to disclose to the Commission such information and documents as the Commission deems necessary to determine whether the cable operator is in compliance with this subsection. The Commission shall maintain the confidentiality of any information or document collected under this subparagraph. [<-Struck out]

[Struck out->] `(F) DEADLINE FOR RESOLUTION OF COMPLAINTS- Not more than 60 days after the Commission receives a complaint under this paragraph, the Commission shall issue a determination with respect to each violation alleged in the complaint. [<-Struck out]

[Struck out->] `(G) DETERMINATION- If the Commission determines (in response to a complaint under this paragraph or on its own initiative) that a cable operator with a franchise under this section to provide cable service in a franchise area has denied access to its cable service to a group of potential residential cable service subscribers in such franchise area because of the income of that group, the Commission shall ensure that the cable operator extends access to that group within a reasonable period of time. [<-Struck out]

[Struck out->] `(H) REMEDIES- [<-Struck out]

[Struck out->] `(i) IN GENERAL- This subsection shall be enforced by the Commission under titles IV and V. [<-Struck out]

[Struck out->] `(ii) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation of this subsection shall be \$750,000 for each day of the violation. [<-Struck out]

[Struck out->] `(iii) PAYMENT OF PENALTIES TO FRANCHISING AUTHORITY- The Commission shall order any cable operator subject to a forfeiture penalty under this subsection to pay the penalty directly to the franchising authority involved. [<-Struck out]

[Struck out->] `(i) Child Pornography- Not later than 180 days after the date of enactment of this section, the Commission shall promulgate regulations to require a cable operator with a national franchise under this section to prevent the distribution of child pornography (as such term is defined in section 254(h)(7)(F)) over its network. [<-Struck out]

[Struck out->] `(j) Leased Access- The provisions of section 612(i) regarding the carriage of programming from a qualified minority programming source or from any qualified educational programming source shall apply to a cable operator franchised under this section to provide cable service in a franchise area. [<-Struck out]

out]

[Struck out->] `(k) Applicability of Other Provisions- The provisions of this title that apply to a cable operator shall apply in a franchise area to a person or group with a national franchise under this section to provide cable service in such franchise area, except that the following sections shall not apply in a franchise area to a person or group franchised under this section in such franchise area, or confer any authority to regulate or impose obligations on such person or group in such franchise area: Sections 611(a), 611(b), 611(c), 613(a), 617, 621 (other than subsections (b)(3)(A), (b)(3)(B), (b)(3)(C), and (c)), 624(b), 624(c), 624(h), 625, 626, 627, and 632(a). [<-Struck out]

[Struck out->] `(l) Emergency Alerts- Nothing in this section shall be construed to prohibit a State or local government from accessing the emergency alert system of a cable operator with a franchise under this section in the area served by the State or local government to transmit local or regional emergency alerts. [<-Struck out]

[Struck out->] `(m) Reporting, Records, and Audits- [<-Struck out]

[Struck out->] `(1) REPORTING- A cable operator with a franchise under this section to provide cable service in a franchise area shall make such periodic reports to the Commission and the franchising authority for such franchise area as the Commission may require to verify compliance with the fee obligations of subsections (c)(1) and (e)(2). [<-Struck out]

[Struck out->] `(2) AVAILABILITY OF BOOKS AND RECORDS- Upon request under paragraph (3) by a franchising authority for a franchise area, and upon request by the Commission, a cable operator with a national franchise for such franchise area shall make available its books and records to periodic audit by such franchising authority or the Commission, respectively. [<-Struck out]

[Struck out->] `(3) FRANCHISING AUTHORITY AUDIT PROCEDURE- A franchising authority may, upon reasonable written request, but no more than once in any 12-month period, review the business records of such cable operator to the extent reasonably necessary to ensure payment of the fees required by subsections (c)(1) and (e)(2). Such review may include the methodology used by such cable operator to assign portions of the revenue from cable service that may be bundled or

functionally integrated with other services, capabilities, or applications. Such review shall be conducted in accordance with procedures established by the Commission. [<-Struck out]

[Struck out->] `(4) COST RECOVERY- [<-Struck out]

[Struck out->] `(A) To the extent that the review under paragraph (3) identifies an underpayment of an amount meeting the minimum percentage specified in subparagraph (B) of the fee required under subsection (c)(1) or (e)(2) for the period of review, the cable operator shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party, as determined by the Commission, with respect to such fee. The costs of any contingency fee arrangement between the franchising authority and the independent reviewer shall not be subject to reimbursement. [<-Struck out]

[Struck out->] `(B) The Commission shall determine by rule the minimum percentage underpayment that requires cost reimbursement under subparagraph (A). [<-Struck out]

[Struck out->] `(5) LIMITATION- Any fee that is not reviewed by a franchising authority within 3 years after it is paid or remitted shall not be subject to later review by the franchising authority under this subsection and shall be deemed accepted in full payment by the franchising authority. [<-Struck out]

[Struck out->] `(6) FEE DISPUTE RESOLUTION- [<-Struck out]

[Struck out->] `(A) COMPLAINT- A franchising authority or a cable operator may file a complaint at the Commission to resolve a dispute between such authority and operator with respect to the amount of any fee required under subsection (c)(1) or (e)(2) if-- [<-Struck out]

[Struck out->] `(i) the franchising authority or the cable operator provides the other entity written notice of such dispute; and [<-Struck out]

[Struck out->] `(ii) the franchising authority and the cable operator have not resolved the dispute within 90 calendar days after receipt of such notice. [<-Struck out]

[Struck out->] `(B) MEETINGS- Within 30 calendar days after receipt of notice of a dispute provided pursuant to subparagraph (A)(i), representatives of the franchising authority and the cable operator, with authority to resolve the dispute, shall meet to attempt to resolve the dispute. [<-Struck out]

[Struck out->] `(C) LIMITATION- A complaint under subparagraph (A) shall be filed not later than 3 years after the end of the period to which the disputed amount relates, unless such time is extended by written agreement between the franchising authority and cable operator. [<-Struck out]

[Struck out->] `(D) RESOLUTION- The Commission shall issue an order resolving any complaint filed under subparagraph (A) within 90 days of filing. [<-Struck out]

[Struck out->] `(n) Access to Programming for Shared Facilities-  
[<-Struck out]

[Struck out->] `(1) PROHIBITION- A cable programming vendor in which a cable operator has an attributable interest shall not deny a cable operator with a national franchise under this section access to video programming solely because such cable operator with a national franchise uses a headend for its cable system that is also used, under a shared ownership or leasing agreement, as the headend for another cable system.  
[<-Struck out]

[Struck out->] `(2) DEFINITION- The term 'cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of video programming which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers. [<-Struck out]

[Struck out->] `(o) Gross Revenues- As used in this section: [<-Struck out]

[Struck out->] `(1) IN GENERAL- Subject to paragraphs (2) and (3), the term 'gross revenues' means all consideration of any kind or nature, including cash, credits, property, and in-kind contributions (services or goods) received by the cable operator from the provision of cable service within the franchise area. [<-Struck out]

[Struck out->] `(2) INCLUDED ITEMS- Subject to paragraph (3), the term `gross revenues' shall include the following: [<-Struck out]

[Struck out->] `(A) all charges and fees paid by subscribers for the provision of cable service, including fees attributable to cable service when sold individually or as part of a package or bundle, or functionally integrated, with services other than cable service; [<-Struck out]

[Struck out->] `(B) any franchise fee imposed on the cable operator that is passed on to subscribers; [<-Struck out]

[Struck out->] `(C) compensation received by the cable operator for promotion or exhibition of any products or services over the cable service, such as on `home shopping' or similar programming; [<-Struck out]

[Struck out->] `(D) revenue received by the cable operator as compensation for carriage of video programming or other programming service on that operator's cable service; [<-Struck out]

[Struck out->] `(E) all revenue derived from the cable operator's cable service pursuant to compensation arrangements for advertising; and [<-Struck out]

[Struck out->] `(F) any advertising commissions paid to an affiliated third party for cable services advertising. [<-Struck out]

[Struck out->] `(3) EXCLUDED ITEMS- The term `gross revenues' shall not include the following: [<-Struck out]

[Struck out->] `(A) any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt; [<-Struck out]

[Struck out->] `(B) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset by subparagraph (A) and to the extent such refund, rebate, credit, or discount is attributable to the cable service; [<-Struck out]

[Struck out->] `(C) subject to paragraph (4), any revenues

received by the cable operator or its affiliates from the provision of services or capabilities other than cable service, including telecommunications services, Internet access services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with cable service; [~~Struck out~~]

[~~Struck out->~~] `(D) any revenues received by the cable operator or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing; [~~Struck out~~]

[~~Struck out->~~] `(E) any amounts attributable to the provision of cable service to customers at no charge, including the provision of such service to public institutions without charge; [~~Struck out~~]

[~~Struck out->~~] `(F) any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a Federal, State, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes and utility user taxes; [~~Struck out~~]

[~~Struck out->~~] `(G) any forgone revenue from the provision of cable service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue; [~~Struck out~~]

[~~Struck out->~~] `(H) sales of capital assets or surplus equipment; [~~Struck out~~]

[~~Struck out->~~] `(I) reimbursement by programmers of marketing costs actually incurred by the cable operator for the introduction of new programming; and [~~Struck out~~]

[~~Struck out->~~] `(J) the sale of cable services for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect thereto. [~~Struck out~~]

[~~Struck out->~~] `(4) FUNCTIONALLY INTEGRATED SERVICES- In the case of a cable service that is bundled or integrated functionally with other services, capabilities, or

applications, the portion of the cable operator's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the cable operator can reasonably identify the division or exclusion of such revenue from its books and records that are kept in the regular course of business. [<-Struck out]

[Struck out->] `(5) AFFILIATE REVENUE- Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of such revenue as revenue of the affiliate has the effect (whether intentional or unintentional) of evading the payment of franchise fees which would otherwise be paid for cable service. [<-Struck out]

[Struck out->] `(6) AFFECT ON OTHER LAW- Nothing in this section is intended to limit a franchising authority's rights pursuant to section 622(h). [<-Struck out]

[Struck out->] `(p) Additional Definitions- For purposes of this section: [<-Struck out]

[Struck out->] `(1) CABLE OPERATOR- The term 'cable operator' has the meaning provided in section 602(5) except that such term also includes a person or group with a national franchise under this section. [<-Struck out]

[Struck out->] `(2) FRANCHISE FEE- [<-Struck out]

[Struck out->] `(A) The term 'franchise fee' includes any fee or assessment of any kind imposed by a franchising authority or other governmental entity on a person or group providing cable service in a franchise area under this section, or on a subscriber of such person or group, or both, solely because of their status as such. [<-Struck out]

[Struck out->] `(B) The term 'franchise fee' does not include-- [<-Struck out]

[Struck out->] `(i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and a person or group providing cable service in a franchise area under this section (or the services of such person or group) but not including a fee or assessment which is unduly discriminatory against such person or group or the subscribers of such person or group); [<-Struck out]



out]

[Struck out->] `(ii) any fee assessed under subsection (e)(2) for support of public, educational, and governmental use and institutional networks (as such term is defined in section 611(f)); [<-Struck out]

[Struck out->] `(iii) requirements or charges under subsection (f)(2) for the management of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or [<-Struck out]

[Struck out->] `(iv) any fee imposed under title 17, United States Code. [<-Struck out]

[Struck out->] `(3) INTERNET ACCESS SERVICE- The term 'Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet. [<-Struck out]

[Struck out->] `(4) UNIT OF GENERAL LOCAL GOVERNMENT- The term 'unit of general local government' means-- [<-Struck out]

[Struck out->] `(A) a county, township, city, or political subdivision of a county, township, or city; [<-Struck out]

[Struck out->] `(B) the District of Columbia; or [<-Struck out]

[Struck out->] `(C) the recognized governing body of an Indian tribe or Alaskan Native village that carries out substantial governmental duties and powers.'. [<-Struck out]

[Struck out->] (b) Implementing Regulations- The Federal Communications Commission shall prescribe regulations to implement the amendment made by subsection (a) within 120 days after the date of enactment of this Act. [<-Struck out]

## **[Struck out->] SEC. 102. DEFINITIONS. [<-Struck out]**

[Struck out->] Section 602 of the Communications Act of 1934 (47 U.S.C. 522) is amended-- [<-Struck out]

[Struck out->] (1) in paragraph (4), by inserting before the

semicolon at the end the following: `, or its equivalent as determined by the Commission'; [<-Struck out]

[Struck out->] (2) in paragraph (5)(A), by inserting `(regardless of whether such person or group provides such service separately or combined with a telecommunications service or information service)' after `over a cable system'; [<-Struck out]

[Struck out->] (3) by striking paragraph (6) and inserting the following: [<-Struck out]

[Struck out->] `(6) the term `cable service' means-- [<-Struck out]

[Struck out->] `(A)(i) the one-way transmission to subscribers of (I) video programming, or (II) other programming service; and [<-Struck out]

[Struck out->] `(ii) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service; or [<-Struck out]

[Struck out->] `(B) the transmission to subscribers of video programming or other programming service provided through wireline facilities located at least in part in the public rights-of-way, without regard to delivery technology, including Internet protocol technology, except to the extent that such video programming or other programming service is provided as part of-- [<-Struck out]

[Struck out->] `(i) a commercial mobile service (as such term is defined in section 332(d)); or [<-Struck out]

[Struck out->] `(ii) an Internet access service (as such term is defined in section 630(p));'; [<-Struck out]

[Struck out->] (4) in paragraph (7)(D), by inserting after `section 653 of this title' the following; `except in a franchise area in which such system is used to provide cable service under a national franchise pursuant to section 630'; [<-Struck out]

[Struck out->] (5) in paragraph (9)-- [<-Struck out]

[Struck out->] (A) by inserting '(A)' after 'means'; and  
[<-Struck out]

[Struck out->] (B) by inserting before the semicolon at the end the following: '; and (B) a national franchise that is effective under section 630 on the basis of a certification with the Commission'; and [<-Struck out]

[Struck out->] (6) in paragraph (10), by inserting before the semicolon at the end the following: ', but does not include the Commission with respect to a national franchise under section 630'. [<-Struck out]

**[Struck out->] SEC. 103. MONITORING AND REPORTING. [<-Struck out]**

[Struck out->] (a) Report on Cable Service Deployment- The Federal Communications Commission shall, commencing not later than one year after the date of enactment of this Act, issue a report annually on the deployment of cable service pursuant to the amendments made by this title. In its report, the Commission shall describe in detail-- [<-Struck out]

[Struck out->] (1) with respect to deployment by new cable operators-- [<-Struck out]

[Struck out->] (A) the progress of deployment of such service within the telephone service area of cable operators, if the operator is also an incumbent local exchange carrier, including a comparison with the progress of deployment of broadband services not defined as cable services within such telephone service area; [<-Struck out]

[Struck out->] (B) the number of franchise areas in which such service is being deployed and offered; [<-Struck out]

[Struck out->] (C) where such service is not being deployed and offered; and [<-Struck out]

[Struck out->] (D) the number and locations of franchise areas in which the cable operator is serving only a portion of the franchise area, and the extent of such service within the franchise area; [<-Struck out]

[Struck out->] (2) the number and locations of franchise areas in which a cable operator with a franchise under section 621

of the Communications Act of 1934 (47 U.S.C. 541) on the date of enactment of this Act withdraws service from any portion of the franchise area for which it previously offered service, and the extent of such withdrawal of service within the franchise area; [~~Struck out~~]

[~~Struck out~~->] (3) the rates generally charged for cable service; [~~Struck out~~]

[~~Struck out~~->] (4) the rates charged by overlapping, competing multichannel video programming distributors and by competing cable operators for comparable service or cable service; [~~Struck out~~]

[~~Struck out~~->] (5) the average household income of those franchise areas or portions of franchise areas where cable services is being offered, and the average household income of those franchise areas, or portions of franchise areas, where cable service is not being offered; [~~Struck out~~]

[~~Struck out~~->] (6) the proportion of rural households to urban households, as defined by the Bureau of the Census, in those franchise areas or portions of franchise areas where cable service is being offered, and the proportion of rural households to urban households in those franchise areas or portions of franchise areas where cable service is not being offered, including a State-by-State breakdown of such data and a comparison with the overall ratio of rural and urban households in each State; and [~~Struck out~~]

[~~Struck out~~->] (7) a comparison of the services and rates in areas served by national franchisees under section 630 of the Communications Act of 1934 (as added by section 101 of this Act) and the services and rates in other areas. [~~Struck out~~]

[~~Struck out~~->] (b) Cable Operator Reports- The Federal Communications Commission is authorized-- [~~Struck out~~]

[~~Struck out~~->] (1) to require cable operators to report to the Commission all of the information that the Commission needs to compile the report required by this section; and [~~Struck out~~]

[~~Struck out~~->] (2) to require cable operators to file the same information with the relevant franchising authorities and State commissions. [~~Struck out~~]

**[Struck out->] SEC. 104. RULE OF CONSTRUCTION. [<-Struck out]**

[Struck out->] Nothing in this Act or the amendments made by this Act shall affect the application or interpretation of section 224 of the Communications Act of 1934 (47 U.S.C. 224). [<-Struck out]

**[Struck out->] TITLE II--ENFORCEMENT OF BROADBAND POLICY STATEMENT [<-Struck out]**

**[Struck out->] SEC. 201. ENFORCEMENT OF BROADBAND POLICY STATEMENT. [<-Struck out]**

[Struck out->] Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is amended by adding at the end the following new section: [<-Struck out]

**[Struck out->] `SEC. 715. ENFORCEMENT OF BROADBAND POLICY STATEMENT. [<-Struck out]**

[Struck out->] `(a) Authority- The Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein. [<-Struck out]

[Struck out->] `(b) Enforcement- [<-Struck out]

[Struck out->] `(1) IN GENERAL- This section shall be enforced by the Commission under titles IV and V. A violation of the Commission's broadband policy statement or the principles incorporated therein shall be treated as a violation of this Act. [<-Struck out]

[Struck out->] `(2) MAXIMUM FORFEITURE PENALTY- For purposes of section 503, the maximum forfeiture penalty applicable to a violation described in paragraph (1) of this subsection shall be \$500,000 for each violation. [<-Struck out]

[Struck out->] `(3) ADJUDICATORY AUTHORITY- The Commission shall have exclusive authority to adjudicate any complaint alleging a violation of the broadband policy statement and the principles incorporated therein. The Commission shall complete an adjudicatory proceeding under this subsection not later than 90 days after receipt of the complaint. If, upon completion of an adjudicatory proceeding pursuant to this section, the Commission determines that such a violation has occurred, the Commission shall have authority to adopt an order to require the entity subject to the complaint to

comply with the broadband policy statement and the principles incorporated therein. Such authority shall be in addition to the authority specified in paragraph (1) to enforce this section under titles IV and V. In addition, the Commission shall have authority to adopt procedures for the adjudication of complaints alleging a violation of the broadband policy statement or principles incorporated therein. [<-Struck out]

[Struck out->] `(4) LIMITATION- Notwithstanding paragraph (1), the Commission's authority to enforce the broadband policy statement and the principles incorporated therein does not include authorization for the Commission to adopt or implement rules or regulations regarding enforcement of the broadband policy statement and the principles incorporated therein, with the sole exception of the authority to adopt procedures for the adjudication of complaints, as provided in paragraph (3). [<-Struck out]

[Struck out->] `(c) Study- Within 180 days after the date of enactment of this section, the Commission shall conduct, and submit to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, a study regarding whether the objectives of the broadband policy statement and the principles incorporated therein are being achieved. [<-Struck out]

[Struck out->] `(d) (1) Rule of Construction- Nothing in this section shall be construed to modify, impair, or supersede the applicability of the antitrust laws or the jurisdiction of the district courts of the United States to hear claims arising under the antitrust laws. [<-Struck out]

[Struck out->] `(2) Definition of Antitrust Laws- The term 'antitrust laws' has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition. [<-Struck out]

[Struck out->] `(e) Definition- For purposes of this section, the term 'Commission's broadband policy statement' means the policy statement adopted on August 5, 2005, and issued on September 23, 2005, in the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, and other Matters (FCC 05-151; CC Docket No. 02-33; CC Docket No. 01-337; CC Docket Nos. 95-20, 98-10; GN Docket No. 00-185; CS Docket No. 02-52).'. [<-Struck out]

**[Struck out->] TITLE III--VOIP/911 [<-Struck out]****[Struck out->] SEC. 301. EMERGENCY SERVICES; INTERCONNECTION. [<-Struck out]**

[Struck out->] Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 715 (as added by section 201 of this Act) the following new sections: [<-Struck out]

**[Struck out->] `SEC. 716. EMERGENCY SERVICES. [<-Struck out]**

[Struck out->] `(a) 911 and E-911 Services- [<-Struck out]

[Struck out->] `(1) IN GENERAL- Each VOIP service provider has a duty to ensure that 911 and E-911 services are provided to subscribers of VOIP services. [<-Struck out]

[Struck out->] `(2) USE OF EXISTING REGULATIONS- A VOIP service provider that complies with the Commission's regulations requiring providers of VOIP service to supply 911 and E911 capabilities to their customers (Report and Order in WC Docket Nos. 04-36 and 05-196) and that are in effect on the date of enactment of this section shall be considered to be in compliance with the requirements of this section, other than subsection (c), until such regulations are modified or superseded by subsequent regulations. [<-Struck out]

[Struck out->] `(b) Non-Discriminatory Access to Capabilities- [<-Struck out]

[Struck out->] `(1) ACCESS- Each incumbent local exchange carrier (as such term is defined in section 251(h)) or government entity with ownership or control of the necessary E-911 infrastructure shall provide any requesting VOIP service provider with nondiscriminatory access to such infrastructure. Such carrier or entity shall provide access to the infrastructure at just and reasonable, nondiscriminatory rates, terms, and conditions. Such access shall be consistent with industry standards established by the National Emergency Number Association or other applicable industry standards organizations. [<-Struck out]

[Struck out->] `(2) ENFORCEMENT- The Commission or a State commission may enforce the requirements of this subsection and the Commission's regulations thereunder. A VOIP service provider may obtain access to such infrastructure pursuant to

section 717 by asserting the rights described in such section. [<-Struck out]

[Struck out->] `(c) New Customers- A VOIP service provider shall make 911 service available to new customers within a reasonable time in accordance with the following requirements: [<-Struck out]

[Struck out->] `(1) CONNECTION TO SELECTIVE ROUTER- For all new customers not within the geographic areas where a VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider, or its third party vendor, shall have no more than 30 days from the date the VOIP provider has acquired a customer to order service providing connectivity to the selective router so that 911 service, or E911 service where the PSAP is capable of receiving and processing such information, can be provided through the selective router. [<-Struck out]

[Struck out->] `(2) INTERIM SERVICE- For all new customers not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide 911 service through-- [<-Struck out]

[Struck out->] `(A) an arrangement mutually agreed to by the VOIP service provider and the PSAP or PSAP governing authority; or [<-Struck out]

[Struck out->] `(B) an emergency response center with national call routing capabilities. [<-Struck out]

[Struck out->] Such service shall be provided 24 hours a day from the date a VOIP service provider has acquired a customer until the VOIP service provider can provide 911 service to the geographically appropriate PSAP. [<-Struck out]

[Struck out->] `(3) NOTICE- Before providing service to any new customer not within the geographic areas where the VOIP service provider can immediately provide 911 service to the geographically appropriate PSAP, a VOIP service provider shall provide such customer with clear notice that 911 service will be available only as described in paragraph (2). [<-Struck out]

[Struck out->] `(4) RESTRICTION ON ACQUISITION OF NEW CUSTOMERS- A VOIP service provider may not acquire new customers within a geographic area served by a selective



router if, within 180 days of first acquiring a new customer in the area served by the selective router, the VOIP service provider does not provide 911 service, or E911 service where the PSAP is capable of receiving and processing such information, to the geographically appropriate PSAP for all existing customers served by the selective router. [<-Struck out]

[Struck out->] `(5) ENFORCEMENT: NO FIRST WARNINGS- Paragraph (5) of section 503(b) shall not apply to the assessment of forfeiture penalties for violations of this subsection or the regulations thereunder. [<-Struck out]

[Struck out->] `(d) State Authority- Nothing in this Act or any Commission regulation or order shall prevent the imposition on or collection from a VOIP service provider, of any fee or charge specifically designated or presented as dedicated by a State, political subdivision thereof, or Indian tribe on an equitable, and non-discriminatory basis for the support of 911 and E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 and E-911 services or enhancements of such services. [<-Struck out]

[Struck out->] `(e) Feasibility- In establishing requirements or obligations under subsections (a) and (b), the Commission shall ensure that such standards impose requirements or obligations on VOIP service providers and entities with ownership or control of necessary E-911 infrastructure that the Commission determines are technologically and operationally feasible. In determining the requirements and obligations that are technologically and operationally feasible, the Commission shall take into consideration available industry technological and operational standards. [<-Struck out]

[Struck out->] `(f) Progress Reports- To the extent that the Commission concludes that it is not technologically or operationally feasible for VOIP service providers to comply with E-911 requirements or obligations, then the Commission shall submit reports to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate on the progress in attaining and deploying E-911 service. Such reports shall be submitted semiannually until the Commission concludes that it is technologically and operationally feasible for all VOIP service providers to comply with E-911 requirements and obligations. Such reports may include any recommendations the Commission considers appropriate to encourage the migration of emergency services to

TCP/IP protocol or other advanced services. [<-Struck out]

[Struck out->] `(g) Access to Information- The Commission shall have the authority to compile a list of PSAP contact information, testing procedures, and classes and types of services supported by PSAPs, or other information concerning the necessary E-911 infrastructure, for the purpose of assisting providers in complying with the requirements of this section. [<-Struck out]

[Struck out->] `(h) Emergency Routing Number Administrator- Within 30 days after the date of enactment of this section, the Federal Communications Commission shall establish an emergency routing number administrator to enable VOIP service providers to acquire non-dialable pseudo-automatic number identification numbers for 9-1-1 routing purposes on a national scale. The Commission may adopt such rules and practices as are necessary to guide such administrator in the fair and expeditious assignment of these numbers. [<-Struck out]

[Struck out->] `(i) Emergency Response Systems- [<-Struck out]

[Struck out->] `(1) NOTICE PRIOR TO INSTALLATION OR NUMBER ACTIVATION OF VOIP SERVICE- Prior to installation or number activation of VOIP service for a customer, a VOIP service provider shall provide clear and conspicuous notice to the customer that-- [<-Struck out]

[Struck out->] `(A) such customer should arrange with his or her emergency response system provider, if any, to test such system after installation; [<-Struck out]

[Struck out->] `(B) such customer should notify his or her emergency response system provider after VOIP service is installed; and [<-Struck out]

[Struck out->] `(C) a battery backup is required for customer premises equipment installed in connection with the VOIP service in order for the signaling of such system to function in the event of a power outage. [<-Struck out]

[Struck out->] `(2) DEFINITION- In this subsection: [<-Struck out]

[Struck out->] `(A) The term `emergency response system' means an alarm or security system, or personal security or medical monitoring system, that is connected to an

emergency response center by means of a telecommunications carrier or VOIP service provider. [<-Struck out]

[Struck out->] `(B) The term `emergency response center' means an entity that monitors transmissions from an emergency response system. [<-Struck out]

[Struck out->] `(j) Migration to IP-Enabled Emergency Network- [<-Struck out]

[Struck out->] `(1) NATIONAL REPORT- No more than 18 months after the date of the enactment of this section, the National 911 Implementation and Coordination Office shall develop a report to Congress on migrating to a national IP-enabled emergency network capable of receiving and responding to all citizen activated emergency communications. [<-Struck out]

[Struck out->] `(2) CONTENTS OF REPORT- The report required by paragraph (1) shall-- [<-Struck out]

[Struck out->] `(A) outline the potential benefits of such a migration; [<-Struck out]

[Struck out->] `(B) identify barriers that must be overcome and funding mechanisms to address those barriers; [<-Struck out]

[Struck out->] `(C) include a proposed timetable, an outline of costs and potential savings; [<-Struck out]

[Struck out->] `(D) provide recommendations on specific legislative language, [<-Struck out]

[Struck out->] `(E) provide recommendations on any legislative changes, including updating definitions, to facilitate a national IP-enabled emergency network; and [<-Struck out]

[Struck out->] `(F) assess, collect, and analyze the experiences of the PSAPs and related public safety authorities who are conducting trial deployments of IP-enabled emergency networks as of the date of enactment of this section. [<-Struck out]

[Struck out->] `(3) CONSULTATION- In developing the report

required by paragraph (1), the Office shall consult with representatives of the public safety community, technology and telecommunications providers, and others it deems appropriate. [<-Struck out]

[Struck out->] `(k) Implementation- [<-Struck out]

[Struck out->] `(1) DEADLINE- The Commission shall prescribe regulations to implement this section within 120 days after the date of enactment of this section. [<-Struck out]

[Struck out->] `(2) LIMITATION- Nothing in this section shall be construed to permit the Commission to issue regulations that require or impose a specific technology or technological standard. [<-Struck out]

[Struck out->] `(1) Definitions- For purposes of this section: [<-Struck out]

[Struck out->] `(1) VOIP SERVICE- The term `VOIP service' means a service that-- [<-Struck out]

[Struck out->] `(A) provides real-time 2-way voice communications transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol (including when the voice communication is converted to or from TCP/IP protocol by the VOIP service provider and transmitted to the subscriber without use of circuit switching), for a fee or without a fee; [<-Struck out]

[Struck out->] `(B) is offered to the public, or such classes of users as to be effectively available to the public (whether part of a bundle of services or separately); and [<-Struck out]

[Struck out->] `(C) has the capability so that the service can originate traffic to, and terminate traffic from, the public switched telephone network. [<-Struck out]

[Struck out->] `(2) VOIP SERVICE PROVIDER- The term `VOIP service provider' means any person who provides or offers to provide a VOIP service. [<-Struck out]

[Struck out->] `(3) NECESSARY E-911 INFRASTRUCTURE- The term `necessary E-911 infrastructure' means the originating trucks to the selective routers, selective routers, databases (including automatic location information databases and

master street address guides), trunks, or other related facilities necessary for the delivery and completion of 911 and E-911 calls, or other 911 and E-911 equipment, facilities, databases, interfaces, and related capabilities specified by the Commission. [<-Struck out]

[Struck out->] `(4) NON-DIALABLE PSEUDO-AUTOMATIC NUMBER IDENTIFICATION NUMBER- The term `non-dialable pseudo-automatic number identification number' means a number, consisting of the same number of digits as numbers used for automatic number identification, that is not a North American Numbering Plan telephone directory number and that may be used in place of an automatic number identification number to convey special meaning. The special meaning assigned to the non-dialable pseudo-automatic number identification number is determined by nationally standard agreements, or by individual agreements, as necessary, between the system originating the call, intermediate systems handling and routing the call, and the destination system. [<-Struck out]

**[Struck out->] `SEC. 717. RIGHTS AND OBLIGATIONS OF VOIP SERVICE PROVIDERS. [<-Struck out]**

[Struck out->] `(a) In General- [<-Struck out]

[Struck out->] `(1) FACILITIES-BASED VOIP SERVICE PROVIDERS- A facilities-based VOIP service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights. [<-Struck out]

[Struck out->] `(2) VOIP SERVICE PROVIDERS- A VOIP service provider that is not a facilities-based VOIP service provider shall have only the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251(b), 251(e), and 252, if the provider elects to assert such rights. [<-Struck out]

[Struck out->] `(3) CLARIFYING TREATMENT OF VOIP SERVICE- A telecommunications carrier may use interconnection, services, and network elements obtained pursuant to sections 251 and 252 from an incumbent local exchange carrier (as such term is defined in section 251(h)) to exchange VOIP service traffic with such incumbent local exchange carrier regardless of the provider originating such VOIP service traffic, including an affiliate of such telecommunications carrier. [<-Struck out]

[Struck out->] `(b) Disabled Access- A VOIP service provider or a manufacturer of VOIP service equipment shall have the same rights, duties, and obligations as a telecommunications carrier or telecommunications equipment manufacturer, respectively, under sections 225, 255, and 710 of the Act. Within 1 year after the date of enactment of this Act, the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, shall prescribe such regulations as are necessary to implement this section. In implementing this subsection, the Commission shall consider whether a VOIP service provider or manufacturer of VOIP service equipment primarily markets such service or equipment as a substitute for telecommunications service, telecommunications equipment, customer premises equipment, or telecommunications relay services. [<-Struck out]

[Struck out->] `(c) Definitions- For purposes of this section: [<-Struck out]

[Struck out->] `(1) FACILITIES-BASED VOIP SERVICE PROVIDER- The term `facilities-based VOIP service provider' means an entity that provides VOIP service over a physical facility that terminates at the end user's location and which such entity or an affiliate owns or over which such entity or affiliate has exclusive use. An entity or affiliate shall be considered a facilities-based VOIP service provider only in those geographic areas where such terminating physical facilities are located. [<-Struck out]

[Struck out->] `(2) VOIP SERVICE PROVIDER; VOIP SERVICE- The terms `VOIP service provider' and `VOIP service' have the meanings given such terms by section 716(1).'. [<-Struck out]

**[Struck out->] SEC. 302. COMPENSATION AND CONTRIBUTION. [<-Struck out]**

[Struck out->] (a) Rule of Construction- Nothing in this Act (including the amendments made by this Act) shall be construed to exempt a VOIP service provider from requirements imposed by the Federal Communications Commission or a State commission on all VOIP service providers to-- [<-Struck out]

[Struck out->] (1) pay appropriate compensation for the transmission of a VOIP service over the facilities and equipment of another provider; or [<-Struck out]

[Struck out->] (2) contribute on an equitable and non-discriminatory basis to the preservation and advancement

of universal service. [~~Struck out~~]

[~~Struck out~~] (b) Definitions- As used in this section-- [~~Struck out~~]

[~~Struck out~~] (1) the terms 'VOIP service provider' and 'VOIP service' have the meanings given such terms in section 716(h) of the Communications Act of 1934, as added by section 301 of this Act; and [~~Struck out~~]

[~~Struck out~~] (2) the term 'State commission' has the meaning given such term in section 3 of the Communications Act of 1934 (47 U.S.C. 153). [~~Struck out~~]

**[~~Struck out~~] TITLE IV--MUNICIPAL PROVISION OF SERVICES [~~Struck out~~]**

**[~~Struck out~~] SEC. 401. GOVERNMENT AUTHORITY TO PROVIDE SERVICES. [~~Struck out~~]**

[~~Struck out~~] (a) In General- Neither the Communications Act of 1934 nor any State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider of telecommunications service, information service, or cable service (as such terms are defined in sections 3 and 602 of such Act) from providing such services to any person or entity. [~~Struck out~~]

[~~Struck out~~] (b) Competition Neutrality- Any State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that is, owns, controls, or is otherwise affiliated with a public provider of telecommunications service, information service, or cable service shall not grant any preference or advantage to any such provider. Such entity shall apply its ordinances, rules, and policies, including those relating to the use of public rights-of-way, permitting, performance bonding, and reporting without discrimination in favor of any such provider as compared to other providers of such services. [~~Struck out~~]

[~~Struck out~~] (c) Compliance With Other Laws not Affected- Nothing in this section shall exempt a public provider from any law or regulation that applies to providers of telecommunications service, information service, or cable service. [~~Struck out~~]

[~~Struck out~~] (d) Report- Not later than 1 year after the date of the enactment of this Act, the Federal Communications Commission shall submit to the Congress a report on the status of the

provision of telecommunications service, information service, and cable service by States and political subdivisions thereof. [<-Struck out]

[Struck out->] (e) Definition of Public Provider- For purposes of this section, the term 'public provider' means a State or political subdivision thereof, or any agency, authority, or instrumentality of a State or political subdivision thereof, that provides telecommunications service, information service, or cable service, or any entity that is owned, controlled, or is otherwise affiliated with such State or political subdivision thereof, or agency, authority, or instrumentality of a State or political subdivision thereof. [<-Struck out]

**[Struck out->] TITLE V--BROADBAND SERVICE [<-Struck out]**

**[Struck out->] SEC. 501. STAND-ALONE BROADBAND SERVICE. [<-Struck out]**

[Struck out->] Title VII of the Communications Act of 1934 (47 U.S.C. 601 et seq.) is further amended by adding after section 717 (as added by section 301 of this Act) the following new section: [<-Struck out]

**[Struck out->] `SEC. 718. STAND-ALONE BROADBAND SERVICE. [<-Struck out]**

[Struck out->] `(a) Prohibition- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service the provider offers, to purchase any cable service, telecommunications service, or VOIP service offered by the provider. [<-Struck out]

[Struck out->] `(b) Definitions- In this section: [<-Struck out]

[Struck out->] `(1) The term 'broadband service' means a two-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction. [<-Struck out]

[Struck out->] `(2) The term 'broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, by whatever technology and whether provided for a fee, in exchange for an explicit benefit, or for free. [<-Struck out]



[Struck out->] `(3) The term `VOIP service' has the meaning given such term by section 716(1)..' [<-Struck out]

**[Struck out->] SEC. 502. STUDY OF INTERFERENCE POTENTIAL OF BROADBAND OVER POWER LINE SYSTEMS. [<-Struck out]**

[Struck out->] Within 90 days after the date of enactment of this Act, the Federal Communications Commission shall conduct, and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a study of the interference potential of broadband over power line systems. [<-Struck out]

**[Struck out->] TITLE VI--SEAMLESS MOBILITY [<-Struck out]**

**[Struck out->] SEC. 601. DEVELOPMENT OF SEAMLESS MOBILITY. [<-Struck out]**

[Struck out->] (a) Streamlined Review- [<-Struck out]

[Struck out->] (1) The Commission shall further the development of seamless mobility. [<-Struck out]

[Struck out->] (2) Within 120 days after the date of enactment of this Act, the Commission shall implement a process for streamlined review and authorization of multi-mode devices that permit communication across multiple Internet protocol-enabled broadband platforms, facilities, and networks. [<-Struck out]

[Struck out->] (b) Study- The Commission shall undertake an inquiry to identify barriers to the achievement of seamless mobility. Within 180 days after the date of enactment of this Act, the Commission shall report to the Congress on its findings and its recommendations for steps to eliminate those barriers. [<-Struck out]

[Struck out->] (c) Definitions- For purposes of this section, the term `seamless mobility' means the ability of a communications device to select between and utilize multiple Internet protocol-enabled technology platforms, facilities, and networks in a real-time manner to provide a unified service. [<-Struck out]

**SECTION 1. SHORT TITLE.**

*This Act may be cited as the `Advanced Telecommunications and*

*Opportunities Reform Act' or the 'Communications Act of 2006'.*

## **SEC. 2. AMENDMENT OF COMMUNICATIONS ACT OF 1934.**

*Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).*

## **SEC. 3. TABLE OF CONTENTS.**

*The table of contents for this Act is as follows:*

*Sec. 1. Short title.*

*Sec. 2. Amendment of Communications Act of 1934.*

*Sec. 3. Table of contents.*

## **TITLE I--WAR ON TERRORISM**

### **Subtitle A--Call Home**

*Sec. 101. Telephone rates for members of armed forces deployed abroad.*

*Sec. 102. Repeal of existing authorization.*

### **Subtitle B--Interoperability**

*Sec. 151. Interoperable emergency communications.*

*Sec. 152. Transfer of Public Safety Grant Program to the Department of Homeland Security.*

*Sec. 153. Public safety interoperable communications grants.*

*Sec. 154. Eligibility of IP-enabled services.*

## **TITLE II--UNIVERSAL SERVICE REFORM; INTERCONNECTION**

*Sec. 201. Short title.*

### **Subtitle A--Contributions to Universal Service**

*Sec. 211. Stabilization of universal service funding.*

*Sec. 212. Modification of rural video service exemption.*

*Sec. 213. Interconnection.*

*Sec. 214. Treatment of substitute services under section 254(g).*

### ***Subtitle B--Distributions from Universal Service***

*Sec. 251. Encouraging broadband deployment.*

*Sec. 252. Establishment of broadband program.*

*Sec. 253. Competitive neutrality principle.*

*Sec. 254. Transition rules for modifications adversely affecting carriers.*

*Sec. 255. Eligibility guidelines.*

*Sec. 256. Primary line.*

*Sec. 257. Phantom traffic.*

*Sec. 258. Random audits.*

*Sec. 259. Integrity and accountability.*

*Sec. 260. Improving effectiveness of rural health care support mechanism.*

*Sec. 261. Communications services for libraries.*

*Sec. 262. USF support for insular areas.*

### ***TITLE III--STREAMLINING THE FRANCHISING PROCESS***

*Sec. 301. Short title.*

### ***Subtitle A--Updating the 1934 Act and Leveling the Regulatory Playing Field***

*Sec. 311. Application of title VI to video services and video service providers.*

*Sec. 312. Franchise applications; scope.*

*Sec. 313. Standard franchise application form.*

*Sec. 314. Definitions.*

*Sec. 315. Family tier study.*

*Sec. 316. Notice of inquiry on violent programming.*

### ***Subtitle B--Streamlining the Provision of Video Services***

*Sec. 331. Franchise requirements and related provisions.*

*Sec. 332. Renewal; revocation.*

*Sec. 333. PEG and institutional network obligations.*

*Sec. 334. Services, facilities, and equipment.*

*Sec. 335. Shared facilities.*

*Sec. 336. Consumer protection and customer service.*

*Sec. 337. Redlining.*

*Sec. 338. Application of section 503(b).*

*Sec. 339. Application of title VII cable provisions to video services.*

*Sec. 340. Children's Television Act amendment.*

### ***Subtitle C--Miscellaneous and Conforming Amendments***

*Sec. 351. Miscellaneous amendments.*

### ***Subtitle D--Effective Dates and Transition Rules***

*Sec. 381. Effective dates; phase-in.*

**TITLE IV--VIDEO CONTENT**

### ***Subtitle A--National Satellite***

*Sec. 401. Availability of certain licensed services in noncontiguous States.*

### Subtitle B--Video and Audio Flag

*Sec. 451. Short title.*

*Sec. 452. Protection of digital broadcast video content.*

*Sec. 453. Protection of digital audio broadcasting content.*

*Sec. 454. Digital Audio Review Board.*

## **TITLE V--MUNICIPAL BROADBAND**

*Sec. 501. Short title.*

*Sec. 502. State regulation of municipal broadband networks.*

## **TITLE VI--WIRELESS INNOVATION NETWORKS**

*Sec. 601. Short title.*

*Sec. 602. Eligible television spectrum made available for wireless use.*

## **TITLE VII--DIGITAL TELEVISION**

*Sec. 701. Analog and digital television sets and converter boxes; consumer education and requirements to reduce the government cost of the converter box program.*

*Sec. 702. Digital stream requirement for the blind.*

*Sec. 703. Status of international coordination.*

*Sec. 704. Certain border stations.*

## **TITLE VIII--PROTECTING CHILDREN**

*Sec. 801. Video transmission of child pornography.*

*Sec. 802. Additional child pornography amendments.*

*Sec. 803. Prevention of interactivity with commercial matter during children's programming.*

*Sec. 804. FCC study of bus-casting.*

## **TITLE IX--INTERNET CONSUMER BILL OF RIGHTS ACT**

*Sec. 901. Short title.*

*Sec. 902. Findings.*

*Sec. 903. Consumer Internet bill of rights.*

*Sec. 904. Application of the First Amendment.*

*Sec. 905. Stand-alone Internet service shall be offered to the public.*

*Sec. 906. Network security, worms, viruses, denial of service, parental controls, and blocking child pornography.*

*Sec. 907. Enforcement.*

*Sec. 908. Commission prohibited from issuing regulations.*

*Sec. 909. FCC review.*

*Sec. 910. Exceptions.*

*Sec. 911. FCC to revisit broadband speeds.*

*Sec. 912. Protection of emergency communications.*

*Sec. 913. Definitions.*

## **TITLE X--MISCELLANEOUS**

*Sec. 1001. Commissioner participation in forums and meetings.*

*Sec. 1002. Office of Indian Affairs.*

*Sec. 1003. Office of Consumer Advocate.*

*Sec. 1004. Data on local competition in different product markets.*

*Sec. 1005. Improved enforcement options.*

*Sec. 1006. Mobile services term and conditions.*

*Sec. 1007. Severability.*

*Sec. 1008. Clarification of certain jurisdictional issues.*

*Sec. 1009. FCC to issue a further notice of proposed rulemaking before changing broadcast media ownership rules.*

*Sec. 1010. Diversity in media ownership.*

*Sec. 1011. Broadband reporting requirements.*

*Sec. 1012. Application of one-year restrictions to certain positions.*

*Sec. 1013. Internet Tax Freedom Act Amendment.*

*Sec. 1014. Status of E-911 Implementation and Coordination Office.*

*Sec. 1015. Federal Communications Commission telemedicine report.*

*Sec. 1016. Federal information and communications technology research.*

*Sec. 1017. Forbearance.*

*Sec. 1018. Deadline for certain Commission proceedings.*

## **TITLE XI--LOCAL COMMUNITY RADIO ACT**

*Sec. 1101. Short title.*

*Sec. 1102. Repeal of prior law.*

*Sec. 1103. Minimum distance separation requirements.*

*Sec. 1104. Protection of radio reading services.*

*Sec. 1105. Ensuring availability of spectrum for LPFM stations.*

*Sec. 1106. Federal Communications Commission rules.*

## **TITLE XII--CELL PHONE TAX MORATORIUM**

*Sec. 1201. Short title.*

*Sec. 1202. Moratorium.*

## **TITLE XIII--TRUTH IN CALLER ID**

*Sec. 1301. Short title.*

*Sec. 1302. Prohibition regarding manipulation of caller identification information.*

## **TITLE XIV--RURAL WIRELESS AND BROADBAND SERVICE**

*Sec. 1401. Short title.*

*Sec. 1402. Small geographic licensing areas.*

*Sec. 1403. Report on the impact of secondary market transactions.*

*Sec. 1404. Radio spectrum review.*

*Sec. 1405. 700 MHz license areas.*

*Sec. 1406. No interference with DTV transition.*

*Sec. 1407. Effective date.*

## **TITLE I--WAR ON TERRORISM**

### **Subtitle A--Call Home**

#### **SEC. 101. TELEPHONE RATES FOR MEMBERS OF ARMED FORCES DEPLOYED ABROAD.**

*(a) IN GENERAL-* The Federal Communications Commission shall take such action as may be necessary to reduce the cost of calling home for Armed Forces personnel who are stationed outside the United States under official military orders or deployed outside the United States in support of military operations, training exercises, or other purposes as approved by the Secretary of Defense, including the reduction of such costs through the waiver of government fees, assessments, or other charges for such calls. The Commission may not regulate rates in order to carry out this section.

*(b) FACTORS TO CONSIDER-* In taking the action described in subsection (a), the Commission, in coordination with the Department of Defense and the Department of State, shall--

*(1) evaluate and analyze the costs to Armed Forces personnel of such telephone calls to and from military bases abroad;*

*(2) evaluate methods of reducing the rates imposed on such calls, including deployment of new technology such as voice over Internet protocol or successor protocol technology;*

*(3) encourage providers of telecommunications to adopt flexible billing procedures and policies for Armed Forces personnel and their dependents for telephone calls to and from such Armed Forces personnel; and*

*(4) seek agreements with foreign governments to reduce international surcharges on such telephone calls.*



(c) *DEFINITIONS- In this section:*

(1) *ARMED FORCES- The term 'Armed Forces' has the meaning given that term by section 2101(2) of title 5, United States Code.*

(2) *MILITARY BASE- The term 'military base' includes official duty stations, including vessels, whether such vessels are in port or underway outside of the United States.*

## **SEC. 102. REPEAL OF EXISTING AUTHORIZATION.**

*Section 213 of the Telecommunications Authorization Act of 1992 (47 U.S.C. 201 note) is repealed.*

### **Subtitle B--Interoperability**

## **SEC. 151. INTEROPERABLE EMERGENCY COMMUNICATIONS.**

(a) *IN GENERAL- Section 3006 of Public Law 109-171 (47 U.S.C. 309 note) is amended by redesignating subsection (d) as subsection (i) and by inserting after subsection (c) the following:*

*'(d) Interoperable Communications System Equipment Deployment-*

*'(1) IN GENERAL- The Secretary of Homeland Security shall allocate at least 25 percent of the funds made available to carry out this section to make interoperable communications system equipment grants for equipment that can utilize, or enable interoperability with systems or networks that can utilize, reallocated public safety spectrum.*

*'(2) ALLOCATION OF FUNDS- The Secretary shall allocate--*

*'(A) a majority of the amounts allocated under paragraph (1) for distribution to public safety agencies based on the threat and risk factors used by the Secretary for the purposes of allocating discretionary grants under the heading 'OFFICE FOR DOMESTIC PREPAREDNESS, STATE AND LOCAL PROGRAMS' in the Department of Homeland Security Appropriations Act, 2006; and*

*'(B) the remainder equally to each State for distribution by the States to public safety agencies.*

*'(3) ELIGIBILITY- A State may not receive funds allocated to it under paragraph (2) unless it has established a statewide interoperable communications plan approved by the Secretary.*

*`(4) USE OF FUNDS- A public safety agency shall use any funds received under this subsection for the purchase of interoperable communications system equipment and infrastructure that is consistent with SAFECOM guidance, including any standards that may be referenced by SAFECOM guidance, and interoperable communications system equipment and infrastructure that improves interoperability that uses Internet protocol or any successor protocol.*

*`(e) Coordination, Planning, and Training Grant Initiative-*

*`(1) IN GENERAL- The Secretary of Homeland Security shall allocate at least 25 percent of the funds made available to carry out this section for interoperable emergency communications coordination, planning, and training grants. The grants shall supplement, and be in addition to, any Federal funds otherwise made available by grant or otherwise to the States for emergency coordination, planning, or training.*

*`(2) ALLOCATION- The Secretary shall allocate--*

*`(A) a majority of the amounts allocated under paragraph (1) for distribution to the States based on the threat and risk factors used by the Secretary for the purposes of allocating discretionary grants under the heading `OFFICE FOR DOMESTIC PREPAREDNESS, STATE AND LOCAL PROGRAMS' in the Department of Homeland Security Appropriations Act, 2006; and*

*`(B) the remainder equally to each State for distribution to public safety agencies.*

*`(3) COORDINATION, PLANNING, AND TRAINING GUIDELINES- A State shall use its emergency communication coordination, planning, and training grant to establish a statewide plan consistent with the State communications interoperability planning methodology developed by the SAFECOM program within the Department of Homeland Security or a regional plan established by a regional planning agency consistent with this section and to establish training programs designed to ensure effective implementation of coordination and interoperability plans. In establishing the statewide plan, the Governor or the Governor's designee shall consult with the Secretary of Homeland Security or the Secretary of Homeland Security's designee. A State shall submit its statewide plan to the Federal Communications Commission and the Secretary of Homeland Security.*

*`(4) MEDICAL SERVICES- As part of its statewide plan, a State shall ensure that--*

*`(A) there are effective 2-way communications and information*

*sharing between medical services and other emergency response entities, including communications among key strategic emergency responders, emergency medical care facilities, and Federal, State, and local authorities in the event of a national, regional, or other large-scale emergency, and redundancy in the event of a failure of the primary communications systems; and*

*(B) medical emergency responses are integrated into all planning and decision-making practices for emergency response.*

*(5) STATE-SPECIFIC COORDINATION, PLANNING, AND TRAINING- Grants under this section shall be available for emergencies and disasters, such as hurricanes, forest fires, and mining accidents.*

*(f) Strategic Technology Reserves Initiative-*

*(1) IN GENERAL- The Secretary of Homeland Security shall allocate up to 25 percent of the funds made available to carry out this section to establish and implement a strategic technology reserve to pre-position or secure interoperable communications systems in advance for immediate deployment in an emergency or major disaster (as defined in section 102(2) of Public Law 93-288 (42 U.S.C. 5122)). In carrying out this paragraph, the Secretary shall take into consideration the continuing technological evolution of communications technologies and devices, with its implicit risk of obsolescence, and ensure that, to the maximum extent feasible, a substantial part of the reserve involves prenegotiated contracts and other arrangements for rapid deployment of equipment, supplies, and systems rather than the warehousing or storage of equipment and supplies currently available at the time the reserve is established.*

*(2) REQUIREMENTS AND CHARACTERISTICS- A reserve established under paragraph (1) shall--*

*(A) be capable of re-establishing communications when existing infrastructure is damaged or destroyed in an emergency or a major disaster;*

*(B) include appropriate current, widely-used equipment, such as Land Mobile Radio Systems, cellular telephones, satellite equipment, Cells-On-Wheels, Cells-On-Light-Trucks, or other self-contained mobile cell sites that can be towed, backup batteries, generators, fuel, and computers;*

*(C) include equipment on hand for the Governor of each State, key emergency response officials, and appropriate State or local personnel;*

*`(D) include contracts (including prenegotiated contracts) for rapid delivery of the most current technology available from commercial sources; and*

*`(E) include arrangements for training to ensure that personnel are familiar with the operation of the equipment and devices to be delivered pursuant to such contracts.*

*`(3) ADDITIONAL CHARACTERISTICS- Portions of the reserve may be virtual and may include items donated on an in-kind contribution basis.*

*`(4) CONSULTATION- In developing the reserve, the Secretary shall seek advice from the Secretary of Defense, as well as national public safety organizations, emergency managers, State, local, and tribal governments, and commercial providers of such systems and equipment.*

*`(5) ALLOCATION AND USE OF FUNDS- The Secretary shall allocate--*

*`(A) a portion of the reserve's funds for block grants to States to enable each State to establish a strategic technology reserve within its borders in a secure location to allow immediate deployment; and*

*`(B) a portion of the reserve's funds for regional Federal strategic technology reserves to facilitate any Federal response when necessary, to be held in each of the Federal Emergency Management Agency's regional offices, including Boston, Massachusetts (Region 1), New York, New York (Region 2), Philadelphia, Pennsylvania (Region 3), Atlanta, Georgia (Region 4), Chicago, Illinois (Region 5), Denton, Texas (Region 6), Kansas City, Missouri (Region 7), Denver, Colorado (Region 8), Oakland, California (Region 9), Bothell, Washington (Region 10), and each of the noncontiguous States for immediate deployment.*

*`(g) Consensus Standards; Applications-*

*`(1) CONSENSUS STANDARDS- In carrying out this section, the Secretary of Homeland Security shall identify, and if necessary encourage the development and implementation of, consensus standards for interoperable communications systems to the greatest extent practicable.*

*`(2) APPLICATIONS- To be eligible for assistance under the programs established in this section, each State shall submit an application, at such time, in such form, and containing such information as the Secretary may require, including--*

*`(A) a detailed explanation of how assistance received under the program would be used to improve local communications interoperability and ensure interoperability with other appropriate public safety agencies in an emergency or a major disaster; and*

*`(B) assurance that the equipment and system would--*

*`(i) be compatible with the communications architecture developed under section 7303(a)(1)(E) of the Intelligence Reform and Terrorism Prevention Act of 2004 (6 U.S.C. 194(a)(1)(E));*

*`(ii) meet any voluntary consensus standards developed under section 7303(a)(1)(D) of that Act (6 U.S.C. 194(a)(1)(D)); and*

*`(iii) be compatible with the common grant guidance established under section 7303(a)(1)(H) of that Act (6 U.S.C. 194(a)(1)(H)).*

*`(h) DEADLINE FOR IMPLEMENTATION REGULATIONS- Within 90 days after the date of enactment of the Advanced Telecommunications and Opportunities Reform Act, the Secretary, in consultation with the Federal Communications Commission, shall promulgate regulations for the implementation of subsections (d) through (f) of this section.'*

*(b) SEAMLESS MOBILITY- Within 180 days after the date of enactment of this Act, the Federal Communications Commission shall streamline its process for certifying multi-mode devices that permit communication across multiple platforms, facilities, or networks in a manner consistent with the public interest.*

*(c) FCC Report on Emergency Communications Back-Up System-*

*(1) IN GENERAL- Not later than 1 year after the date of enactment of this Act, the Federal Communications Commission, in coordination with the Secretary of Homeland Security, shall evaluate the technical feasibility of creating a back-up emergency communications system that complements existing communications resources and takes into account next generation and advanced telecommunications technologies. The overriding objective for the evaluation shall be providing a framework for the development of a resilient interoperable communications system for emergency responders in an emergency. The Commission shall evaluate all reasonable options, including satellites, wireless, and terrestrial-based communications systems and other alternative transport mechanisms that can be used in tandem with existing technologies.*

*(2) Factors to be evaluated- The evaluation under paragraph (1) shall*

*include--*

*(A) a survey of all Federal agencies that use terrestrial or satellite technology for communications security and an evaluation of the feasibility of using existing systems for the purpose of creating such an emergency back-up public safety communications system;*

*(B) the feasibility of using private satellite, wireless, or terrestrial networks for emergency communications;*

*(C) the technical options, cost, and deployment methods of software, equipment, handsets, or desktop communications devices for public safety entities in major urban areas, and nationwide; and*

*(D) the feasibility and cost of necessary changes to the network operations center of terrestrial-based or satellite systems to enable the centers to serve as emergency back-up communications systems.*

*(3) Report- Upon the completion of the evaluation under paragraph (1), the Commission shall submit a report to Congress that details the findings of the evaluation, including a full inventory of existing public and private resources most efficiently capable of providing emergency communications.*

*(d) Interoperable Communications and E-911 Services- The Secretary of Homeland Security shall take into consideration the role of public safety answering points and E-911 systems, and shall reserve a portion of the funds made available to carry out section 3006 of Public Law 109-171 (47 U.S.C. 309 note) to provide interoperable communication system grants for projects to public safety answering points that enable interoperability and that advance E-911 deployment.*

## **SEC. 152. TRANSFER OF PUBLIC SAFETY GRANT PROGRAM TO THE DEPARTMENT OF HOMELAND SECURITY.**

*(a) IN GENERAL- Section 3006 of Public Law 109-171 (47 U.S.C. 309 note) is amended--*

*(1) by striking 'The Assistant Secretary, in consultation with the' in subsection (a) and inserting 'The'; and*

*(2) by striking 'Assistant Secretary' each place it appears in subsection (b) and inserting 'Secretary of Homeland Security'.*

*(b) USE OF FUNDS- In carrying out section 3006(a) of Public Law 109-171*

(47 U.S.C. 309 note), as amended by subsection (a), the Secretary of Homeland Security may not use funds under that section for any purpose other than those provided in section 3006 of that Act.

## **SEC. 153. PUBLIC SAFETY INTEROPERABLE COMMUNICATIONS GRANTS.**

Pursuant to section 3006 of Public Law 109-171 (47 U.S.C. 309 note), the Secretary of Homeland Security, in coordination with the Secretary of Commerce, shall award no less than \$1,000,000,000 for public safety interoperable communications grants no later than September 30, 2006.

## **SEC. 154. ELIGIBILITY OF IP-ENABLED SERVICES.**

Section 158(a)(1)(A) of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 942(a)(1)(A)) is amended by striking 'services;' and inserting 'services and services related to the migration to an IP-enabled emergency network that provides E-911 services;'.

## **TITLE II--UNIVERSAL SERVICE REFORM; INTERCONNECTION**

### **SEC. 201. SHORT TITLE.**

This title may be cited as the 'Internet and Universal Service Act of 2006'.

#### **Subtitle A--Contributions to Universal Service**

### **SEC. 211. STABILIZATION OF UNIVERSAL SERVICE FUNDING.**

(a) ENSURING AN EQUITABLE CONTRIBUTION BASE FOR UNIVERSAL SERVICE-

(1) IN GENERAL- Section 254(d) (47 U.S.C. 254(d)) is amended to read as follows:

'(d) Universal Service Support Contributions-

'(1) Contribution mechanism-

'(A) IN GENERAL- Each communications service provider shall contribute as provided in this subsection to support universal service.

'(B) REQUIREMENTS- The Commission shall ensure that the contributions required by this subsection are--

*`(i) applied in a manner that is as competitively and technologically neutral as possible;*

*`(ii) specific, predictable, and sufficient to sustain the funding of networks used to preserve and advance universal service; and*

*`(iii) applied in such a manner that no methodology results in a communications services provider being required to contribute more than once to support Federal universal service for the same transaction, activity, or service.*

*`(C) ADJUSTMENTS- The Commission shall adjust the contribution for communication service providers for their low-call volume, non-business customers.*

*`(2) EXEMPTIONS- The Commission may exempt a communications service provider or any class of communications service providers from the requirements of this subsection in the following circumstances:*

*`(A) The services of such a provider are limited to such an extent that the level of its contributions would be de minimis.*

*`(B) The communications service is provided pursuant to the Commission's Lifeline Assistance Program.*

*`(C) The communications service is provided only to in-vehicle emergency communications customers.*

*`(D) The communications service is provided by a not-for-profit communications service provider that is neither an affiliate of a for-profit organization nor has a for-profit affiliate and which provides voice mailboxes to low income consumers and the homeless.*

*`(3) Contribution assessment flexibility-*

*`(A) METHODOLOGY- To achieve the principles in this section, the Commission may base universal service contributions upon--*

*`(i) revenue from communications service;*

*`(ii) in-use working phone numbers or any other identifier protocol or connection to the networks; or*

*`(iii) network capacity.*

*`(B) Use of more than 1 methodology- If no single methodology*



*employed under subparagraph (A) achieves the principles described in this subsection, the Commission may employ a combination of any such methodologies.*

*`(C) REMOVAL OF INTERSTATE/INTRASTATE DISTINCTION- Notwithstanding section 2(b) of this Act, the Commission may assess the interstate, intrastate, and international portions of communications service for the purpose of universal service contributions.*

*`(D) GROUP PLAN DISCOUNT- If the Commission utilizes a methodology under subparagraph (A) based in whole or in part on in-use working phone numbers, it may provide a discount for additional numbers provided under a group or family pricing plan for residential customers provided in 1 bill.*

*`(4) NON-DISCRIMINATORY ELIGIBILITY REQUIREMENT- A communications service provider is not exempted from the requirements of this subsection solely on the basis that such provider is not eligible to receive support under this section.*

*`(5) Billing-*

*`(A) IN GENERAL- A communications service provider that contributes to universal service under this section may place on any customer bill a separate line item charge that does not exceed the amount for the customer that the provider is required to contribute under this subsection that shall be identified as the 'Federal Universal Service Fee'.*

*`(B) LIMITATION- A communications service provider may not separately bill customers for administrative costs associated with its collection and remission of universal service fees under this subsection.*

*`(6) DEFINITIONS- In this subsection:*

*`(A) BROADBAND SERVICE- The term 'broadband service' means any service (whether part of a bundle of services or offered separately) used for transmission of information of a user's choosing with a transmission speed of at least 200 kilobits per second in at least 1 direction, regardless of the transmission medium or technology employed, that connects to the public Internet directly--*

*`(i) to the public; or*

*`(ii) to such classes of users as to be effectively available directly to the public.*

*`(B) COMMUNICATIONS SERVICE- The term `communications service' means telecommunications service, broadband service, or IP-enabled voice service (whether part of a bundle of services or offered separately).*

*`(C) CONNECTION- The term `connection' means the facilities that provide customers with access to a public or private network, regardless of whether the connection is circuit-switched, packet-switched, wireline or wireless, or leased line.*

*`(D) IN-VEHICLE EMERGENCY COMMUNICATIONS- The term `in-vehicle emergency communications' means services and technology, including automatic crash notification, roadside assistance, SOS distress calls, remote diagnostics, navigation or location-based services, and other driver assistance services, which are integrated into passenger automobiles to facilitate communications from the automobile to emergency response professionals.*

*`(E) IP-ENABLED VOICE SERVICE- The term `IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using Internet protocol, or a successor protocol, for a fee (whether part of a bundle of services or offered separately) with 2-way interconnection capability such that the service can originate traffic to, and terminate traffic from, the public switched telephone network.*

*`(F) WORKING PHONE NUMBERS- The term `working phone number' means an assigned number (as defined in section 52.15 of the Commission's regulations (47 C.F.R. 52.15)) or an intermediate number (as defined in that section).'*

*(2) CONFORMING AMENDMENT- Section 254(b)(4) (47 U.S.C. 254(b)(4)) is amended by striking `telecommunications services' and inserting `communications services (as defined in subsection (d)(6)(B)).'*

*(3) STATE AUTHORITY- Section 254(f) (47 U.S.C. 254(f)) is amended to read as follows:*

*`(f) State Authority-*

*`(1) IN GENERAL- A State may adopt regulations not inconsistent with*

*the Commission's rules to preserve and advance universal service. In adopting those rules, a State may require telecommunications service providers and IP-enabled voice service (as defined in subsection (d)(6)(E)) providers to contribute to universal service on the basis of--*

*`(A) revenue;*

*`(B) in-use working phone numbers or any other identifier protocol or connection to the networks;*

*`(C) network capacity; or*

*`(D) any combination of such methodologies.*

*`(2) DISREGARD OF INTERSTATE COMPONENT- A State may require telecommunications service providers and IP-enabled voice service providers to contribute under paragraph (1) regardless of whether the service contains an interstate component.*

*`(3) BUNDLING- If a telecommunications service or IP-enabled voice service is offered as part of a bundle of services, the Commission shall determine a fair allocation of revenue between the telecommunications service or IP-enabled voice service and other bundled services if the primary place of use of such bundled services is within the State.*

*`(4) GUIDELINES- Regulations adopted by a State under this subsection shall result in a specific, predictable, and sufficient mechanism to support universal service and shall be competitively and technologically neutral, equitable, and nondiscriminatory.'*

*(b) Proper Accounting of Universal Service Contributions-*

*(1) FROM ALL BUDGETS- Notwithstanding any other provision of law, the receipts and disbursements of universal service under section 254 of the Communications Act of 1934 (47 U.S.C. 254) shall not be counted as new budget authority, outlays, receipts, or deficit or surplus for purposes of--*

*(A) the budget of the United States Government as submitted by the President;*

*(B) the Congressional budget;*

*(C) the Balanced Budget and Emergency Deficit Control Act of 1985; or*

*(D) any other law requiring budget sequesters.*

(2) *ADDITIONAL EXEMPTIONS-* Section 1341, subchapter II of chapter 15, and sections 3302, 3321, 3322, and 3325 of title 31, United States Code, shall not apply to--

(A) the collection and receipt of universal service contributions, including the interest earned on such contributions; or

(B) disbursements or other obligations authorized by the Federal Communications Commission under section 254 and 254A of the Communications Act of 1934 (47 U.S.C. 254 and 254A).

(c) *FINANCIAL MANAGEMENT-* The Federal Communications Commission and the Administrator of the Universal Service Fund--

(1) shall account for the financial transactions of the Fund in accordance with generally accepted accounting principles for Federal agencies;

(2) shall maintain the accounts of the Fund in accordance with the United States Government Standard General Ledger; and

(3) may invest unexpended balances only in Federal securities (as defined in section 113(b)(5) of Office of Management and Budget circular OMB A-11 or any revision of that circular).

(d) *RULEMAKING-* Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a rule to implement section 254(d) of the Communications Act of 1934 (47 U.S.C. 254(d)) as amended by this section.

(e) *CONGRESSIONAL REVIEW-* Any rule issued under subsection (d) shall--

(1) be submitted to Congress, along with any data and information relied upon to establish such rule; and

(2) not take effect until the date that is 90 days after the date of such submission.

## **SEC. 212. MODIFICATION OF RURAL VIDEO SERVICE EXEMPTION.**

(a) *RURAL TELEPHONE COMPANIES-* Section 251(f)(1) (47 U.S.C. 251(f)(1)) is amended--

(1) by striking 'Subsection' in subparagraph (A) and inserting 'Except as provided in subparagraph (B), subsection';

(2) by striking 'interconnection, services, or network elements' in subparagraphs (A) and (B) and inserting 'services or network elements';

(3) by striking *'(under subparagraph (B))'* in subparagraph (A) and inserting *'(under subparagraph (C))'*;

(4) by redesignating subparagraphs (B) and (C) as subparagraphs (D) and (E);

(5) by inserting after subparagraph (A) the following:

*'(B) CERTAIN CARRIERS- Subsection (c) (other than paragraphs (1) and (2) thereof) of this section shall not apply to a rural telephone company in Alaska with fewer than 10 access lines per square mile installed in the aggregate in its service area (as defined in section 214(e)(5)).*

*'(C) INTERCONNECTION- Notwithstanding subparagraphs (A) and (D), paragraphs (1) and (2) of subsection (c) of this section shall not apply to a rural telephone company until such company has received a bona fide request for interconnection.'; and*

(6) by striking subparagraph (E), as redesignated.

(b) *OTHER RURAL CARRIERS- Section 251(f)(2) (47 U.S.C. 251(f)(2)) is amended by inserting *'(other than paragraphs (1) and (2) of subsection (c))'* after *'subsection (b) or (c)'* in the first sentence.*

(c) *EFFECTIVE DATE- Notwithstanding any other provision of this Act, the amendments made by this section shall take effect on the date of enactment of this Act.*

## **SEC. 213. INTERCONNECTION.**

*Title VII (47 U.S.C. 601 et seq.) is amended by adding after section 714 the following new section:*

## ***'SEC. 715. RIGHTS AND OBLIGATIONS OF IP-ENABLED VOICE SERVICE PROVIDERS.***

*'(a) In General- A facilities-based IP-enabled voice service provider shall have the same rights, duties, and obligations, including any obligation imposed under section 276, as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights. A telecommunications carrier may not refuse to transport or terminate IP-enabled voice traffic solely on the basis that it is IP-enabled. A provider originating, transmitting, or terminating IP-enabled voice traffic shall not be exempted from paying compensation for interstate traffic owed to another provider or carrier solely on the basis that such traffic is IP-enabled, and any*

*obligations to pay compensation with respect to traffic that originates or terminates on the public switched telephone network shall be reciprocal, including any payment to an IP-enabled voice service provider that receives traffic from, or sends traffic to, the public switched telephone network.*

*“(b) Disabled Access- An IP-enabled voice service provider or a manufacturer of IP-enabled voice service equipment shall have the same rights, duties, and obligations as a telecommunications carrier or telecommunications equipment manufacturer, respectively, under sections 225, 255, and 710 of the Act. Within 1 year after the date of enactment of the Internet and Universal Service Act of 2006, the Commission, in consultation with the Architectural and Transportation Barriers Compliance Board, shall prescribe such regulations as are necessary to implement this section. In prescribing the regulations, the Commission shall take into account the differences between IP-enabled voice service and circuit-switched communications, and the functionalities required by the disabled community. Every 2 years after the date of enactment of the Internet and Universal Service Act of 2006, the Commission shall submit a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives that assesses the level of compliance with this section and evaluates the extent to which any accessibility barriers still exist with respect to new technologies and hearing aid compatibility.*

*“(c) IP-Enabled Emergency Response Systems- Prior to installation or activation of an IP-enabled voice service for a customer, an IP-enabled voice service provider shall provide clear and conspicuous notice to the customer that--*

*“(1) such customer should arrange with his or her emergency response system provider, if any, to test such system after installation;*

*“(2) such customer should notify his or her emergency response system provider as soon as the IP-enabled voice service is installed; and*

*“(3) a battery backup may be required for customer premises equipment installed in connection with the IP-enabled voice service in order for the signaling of such system to function in the event of a power outage.*

*“(e) NO EFFECT ON TAX LAWS- Nothing in this section shall be construed to modify, impair, supersede, or authorize the modification, impairment, or supersession of, any State or local tax law.*

*“(f) DEFINITIONS- In this section:*

*“(1) EMERGENCY RESPONSE SYSTEM- The term ‘emergency response*

*system' means an alarm or security system, or personal security or medical monitoring system, that is connected to an emergency response center by means of a telecommunications carrier or IP-enabled voice service provider.*

*'(2) EMERGENCY RESPONSE CENTER- The term 'emergency response center' means an entity that monitors transmissions from an emergency response system.*

*'(3) FACILITIES-BASED- The term 'facilities-based' includes an IP-enabled voice service provider with control and operation within a local access transport area of--*

*'(A) communications switching and routing equipment;*

*'(B) long-haul trunks; or*

*'(C) local transmission facilities.*

*'(4) IP-ENABLED VOICE SERVICE- The term 'IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using Internet protocol, or a successor protocol, for a fee (whether part of a bundle of services or offered separately) with interconnection capability such that the service can originate traffic to, and terminate traffic from, the public switched telephone network.'*

## **SEC. 214. TREATMENT OF SUBSTITUTE SERVICES UNDER SECTION 254(g).**

*Section 254(g) (47 U.S.C. 254(g)) is amended by inserting after 'State.' the following: 'This section shall also apply to any services within the jurisdiction of the Commission that can be used as effective substitutes for interexchange telecommunications services, including any such substitute classified as an information service that uses telecommunications.'*

### **Subtitle B--Distributions From Universal Service**

## **SEC. 251. ENCOURAGING BROADBAND DEPLOYMENT.**

*(a) IN GENERAL- Beginning 2 years after the date of enactment of this Act, and biennially thereafter, an eligible communications carrier shall submit a report to the Commission and to the State commission in each State in which it provides communications service that sets forth the following:*

(1) *The percentage of households to which it offers broadband service in each of its service areas.*

(2) *The percentage of households that subscribe to broadband service in each of its service areas.*

(3) *The service plans and speeds at which broadband service is offered in each of its service areas.*

(4) *The types of technologies used in offering broadband service in each of its service areas.*

(5) *Any planned upgrade or deployment of broadband service in the next 2 years in each of its service areas.*

(b) *INFORMATION TREATED AS CONFIDENTIAL-* The Commission and State commissions shall treat information received pursuant to subsection (a) as confidential and proprietary, and shall protect sensitive business information from disclosure in any reports made public.

(c) *COMMISSION REPORT-* The Commission shall incorporate the data from reports it receives under subsection (a) into its advanced telecommunications capability reports under section 706 of the Telecommunications Act of 1996.

## **SEC. 252. ESTABLISHMENT OF BROADBAND PROGRAM.**

Part I of title II (47 U.S.C. 201 et seq.) is amended by inserting after section 254 the following:

### **`SEC. 254A. BROADBAND FOR UNSERVED AREAS PROGRAM.**

*`(a) Program Established-*

*`(1) IN GENERAL-* The Commission shall establish a new separate program to be known as the *`Broadband for Unserved Areas Program'.*

*`(2) PURPOSE-* The purpose of the Program is to provide financial assistance for the deployment of broadband equipment and infrastructure necessary for the deployment of broadband service (including installation costs) to unserved areas throughout the United States.

*`(3) FUNDING-* The Program shall be funded by amounts collected under section 254(d).

*`(b) Implementation-*



*`(1) IN GENERAL- Within 180 days after the date of enactment of the Internet and Universal Service Act of 2006, the Commission shall issue rules establishing--*

*`(A) guidelines for determining which areas may be considered to be unserved areas for purposes of this section, which may be portions of service areas or study areas;*

*`(B) criteria for determining which facilities-based providers of broadband service and which projects are eligible for support from the Program;*

*`(C) procedural guidelines for awarding assistance from the Program on a merit-based and competitive basis;*

*`(D) guidelines for application procedures, accounting and reporting requirements, and other appropriate fiscal controls for assistance made available from the Program, including random audits with respect to the receipt and use of funds under this section;*

*`(E) a procedure for making funds in the Program available among the several States on an equitable basis; and*

*`(F) the Universal Service Administrative Company as the administrator of the Program, subject to Commission rules and oversight.*

*`(2) FACILITIES-BASED PROVIDER ELIGIBILITY- For purposes of this section, satellite broadband service providers, terrestrial wireless broadband service providers, and wireline broadband service providers shall be considered to be facilities-based providers eligible for support from the Program. The deployment of satellite broadband service customer premises equipment shall be considered to be a project eligible for support from the Program.*

*`(3) DE MINIMIS SUBSCRIBERSHIP EXCEPTION- The availability of satellite broadband service in an area shall not preclude the designation of that area as an unserved area if the Commission determines that subscribership to broadband satellite service in the area is de minimis.*

*`(4) MULTIPLE AREAS WITHIN STATE- There may be more than 1 unserved area within a State.*

*`(c) LIMITATIONS-*

*`(1) ANNUAL AMOUNT- Amounts obligated or expended under subsection (b) for any fiscal year may not exceed \$500,000,000.*

*`(2) UNOBLIGATED BALANCES- To the extent that the full amount in the program is not obligated for financial assistance under this section within a fiscal year, any unobligated balance shall be used to support universal service under section 254.*

*`(3) SUPPORT LIMITED TO SINGLE FACILITIES-BASED PROVIDER PER UNSERVED AREA- Assistance under this section may be provided only to 1 facilities-based provider of broadband service in each unserved area.*

*`(d) Application With Section 410- Section 410 shall not apply to the Broadband for Unserved Areas Program.*

*`(e) Broadband Service Defined-*

*`(1) IN GENERAL- In this section, except to the extent revised by the Commission under paragraph (2), the term 'broadband service' means any service used for transmission of information of a user's choosing at a transmission speed of at least 400 kilobits per second in at least 1 direction, regardless of the transmission medium or technology employed, that connects to the public Internet directly--*

*`(A) to the public; or*

*`(B) to such classes of users as to be effectively available directly to the public.*

*`(2) ANNUAL REVIEW OF TRANSMISSION SPEED- The Commission shall review the transmission speed component of the definition in paragraph (1) biannually and revise that component as appropriate.*

*`(f) REPORT- The Commission shall transmit an annual report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce making recommendations for an increase or decrease, if necessary, in the amounts credited to the program under this section.'*

## **SEC. 253. COMPETITIVE NEUTRALITY PRINCIPLE.**

*Section 254(b) (47 U.S.C. 254(b)) is amended by redesignating paragraph (7) as paragraph (8), and inserting after paragraph (6) the following:*

*`(7) COMPETITIVE NEUTRALITY- Universal service support mechanisms and rules should be competitively neutral. In this context, competitively neutral means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.'*

**SEC. 254. TRANSITION RULES FOR MODIFICATIONS ADVERSELY AFFECTING CARRIERS.**

*If the Federal Communications Commission modifies the high-cost distribution rules under section 254 of the Communications Act of 1934 (47 U.S.C. 254), it shall adopt transition mechanisms of not less than 5 years in duration designed to alleviate any harmful affect of those modifications on existing eligible communications carriers and their customers.*

**SEC. 255. ELIGIBILITY GUIDELINES.**

*Section 214(e) (47 U.S.C. 214(e)) is amended by adding at the end the following:*

*`(7) Eligibility guidelines-*

*`(A) IN GENERAL- A common carrier may not be designated as a new eligible communications carrier unless it--*

*`(i) is committed to providing service throughout its proposed designated service area, using its own facilities or a combination of facilities and resale of another carrier's facilities, to all customers making a reasonable request for service;*

*`(ii) has certified to the State commission or the Commission that it will provide service on a timely basis to requesting customers within its service area, if service can be provided at reasonable cost;*

*`(iii) has submitted a plan to the State commission or the Commission that describes with specificity proposed improvements or upgrades to its network that will be accomplished with high-cost support over the first 2 years following its designation as an eligible communications carrier;*

*`(iv) has demonstrated to the State commission or the Commission its ability to remain functional in emergency situations, including a demonstration that it has a reasonable amount of back-up power to ensure functionality without an external power source;*

*`(v) is committed to following applicable consumer protection and service quality standards; and*

*`(vi) has complied with annual reporting requirements*

*established by the Commission or by State Commissions for all carriers receiving universal service support to ensure that such support is used for the provision, maintenance, and upgrading of the facilities for which support is intended.*

*“(B) APPLICATION LIMITED TO POST DATE-OF-ENACTMENT DESIGNATIONS- Subparagraph (A) applies only to an entity designated as an eligible communications carrier after the date of enactment of the Internet and Universal Service Act of 2006.*

*“(C) 6-month designation deadline- Beginning 6 months after the date of enactment of the Internet and Universal Service Act of 2006, a State commission or the Commission shall grant or deny an application for designation as an eligible communications carrier within 6 months after the date on which it receives a complete application.*

*“(D) ELIGIBLE COMMUNICATIONS CARRIER- In this paragraph, the term ‘eligible communications carrier’ means an entity designated under paragraph (2), (3), or (6) of this subsection. Any reference to eligible telecommunications carrier in this section or in section 254 refers also to an eligible communications carrier.’.*

## **SEC. 256. PRIMARY LINE.**

*Section 214(e) (47 U.S.C. 214(e)), as amended by section 255 of this Act, is amended by adding at the end the following:*

*“(8) PRIMARY LINE- In implementing the requirements of this Act with respect to the distribution and use of Federal universal service support, the Commission shall not limit such distribution and use to a single connection or primary line, and all residential and business lines served by an eligible communications carrier shall be eligible for Federal universal service support.’.*

## **SEC. 257. PHANTOM TRAFFIC.**

*(a) IN GENERAL- Section 254 (47 U.S.C. 254) is amended by adding at the end the following:*

*“(m) NETWORK TRAFFIC IDENTIFICATION ACCOUNTABILITY STANDARDS-*

*“(1) NETWORK TRAFFIC IDENTIFICATION ACCOUNTABILITY STANDARDS- A provider of voice communications services shall ensure, to the degree technically possible, that all traffic that originates on its network contains, or, in the case of nonoriginated traffic, preserves,*

sufficient information to allow for traffic identification by other voice communications service providers that transport or terminate such traffic, including information on the identity of the originating provider, the class of service of the originating line as required under Commission orders in effect on the date of enactment of the Internet and Universal Service Act of 2006, the calling and called parties, and such other information as the Commission deems appropriate. Except as otherwise permitted by the Commission, a provider that transports traffic between communications service providers shall signal-forward without altering call signaling information it receives from another provider.

`(2) NETWORK TRAFFIC IDENTIFICATION RULEMAKING- The Commission, in consultation with the State commissions, shall initiate a single rulemaking no later than 180 days after the date of enactment of the Internet and Universal Service Act of 2006 to establish rules and enforcement provisions for traffic identification.

`(3) NETWORK TRAFFIC IDENTIFICATION ENFORCEMENT- The Commission shall adopt and enforce clear penalties, fines, and sanctions under this section.

`(4) VOICE COMMUNICATIONS SERVICE DEFINED- In this subsection, the term `voice communications service' means telecommunications service or IP-enabled voice service (as defined in section 254(d)(6)(E)).'.

(b) CONFORMING AMENDMENT- Section 276(d) (47 U.S.C. 276(d)) is amended--

(1) by striking `DEFINITION- ' and inserting `DEFINITIONS- '; and

(2) by striking `services.' and inserting `services, and the term `call' includes any communication coming within the definition of `communications service' (as defined in section 254(d)) when it originated from a payphone.'.

## **SEC. 258. RANDOM AUDITS.**

Section 254 (47 U.S.C. 254), as amended by section 257 of this Act, is amended by adding at the end the following:

`(n) AUDITS- The Commission shall provide for random periodic audits, to be administered by the Universal Service Administrative Company, of each recipient of funds collected pursuant to subsection (d) with respect to its receipt and use of such support. With respect to an eligible communications carrier, the audit shall include a review of its relative cost to provide service compared to other, similarly situated, universal service recipients based on

*their respective service areas (as defined in section 214(e)(5)). The Commission shall take such remedial action as it deems necessary if any audit under this subsection reveals improper use of universal service support, including the imposition of fines or other appropriate remedies.'*

## **SEC. 259. INTEGRITY AND ACCOUNTABILITY.**

*(a) IN GENERAL- The Federal Communications Commission, in consultation with the Administrator of the Universal Service Administrative Company, shall--*

*(1) ensure the integrity and accountability of all programs established under sections 254 and 254A of the Communications Act of 1934 (47 U.S.C. 254 and 254A); and*

*(2) not later than 180 days after the date of enactment of this Act, establish rules--*

*(A) identifying appropriate fiscal controls and accountability standards that shall be applied to programs under sections 254 and 254A;*

*(B) establishing a memorandum of understanding, or contractual relationships, as the Commission determines appropriate, defining the administrative structure and processes by which the Universal Service Administrative Company administers programs under sections 254 and 254A;*

*(C) creating performance goals and measures for programs under sections 254 and 254A, that shall be used by the Commission to determine--*

*(i) how efficiently and cost-effectively the Universal Service Administrative Company spends funds pursuant to its operation of all universal service programs; and*

*(ii) areas for improving operations;*

*(D) creating performance goals and measurements for the Schools and Libraries Program under section 254(h) that--*

*(i) determine the progress of schools and libraries toward achieving advances in connectivity goals; and*

*(ii) reflect the evolving level of advanced services; and*

*(E) establishing appropriate enforcement actions, including the*

*imposition of sanctions on applicants and vendors who repeatedly and knowingly violate program rules set forth in section 254(h) or adopted by the Commission, such as debarment from the program for individuals convicted of crimes or held civilly liable for actions taken in connection with the Schools and Libraries Program.*

*(b) PERMANENT BAN OF VENDORS CONVICTED OF CRIMINAL FRAUD- A vendor that has been convicted of a criminal fraud violation in connection with the provision of goods or services under section 254(h) of the Communications Act of 1934 (47 U.S.C. 254(h)) is not eligible to provide goods or services to any school, library, or other entity under the program authorized by that section.*

## **SEC. 260. IMPROVING EFFECTIVENESS OF RURAL HEALTH CARE SUPPORT MECHANISM.**

*(a) IN GENERAL- Section 254(h) (47 U.S.C. 254(h)) is amended--*

*(1) by resetting so much of paragraph (1)(A) as follows 'AREAS- ' as an indented paragraph 6 ems from the left margin and inserting '(i) IN GENERAL- ' before 'A telecommunications';*

*(2) by inserting 'deployment of reasonable infrastructure and' after 'including' in the first sentence of paragraph (1)(A)(i), as designated by paragraph (1) of this subsection;*

*(3) by striking 'service.' in paragraph (1)(A)(i), as designated by paragraph (1) of this subsection, and inserting 'service, and to receive reimbursement promptly of any amount in excess of such obligations to participate in universal service mechanisms.';*

*(4) by adding at the end of paragraph (1)(A) the following:*

*'(ii) LIMITATION- The discount required under clause (i) shall be available only to a public or nonprofit health care provider located in a rural area.*

*'(iii) DEFINITION- For purposes of this subparagraph, the term 'rural area' means--*

*'(I) any incorporated or unincorporated area in the United States, or in the territories or insular possessions of the United States that has not more than 20,000 inhabitants based on the most recent available population statistics published in the most recent decennial census issued by the Census Bureau;*

*`(II) any area located outside the boundaries of any incorporated or unincorporated city, county, or borough that has more than 20,000 inhabitants based on the most recent available population statistics published in the most recent decennial census issued by the Census Bureau; or*

*`(III) any area that qualified as a rural area under the rules of the Commission in effect on December 1, 2004.';*

*(5) by striking 'and' in paragraph (7)(B)(vi); and*

*(6) by striking paragraph (7)(B)(vii) and inserting the following:*

*`(vii) not-for-profit nursing homes or skilled nursing facilities;*

*`(viii) critical access hospitals;*

*`(ix) emergency medical services facilities;*

*`(x) hospice providers;*

*`(xi) rural dialysis facilities;*

*`(xii) tribal health clinics;*

*`(xiii) not-for-profit dental offices;*

*`(xiv) school health clinics;*

*`(xv) residential treatment facilities;*

*`(xvi) rural pharmacies;*

*`(xvii) consortia of health care providers consisting of 1 or more entities described in clauses (i) through (xv); and*

*`(xviii) any other entity the Commission determines--*

*`(I) eligible to receive discounted telecommunications service under paragraph (1)(A); and*

*`(II) essential to the public health.'.*

*(b) SCHOOLS, LIBRARIES, RURAL HEALTH CARE, LIFE-LINE, LINK-UP, AND TOLL LIMITATION HOLD HARMLESS- Except as provided in subsections (h)(1)(A), (h)(7)(B), and (h)(7)(J) of section 254 of the Communications Act of*



1934 (47 U.S.C. 254), as amended by subsection (a)--

(1) nothing in this Act (or the amendments made by this Act) shall be construed as limiting, changing, modifying, or altering the amount of support or means of distribution for the schools, libraries, rural health care, life-line, link-up, and toll limitation programs; and

(2) the Federal Communications Commission shall ensure that such amendments do not result in a decrease of such support to a level below the level for the fiscal year preceding the fiscal year in which this Act is enacted.

(c) AMERICAN COMMUNITY SURVEY RESIDENTIAL INTERNET ACCESS QUESTION- The Secretary of Commerce, in consultation with the Federal Communications Commission, shall expand the American Community Survey conducted by the Bureau of the Census to elicit information for residential households, including those located on Indian land (as defined in section 4(9) of the American Indian Agricultural Resource Management Act (25 U.S.C. 3703(9))), as to what technology such households use to access the Internet from home.

## **SEC. 261. COMMUNICATIONS SERVICES FOR LIBRARIES.**

Section 254(h)(4) of the Communications Act of 1934 (47 U.S.C. 254(h)(4)) is amended to read as follows:

`(4) CERTAIN USERS NOT ELIGIBLE- Notwithstanding any other provision of this subsection, the following entities are not entitled to preferential rates or treatment as required by this subsection:

`(A) An entity operated as a for-profit business.

`(B) A school described in paragraph (7)(A) with an endowment of more than \$50,000,000.

`(C) A library or library consortium not eligible for assistance under the Library Services and Technology Act (20 U.S.C. 9101 et seq.) from a State library administrative agency.

`(D) A library or library consortium not eligible for assistance funded by a grant under section 261 of the Library Services and Technology Act (20 U.S.C. 9161) from an Indian tribe or other organization.'.

## **SEC. 262. USF SUPPORT FOR INSULAR AREAS.**

*Within 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue an order in FCC Docket 96-45 establishing a predictable and sufficient support mechanism for eligible carriers in insular areas, including any insular area that is a State comprised entirely of islands, that includes assistance for high-cost communications transport services used by carriers whose service territory includes multiple noncontiguous service areas.*

### **TITLE III--STREAMLINING THE FRANCHISING PROCESS**

#### **SEC. 301. SHORT TITLE.**

*This title may be cited as the 'Video Competition and Savings for Consumers Act of 2006'.*

#### **Subtitle A--Updating the 1934 Act and Leveling the Regulatory Playing Field**

#### **SEC. 311. APPLICATION OF TITLE VI TO VIDEO SERVICES AND VIDEO SERVICE PROVIDERS.**

*(a) TERMINOLOGY- Title VI (47 U.S.C. 521 et seq.), except for section 602 (47 U.S.C. 522), is amended--*

*(1) by striking 'cable operator', 'cable operator's', and 'cable operators' each place they appear and inserting 'video service provider', 'video service provider's', or 'video service providers', respectively;*

*(2) by striking 'cable' when used in 'cable auxiliary', 'cable communications', 'cable network', 'cable programmer', 'cable programmers', 'cable service', 'cable services', 'cable subscriber', 'cable system', 'cable systems', or 'cable telecommunications', each place it appears and inserting 'video service';*

*(3) by striking 'noncable' in section 614(h)(1)(C)(ii)(IV) and inserting 'non-video service';*

*(4) except where amended by paragraph (1), by striking 'operator', 'operator's', and 'operators' each place they appear and inserting 'provider', 'provider's', or 'providers', respectively;*

*(5) by striking 'cassette' each place it appears; and*

*(6) by striking 'tape' each place it appears and inserting 'record'.*

*(b) HEADINGS- Title VI (47 U.S.C. 521 et seq.) is amended--*

(1) by striking the heading for title VI and inserting **`TITLE VI--VIDEO SERVICES'**;

(2) by striking the heading for part II and inserting **`PART II--USE OF VIDEO SERVICES; RESTRICTIONS'**;

(3) by striking the heading for part III and inserting **`PART III--FRANCHISING'**; and

(4) striking **`CABLE'** in the heading for sections 633 and 640 and inserting **`VIDEO'**.

(c) **REGULATIONS-** Notwithstanding section 381(a) of this Act:

(1) **NEW REGULATIONS-** Within 120 days after the date of enactment of this Act, the Commission shall issue regulations to implement sections 603, 611, 612, 621, and 622 of the Communications Act of 1934, as amended by this Act.

(2) **UPDATING EXISTING REGULATIONS-** Within 120 days after the date of enactment of this Act, the Commission shall issue, as necessary, updated regulations needed under title VI or other provisions of the Communications Act of 1934 to reflect the amendments made by this Act.

## **SEC. 312. FRANCHISE APPLICATIONS; SCOPE.**

Part I of title VI (47 U.S.C. 521 et seq.) is amended by adding at the end the following:

### **`SEC. 603. FRANCHISE APPLICATIONS.**

**`(a) In General-**

**`(1) Expedited process-** Except as otherwise provided in this subsection, a franchising authority shall grant a franchise to provide video service within its franchise area to a video service provider within 90 calendar days after receiving a franchise application that is complete from the video service provider except for--

**`(A) the franchise fee percentage, as provided by section 622(b)(1);**

**`(B) the number of public, educational, or governmental use channels required by section 611;**

*`(C) any fee percentage that may be assessed under section 622 (b)(4); and*

*`(D) the point of contact for the franchising authority.*

*`(2) STANDARDIZED APPLICATION FORM- A video service provider shall use the standard franchise application form promulgated by the Commission under section 612.*

*`(3) RESPONSIBILITIES OF FRANCHISING AUTHORITY--After receiving a franchise application under paragraph (1), a franchising authority shall--*

*`(A) publish public notice of the application within 15 days after receiving a complete application from a video service provider if public notice is required by State or local law; and*

*`(B) complete and return the application form by providing the information described in subparagraphs (A), (B), (C), and (D) of paragraph (1) in a manner that is consistent with the requirements of this title within 90 calendar days after the date on which it was received.*

*`(4) ACCEPTANCE OF TERMS- A franchising agreement shall take effect 15 calendar days after the date that the completed franchise application is received by the applicant under paragraph (3)(B) unless the applicant notifies the franchising authority within that 15-day period that the terms offered are not accepted.*

*`(5) EXCEPTION- This subsection does not require a franchising authority to approve or complete an application from a video service provider if a franchise held by that provider has been revoked under section 625(b) by the franchising authority.*

*`(b) DEEMED APPROVAL- Except as provided in subsection (a)(5), if a franchising authority fails to act on a franchise application that meets the requirements of this title within the 90-day period described in subsection (a) (3)(B), the franchise application shall be deemed granted--*

*`(1) effective on the 91st day after the franchising authority received the application;*

*`(2) for a term of 15 years;*

*`(3) with--*

*`(A) the same percentage of gross revenue paid by the cable operator with the most subscribers offering cable service in the*

*franchise area; or*

*`(B) if there is no cable operator offering cable service in the franchise area, 5 percent of gross revenue; and*

*`(4) with an obligation to provide the number of public, educational, or governmental use channels required by section 611.*

*`(c) PROCEDURE- If an application is not granted within the 90-day period described in subsection (a)(3)(B) because of subsection (a)(5), the applicant may avail itself of the procedures in section 635 of this Act.*

#### ***`SEC. 604. NO EFFECT ON STATE LAWS OF GENERAL APPLICABILITY.***

*`Nothing in this title is intended to affect State or local laws of general applicability, except to the extent that such laws are inconsistent with this title.*

#### ***`SEC. 605. DIRECT BROADCAST SATELLITE SERVICE.***

*`No State or local government may regulate direct broadcast satellite services (as that term is used in section 335 of this Act). This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State, to the extent otherwise permissible, and shall not preempt State or local laws of general applicability.'*

#### ***SEC. 313. STANDARD FRANCHISE APPLICATION FORM.***

*Section 612 (47 U.S.C. 532) is amended to read as follows:*

#### ***`SEC. 612. STANDARD FRANCHISE APPLICATION FORM.***

*`(a) IN GENERAL- Within 30 days after the date of enactment of the Video Competition and Savings for Consumers Act of 2006, the Commission shall promulgate a standard franchise application form, the use of which by franchising authorities shall be mandatory.*

*`(b) COMPLIANCE COMMITMENTS- The franchise application form shall include a statement, to be signed by the video service provider--*

*`(1) that it agrees to comply with all applicable Federal and State statutes and regulations that are consistent with this title;*

*`(2) that it agrees to comply with all applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery*

*of video service, including the police powers of the municipalities in which the service is delivered that are consistent with this title;*

*`(3) geographically identifying the franchise area in which the provider intends to offer cable service pursuant to the standard franchise; and*

*`(4) certifying that the information contained in the notice is accurate and correct and that the provider will immediately notify the franchising authority of any material changes in that information during the franchise term.*

*`(c) PROVISIONS TO BE SUPPLIED- The franchise application form shall include only the following blank spaces to be filled in by the video service provider and the franchising authority, as appropriate:*

*`(1) The name of the video service provider.*

*`(2) The name and business address of each director and principal executive officer.*

*`(3) A point of contact for the video service provider.*

*`(4) A point of contact for the franchising authority.*

*`(5) The franchise fee percentage under section 622(b)(1).*

*`(6) Any fee percentage that may be assessed under section 622(b)(4).*

*`(7) The period during which the franchising agreement shall be in effect.*

*`(8) The public, educational, or governmental capacity to be provided.*

*`(9) The physical location of the headend.*

*`(10) A description of the video service to be provided.*

*`(11) Signatures.*

*`(12) Dates for each signature.'*

## **SEC. 314. DEFINITIONS.**

*(a) IN GENERAL- Section 602 (47 U.S.C. 522) is amended--*

*(1) by striking 'cable system' in paragraphs (1) and (9) and inserting 'video service system';*

(2) by striking 'regulation);' in paragraph (4) and inserting 'regulation) or its equivalent (as determined by the Commission).';

(3) by inserting after paragraph (11) the following:

'(11A) HEADEND- The term 'headend' means the headend of a cable system or its equivalent as determined by the Commission.';

(4) by inserting after paragraph (12) the following:

'(12A) INSTITUTIONAL NETWORK- The term 'institutional network' means a communication network constructed by a cable operator that is generally available only to subscribers who are not residential subscribers.';

(5) by striking 'cable operator' in paragraph (14) and inserting 'video service provider';

(6) by inserting after paragraph (16) the following:

'(16A) SATELLITE CARRIER- The term 'satellite carrier' means an entity that uses the facilities of a satellite or satellite service licensed by the Commission and operates in the Fixed-Satellite Service under part 25 of title 47, Code of Federal Regulations, or the Direct Broadcast Satellite Service under part 100 of title 47, Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under this Act, for purposes other than for private home viewing.';

(7) by striking 'cable service' in paragraph (17) and inserting 'video service';

(8) by striking 'cable operator' each place it appears in paragraph (17) and inserting 'video service provider'; and

(9) by inserting after paragraph (20) the following:

'(24) VIDEO SERVICE- The term 'video service' means--

'(A) the transmission to subscribers of--

'(i) video programming;

'(ii) interactive on-demand service; or

*`(iii) other programming service; and*

*`(B) subscriber interaction, if any, required for the selection or use of such video programming, interactive on-demand service, or other programming service regardless of the transmission technology used and regardless of how the subscriber interacts with the service.*

*`(25) VIDEO SERVICE PROVIDER- The term `video service provider'--*

*`(A) means a facilities-based (as determined by the Commission) provider of video service that utilizes a public right-of-way in the provision of such service (including cable operators and providers offering open video systems under section 653), regardless of the transmission technology used and regardless of how the subscriber interacts with the service; but*

*`(B) does not include any person to the extent that the person is providing--*

*`(i) satellite service, including if such service is bundled with, or offered in conjunction with, an Internet access service or other broadband capability;*

*`(ii) video programming using radio communication directly to the recipient's premises; or*

*`(iii) service via commercial mobile service (as defined in section 332(d)).'.*

*(b) STYLISTIC CONSISTENCY- Section 602 (47 U.S.C. 522), as amended by subsection (a), is amended--*

*(1) by striking `title--' and inserting `title:';*

*(2) by redesignating paragraphs (1) through (20) as paragraphs (1) through (23);*

*(3) by striking the semicolon at the end of each such paragraph and inserting a period; and*

*(4) by striking `Commission; and' in paragraph (22), as redesignated, and inserting `Commission.';*

*(5) except in paragraphs (12), (14), and (19), as redesignated--*

*(A) by inserting after the designation of each such paragraph a*



*heading, in a form consistent with the form of the heading of paragraphs (24) and (25), as added by subsection (a) of this section consisting of the term defined by such paragraph, or the first term so defined if the paragraph defines more than 1 term; and*

*(B) by striking 'the' the first place it appears and inserting 'The'.*

### **SEC. 315. FAMILY TIER STUDY.**

*(a) IN GENERAL- The Congress endorses and commends cable operators, satellite providers, and other multi-channel video programming distributors for their voluntary efforts to offer family program tiers that seek to meet consumer demand for programming packages free of indecent and obscene programming suitable for family audiences.*

*(b) DATA COLLECTION- Every multichannel video programming distributor shall submit an annual report to the Federal Communications Commission on family tiers that includes whether it offers a family tier, the retail price of such tier, a description of the channels included in such tier, a description of the distributor's efforts to market such tier, and the subscribership level for every tier and package offered by such distributor. The Commission shall keep confidential any data that is not available in the public domain on the date of submission.*

*(c) REPORT TO CONGRESS- Within 1 year after the date of enactment of this Act, and every year thereafter for 5 years, the Commission shall submit a report to Congress aggregating the data it receives pursuant to subsection (b).*

### **SEC. 316. NOTICE OF INQUIRY ON VIOLENT PROGRAMMING.**

*Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall complete its Notice of Inquiry and issue its finding in the matter of Violent Television Programming and Its Impact on Children, MB Docket No. 04-261. .AEMD23AF*

### **Subtitle B--Streamlining the Provision of Video Services**

### **SEC. 331. FRANCHISE REQUIREMENTS AND RELATED PROVISIONS.**

*(a) GENERAL FRANCHISE REQUIREMENTS- Section 621 (47 U.S.C. 541) is amended--*

*(1) by striking subsection (a) and inserting the following:*

*`(a) In General-*

*`(1) AWARD OF FRANCHISE- A franchising authority may not--*

*`(A) grant an exclusive franchise; or*

*`(B) grant a franchise for a term shorter than 5 years or longer than 15 years as provided in section 603.*

*`(2) Preservation of local government authority to manage public rights-of-way; easements-*

*`(A) IN GENERAL- Except as provided in this title, no State or local law may prohibit, or have the effect of prohibiting, a video service provider from offering video service.*

*`(B) HOLD HARMLESS- A State or local government shall apply its laws or regulations in a manner that is reasonable, competitively neutral, nondiscriminatory, and consistent with State police powers, including permitting, payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages to ensure compliance with such laws and regulations. Any permitting fees imposed by a State or local government shall be for the purpose of compensating that government for the costs incurred in managing public rights-of-way. Any law or regulation that meets the requirements of this subparagraph shall not be held to violate subparagraph (A).*

*`(C) PROPERTY OWNERS- Nothing in this title precludes a State or local government from requiring that a property owner be justly compensated by a video service provider for damage caused by the installation, construction, operation, or removal of facilities by the video service provider.*

*`(D) DISPUTE RESOLUTION- If a dispute arises concerning the application of subparagraph (A), (B), or (C), the sole recourse of any party to the dispute shall be to file an action in a court of competent jurisdiction.*

*`(3) USE OF PUBLIC RIGHTS-OF-WAY- Any franchise shall be construed to authorize the construction of a video service system over public rights-of-way, and through easements, which is within the area to be served by the video service system and which have been dedicated for compatible uses, except that in using such easements the video service provider shall ensure--*

*`(A) that the safety and functioning of the property and the safety*

*of other persons not be adversely affected by the installation or construction of facilities necessary for a video service system; and*

*'(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the video service provider or subscriber, or a combination of both.'; and*

*(2) by striking paragraph (1) of subsection (b) and inserting '(1) Except to the extent provided in subsection (f), a video service provider may not provide video service without a franchise.'*

*(b) FRANCHISE FEE- Section 622 (47 U.S.C. 542) is amended--*

*(1) by striking subsections (a) and (b) and inserting the following:*

*'(a) IN GENERAL- A franchising authority may impose and collect a franchise fee from a video service provider that provides video services within the local franchise area of that authority. A franchising authority may not discriminate among video service providers in imposing or collecting any fee assessed under this section.*

*'(b) Amount-*

*'(1) IN GENERAL- The franchise fee imposed by a franchising authority under subsection (a) for any 12-month period may not exceed 5 percent of the video service provider's gross revenue derived in such period. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes.*

*'(2) PREPAID OR DEFERRED PAYMENT ARRANGEMENTS- Nothing in this subsection prohibits a franchising authority and a video service provider from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis, except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.*

*'(3) FRANCHISING AUTHORITY AND VIDEO SERVICE PROVIDER AGREEMENTS- Nothing in this section precludes a State or local government and a video service provider from entering into a voluntary commercial agreement, whereby in consideration for a mutually agreed upon reduction in the franchise fee under paragraph (1), the video service provider makes available to the local unit of government services, equipment, capabilities, or other valuable consideration.*

*'(4) PEG and institutional network financial support-*

*`(A) IN GENERAL- Except as provided in subparagraph (D), a video service provider may be required to pay a fee equal to--*

*`(i) not more than 1 percent of the video service provider's gross revenue in the franchise area to the franchising authority for the support of public, educational, and governmental access facilities and institutional networks; or*

*`(ii) the value, on a per subscriber basis, of all monetary grants or in-kind services or facilities for public, educational, or governmental access facilities provided by the cable operator in the franchise area with the most cable service subscribers in the calendar year preceding the date of enactment of the Video Competition and Savings for Consumers Act of 2006, pursuant to that cable operator's existing franchise in effect on the date of enactment of that Act.*

*`(B) CALCULATION DATA- A franchising authority may require a cable operator to provide information sufficient to calculate the per-subscriber equivalent fee allowed by subparagraph (A)(ii). The information shall be treated as confidential and proprietary business information. The payments made by a video service provider pursuant to subparagraph (A) shall be assessed and collected in a manner consistent with this section.*

*`(C) Existing institutional networks-*

*`(i) CONTINUED SERVICE- Except as provided in subparagraph (D), a franchising authority may require a cable operator or video service provider with a franchise in effect on the date of enactment of the Video Competition and Savings for Consumers Act of 2006 to continue to provide any institutional network it was required to provide on the date of enactment of that Act notwithstanding the expiration or termination of that franchise pursuant to section 381(b) of the Video Competition and Savings for Consumers Act of 2006.*

*`(ii) NEW NETWORK NOT REQUIRED- A franchising authority may not require a video service provider to construct a new institutional network.*

*`(D) SPECIAL RULE- In Hawaii--*

*`(i) subparagraph (A)(ii) shall be applied by inserting 'and institutional networks' after 'governmental access facilities'; and*

*`(ii) subparagraph (C)(i) shall be applied by inserting `or had committed to provide' after `required to provide'.'; and*

*(2) by striking subsections (d) through (h), redesignating subsection (i) as subsection (h), and inserting the following after subsection (c):*

*`(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.*

*`(e) ANNUAL REVIEW-*

*`(1) FRANCHISING AUTHORITY AUDIT PROCEDURE- A franchising authority may, upon reasonable written request, but no more than once in any 12-month period, review the business records of a video service provider to the extent reasonably necessary to ensure payment of the fees required by this section. The review may include the methodology used by the video service provider to assign portions of the revenue from video service that may be bundled or functionally integrated with other services, capabilities, or applications. The review shall be conducted in accordance with procedures established by the Commission.*

*`(2) AVAILABILITY OF BOOKS AND RECORDS- Upon request under paragraph (1), a video service provider shall make available its books and records for periodic audit by a franchising authority. The franchising authority shall treat information obtained in the course of such an audit as confidential and proprietary and protect sensitive information from public disclosure.*

*`(3) COST RECOVERY- To the extent that the review under paragraph (1) identifies an underpayment of more than 5 percent of any fee required by this section for the period of review, the video service provider shall reimburse the franchising authority the reasonable costs of any such review conducted by an independent third party with respect to such fee. The costs of any contingency fee arrangement between the franchising authority and the independent reviewer shall not be subject to reimbursement.*

*`(4) LIMITATION- Any fee that is not reviewed by a franchising authority within 3 years after it is paid or remitted shall not be subject to later review by the franchising authority under this subsection and shall be deemed accepted in full payment by the franchising authority.*

*`(f) GAAP STANDARDS- For purposes of this section, all financial determinations and computations shall be made in accordance with generally*

*accepted accounting principles except as otherwise provided.*

*`(g) DEFINITIONS- In this section:*

*`(1) FRANCHISE FEE- The term `franchise fee'--*

*`(A) includes any tax, fee, or assessment of any kind imposed by a franchising authority or a State or local governmental entity on a video service provider or subscriber, or both, solely because of their status as such; but*

*`(B) does not include--*

*`(i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and video service providers or their services but not including a tax, fee, or assessment which is unduly discriminatory against video service providers or subscribers);*

*`(ii) any fee that is required by the franchise under subsection (b)(4);*

*`(iii) requirements or charges incidental to the use of public rights-of-way, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages;*

*`(iv) costs of fines, penalties, or recoupment; or*

*`(v) any fee imposed under title 17, United States Code.*

*`(2) GROSS REVENUE-*

*`(A) IN GENERAL- The term `gross revenue' means all consideration of any kind or nature including cash, credits, property, and in-kind contributions (services or goods) received by a video service provider from the provision of video service within a franchise area including--*

*`(i) all charges and fees paid by subscribers for the provision of video service, including fees attributable to video service when that service is sold individually or as part of a package or bundle, or is functionally integrated with services other than video service;*

*`(ii) revenue received by a video service provider as compensation for carriage of video programming on the*

*provider's system;*

*` (iii) compensation received by a video service provider as compensation for promotion or exhibition of any product or service on the provider's video service, such as a home shopping or similar channel, subject to subparagraph (D)(vi); and*

*` (iv) a pro rata portion of all revenue derived by a video service provider or an affiliate thereof pursuant to a compensation arrangement for advertising derived from the operation of the provider's video service or the video service within a franchise area subject to subparagraph (D)(ii).*

*` (B) AFFILIATES- The gross revenue of a video service provider includes gross revenue of an affiliate to the extent the exclusion of the affiliate's gross revenue would have the effect of permitting the video service provider to evade the payment of franchise fees which would otherwise be paid by that video service provider for video services provided within the franchise area of the franchising authority imposing the fee.*

*` (C) REVENUE FROM BUNDLED OR FUNCTIONALLY INTEGRATED SERVICE- In the case of a video service that is packaged, bundled, or functionally integrated with other services, capabilities, or applications, gross revenue shall include only the revenue attributable to the video service, which shall be reflected on the books and records of the video service provider kept in the regular course of business.*

*` (D) EXCLUSIONS- Gross revenue of a video service provider (or an affiliate to the extent otherwise included in the gross revenue of the video service provider under subparagraph (B)) does not include--*

*` (i) any revenue not actually received, even if billed, such as bad debts, net of any recoveries of bad debts;*

*` (ii) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already excluded under clause (i);*

*` (iii) subject to subparagraph (C), any revenues received by a video service provider or its affiliates from the provision of services or capabilities other than video service, including--*

*` (I) voice, Internet access, or other broadband-enabled applications that are not video service; and*

*`(II) services, capabilities, and applications that are sold or provided as part of a package or bundle of services or capabilities, or that are functionally integrated with video service;*

*`(iv) any revenues received by a video service provider or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;*

*`(v) any costs attributable to the provision of video services to subscribers at no charge, including the provision of such services to public institutions without charge;*

*`(vi) any revenue paid by subscribers to a home shopping programmer directly from the sale of merchandise through any home shopping channel offered as part of the video service provider's video services, but not excluding any commissions that are paid to the video service provider as compensation for promotion or exhibition of any product or service on the provider's video service, such as a home shopping or similar channel;*

*`(vii) any revenue forgone from the provision of video service at no charge to any person other than forgone revenue exchanged for trades, barter, services, or other items of value;*

*`(viii) any tax, fee, or assessment of general applicability imposed on a subscriber or transaction by Federal, State, or local government that is required to be collected by the video service provider and remitted to the taxing authority, including sales taxes, use taxes, and utility user taxes;*

*`(ix) any revenue from the sale of capital assets or surplus equipment;*

*`(x) the reimbursement by programmers for marketing costs actually incurred by a video service provider for the introduction of new programming; or*

*`(xi) any revenue from the sale of video services for resale to the extent that the purchaser certifies in writing that it will--*

*`(I) resell the service; and*

*`(II) pay any applicable franchise fee with respect*



thereto.'.

### **SEC. 332. RENEWAL; REVOCATION.**

Part II of title VI (47 U.S.C. 541 et seq.) is amended by striking sections 625 and 626 and inserting the following:

### **SEC. 625. RENEWAL; REVOCATION.**

*'(a) RENEWAL- A video service provider may submit a written application for renewal of its franchise to a franchising authority not more than 180 days before the franchise expires. Any such application shall be made on the standard application form promulgated by the Commission under section 612 and shall be treated under section 603 in the same manner as any other franchise application.*

*'(b) REVOCATION- Notwithstanding any other law of general applicability, a franchising authority may revoke a video service provider's franchise if it determines, after notice and an opportunity for a hearing, that the video service provider has--*

*'(1) violated any Federal or State law, or any Commission regulation, relating to the provision of video services in the franchise area;*

*'(2) made false statements, or material omissions, in any filing with the franchising authority or the Commission relating to the provision of video service in the franchise area;*

*'(3) violated the rights-of-way management laws or regulations of any franchising authority in the franchise area relating to the provision of video service in the franchise area; or*

*'(4) violated the terms of the franchise agreement (including any commercial agreement permitted under section 622(b)(3)).*

*'(c) NOTICE; OPPORTUNITY TO CURE- A franchising authority may not revoke a franchise unless it first provides--*

*'(1) written notice to the video service provider of the alleged violation in which the revocation would be based; and*

*'(2) a reasonable opportunity to cure the violation.*

*'(d) FINALITY OF DECISION- Any decision of a franchising authority to revoke a franchise under this section is final for purposes of appeal. A video service provider whose franchise is revoked by a franchising authority may*

*avail itself of the procedures in section 635 of this Act.'*

### **SEC. 333. PEG AND INSTITUTIONAL NETWORK OBLIGATIONS.**

*Section 611 (47 U.S.C. 531) is amended to read as follows:*

#### **'SEC. 611. CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE.**

*'(a) IN GENERAL- A video service provider that obtains a franchise shall provide channel capacity for public, educational, or governmental use that is not less than the channel capacity required of the cable operator or video service provider with the greatest number of public, educational, or governmental use channels in the franchise area on the effective date of the franchise. If there is no other video service provider in the franchise area on the effective date of the franchise, the video service provider may be required to provide up to 3 channels.*

*'(b) ADJUSTMENT- Every 15 years after the commencement of a franchise granted after April 30, 2006, a franchising authority may require a video service provider to increase the channel capacity designated for public, educational, or governmental use, and the channel capacity designated for such use on any institutional networks required under subsection (a). The increase may not exceed the greater of--*

*'(1) 1 channel; or*

*'(2) 10 percent of the public, educational, or governmental channel capacity required of the video service provider before the required increase.*

*'(c) EDITORIAL CONTROL- Subject to section 624(d)(1), a video service provider shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, but a video service provider may refuse to transmit any public access program or portion of a public access program which contains obscenity.*

*'(d) TRANSMISSION AND PRODUCTION OF PROGRAMMING-*

*'(1) PEG PROGRAMMING- A video service provider shall ensure that all subscribers receive any public, educational, or governmental programming carried by the video service provider within the subscriber's franchise area.*

*'(2) PRODUCTION RESPONSIBILITY- The production of any programming provided under this subsection shall be the responsibility*

of the franchising authority.

`(3) TRANSMISSION RESPONSIBILITY- The video service provider shall be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another video service provider already offering the public, educational, or governmental programming under paragraph (4), to the video service provider's subscribers, or any public, educational, or governmental programming produced by or for the franchising authority and carried by the video service provider pursuant to this section.

`(4) INTERCONNECTION; COST-SHARING- Unless 2 video service providers otherwise agree to the terms for interconnection and cost sharing, such video service providers shall comply with regulations prescribed by the Commission providing for--

`(A) the interconnection between 2 video service providers in a franchise area for transmission of public, educational, or governmental programming, without material degradation in signal quality or functionality; and

`(B) the reasonable allocation of the costs of such interconnection between such video service providers.

`(5) DISPLAY OF PROGRAM INFORMATION- The video service provider shall display the program information for public, educational, or governmental programming in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The video service provider may not omit public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area if the franchising authority provides such programming to the video service provider at a location, in the data format, and in sufficient time normally required for the programming to be displayed on such device, guide, or menu.'.

### **SEC. 334. SERVICES, FACILITIES, AND EQUIPMENT.**

(a) IN GENERAL- Section 624 (47 U.S.C. 544) is amended--

(1) by striking subsections (a), (b), (c), (e), and (h) and redesignating subsections (d), (f), (g), and (i) as subsections (a) through (d), respectively; and

(2) by inserting 'or wire' after 'any cable' in subsection (d), as

*redesignated.*

*(b) CONFORMING AMENDMENT- Section 611(c) (47 U.S.C. 531(c)), as amended by section 333 of this Act, is amended by striking `624(d)(1)' and inserting `624(a)(1)'.*

### **SEC. 335. SHARED FACILITIES.**

*Part III of title VI (47 U.S.C. 541 et seq.) is amended--*

*(1) by striking section 627 and redesignating sections 628 and 629 as sections 626 and 627, respectively; and*

*(2) by adding at the end the following:*

### **`SEC. 628. ACCESS TO PROGRAMMING FOR SHARED FACILITIES.**

*`(a) IN GENERAL- A video service programming vendor in which a video service provider has an attributable interest may not deny a video service provider with a franchise under this title access to video programming solely because that video service provider uses a headend for its video service system that is also used, under a shared ownership or leasing agreement, as the headend for another video service system.*

*`(b) VIDEO SERVICE PROGRAMMING VENDOR DEFINED- The term `video service programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of video programming that is primarily intended for receipt by video service providers for retransmission to their video service subscribers.'*

### **SEC. 336. CONSUMER PROTECTION AND CUSTOMER SERVICE.**

*Section 632 (47 U.S.C. 552) is amended to read as follows:*

### **`SEC. 632. CONSUMER PROTECTION AND CUSTOMER SERVICE.**

*`(a) Regulations-*

*`(1) IN GENERAL- Not later than 120 days after the date of enactment of the Video Competition and Savings for Consumers Act of 2006, the Commission, after receiving comments from interested parties, including national associations representing franchising authorities or consumers, shall promulgate regulations, which shall include penalties to be paid to subscribers with respect to customer service and consumer protection requirements for video service providers.*

*`(2) EFFECTIVE DATE OF REGULATIONS- The regulations required by subsection (a) shall take effect 60 days after the date on which a final rule is promulgated by the Commission.*

*`(b) MAXIMUM PENALTY FOR EARLY TERMINATION OF SUBSCRIPTION- It is unlawful for a video service provider to charge a subscriber an amount in excess of 1 month's subscription fee as a penalty or service charge for terminating a subscription to the video service provider's service before the date on which the subscription term ends.*

*`(c) ENFORCEMENT- The regulations promulgated by the Commission under subsection (a) and the provisions of subsection (b) shall be enforced by franchising authorities. A franchising authority may refer a matter for enforcement to the State attorney general or the State consumer protection agency on a case-by-case basis.*

*`(d) REVIEW BY COMMISSION- A video service provider may appeal any enforcement action taken against that provider by a franchising authority to the Commission.'*

### **SEC. 337. REDLINING.**

*Part IV of title VI (47 U.S.C. 551 et seq.) is amended by adding at the end the following:*

### **` SEC. 642. REDLINING.**

*`(a) IN GENERAL- A video service provider may not deny access to its video service to any group of potential residential video service subscribers because of the income, race, or religion of that group.*

*`(b) Enforcement-*

*`(1) STATE ATTORNEY GENERAL ENFORCEMENT- This section may be enforced by the State attorney general through a complaint-initiated adjudication process under which a complaint may be filed by a resident of the franchising area who is aggrieved by a violation of subsection (a) or by a franchising authority on behalf of residents of its franchise area. Within 180 days after receiving the resident's or franchising authority's complaint, a State attorney general shall act on such a complaint either by filing a complaint with a court of competent jurisdiction or notifying the resident or franchising authority that the State attorney general will not file such a complaint.*

*`(2) EVALUATION OF COMPLAINT- The totality of the video service provider's deployments in its service areas shall be considered in any*

*adjudication pursuant to an enforcement action under this subsection.*

*`(c) REMEDIES- If a court determines that a video service provider has violated subsection (a) it--*

*`(1) shall ensure that the video service provider remedies any violation of subsection (a); and*

*`(2) may assess a civil penalty in such amount as may be authorized under State law for the franchising area in which the violation occurred for violation of that State's antidiscrimination laws.*

*`(d) LIMITATIONS-*

*`(1) NATURAL AND TECHNOLOGICAL BARRIERS- It is not a violation of subsection (a) if video service is denied because technical feasibility, commercial feasibility, operational limitations, or physical barriers preclude the effective provision of video service.*

*`(2) QUOTAS, GOALS, OR TIMETABLES- Nothing in this section authorizes the use of quotas, goals, or timetables as a remedy.*

*`(e) Reports-*

*`(1) ANNUAL REPORTS TO COMMISSION- Beginning 3 years after the date of enactment of the Video Competition and Savings for Consumers Act of 2006, each franchising authority shall report to the Commission on video service provider deployment in its franchise area. The Commission shall develop and make available to franchising authorities a standardized, electronic data-based, report form to be used in complying with the requirements of this paragraph. A video service provider shall provide such information to the franchising authority as is needed to complete the report.*

*`(2) COMMISSION REPORT TO CONGRESS- Beginning 4 years after the date of enactment of the Video Competition and Savings for Consumers Act of 2006, and every 4 years thereafter, the Commission shall report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce on the buildout of video service.'*

### **SEC. 338. APPLICATION OF SECTION 503(b).**

*Section 503(b) (47 U.S.C. 503(b)) is amended by adding at the end the following:*

*`(7) APPLICATION TO VIDEO SERVICE PROVIDERS- In this section the terms*

*'cable television operator' and 'cable television system operator' include a video service provider (as defined in section 602 of this Act).'*

### **SEC. 339. APPLICATION OF TITLE VII CABLE PROVISIONS TO VIDEO SERVICES.**

*Title VII (47 U.S.C. 601 et seq.) is amended--*

*(1) by striking 'cable operators for their retransmission to cable subscribers;' in section 705(d)(1) and inserting 'cable operators or video service providers (as defined in section 602 of this Act) for their retransmission to subscribers;';*

*(2) by striking 'and cable television;' in section 712(a)(1) and inserting 'cable television, and video service (as defined in section 602 of this Act);'; and*

*(3) by inserting 'video service,' in section 714(k)(3) after 'cable,'.*

### **SEC. 340. CHILDREN'S TELEVISION ACT AMENDMENT.**

*Section 102(d) of the Children's Television Act of 1990 (47 U.S.C. 303a(d)) is amended by striking 'a cable operator,' and inserting 'cable operators and video service providers,'.*

#### **Subtitle C--Miscellaneous and Conforming Amendments**

### **SEC. 351. MISCELLANEOUS AMENDMENTS.**

*(a) MUNICIPAL OPERATORS- Section 621(f) (47 U.S.C. 541(f)) is amended to read as follows:*

*'(f) MUNICIPAL OPERATORS- No provision of this title shall be construed to prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by the franchising authority.'*

*(b) SUNSET- Section 626(c)(5), as redesignated by section 335 of this Act, is amended--*

*(1) by striking '10 years after the date of enactment of this section,' and inserting 'on October 5, 2012,'; and*

*(2) by striking 'last year of such 10-year period,' and inserting '12-month period ending on that date,'.*

(c) *UPDATING-* Section 613 (47 U.S.C. 533) is amended--

(1) by striking 'July 1, 1984,' in subsection (g) and inserting 'the date of enactment of the Video Competition and Savings for Consumers Act of 2006'; and

(2) by striking subsection (a) and redesignating subsections (c) through (h) as subsections (a) through (f), respectively.

(d) *REPEAL-* Section 617 (47 U.S.C. 537) is repealed.

(e) *RESTRUCTURING PART IV-* Part IV of title VI (47 U.S.C. 551 et seq.) is amended--

(1) by striking sections 636 and 637; and

(2) by redesignating sections 635A, 638, 639, 640, 641, and 642 (as added by section 337 of this Act) as sections 636, 637, 638, 639, 640, and 641, respectively.

(f) *FEDERAL REGULATION OF IP-ENABLED VIDEO SERVICE-* Title VI (47 U.S.C. 521 et seq.), as amended by section 337 and subsection (e)(2), is amended by adding at the end the following:

***SEC. 642. IP-ENABLED VIDEO SERVICE.***

(a) *IN GENERAL-* Notwithstanding any other provision of law, IP-enabled video service is an interstate service and is subject only to Federal regulations.

(b) *IP-ENABLED VIDEO SERVICE DEFINED-* In this section, the term 'IP-enabled video service' means a video service provided over the public Internet utilizing Internet protocol, or any successor protocol that is not offered by, or not offered as part of a package of video services offered by, a video service provider or its affiliate.

(c) *COMMISSION AUTHORITY-* The commission may not impose any rule on, apply any regulation to, or otherwise regulate the offering or provision of IP-enabled video service.

(d) *LAW ENFORCEMENT-* Nothing in this section shall be construed to interfere with any lawful activity of a law enforcement agency or to limit the application of any law the violation of which is punishable by a fine, imprisonment, or both.

(e) *NO EFFECT ON TAX LAWS-* Nothing in this section shall be construed to modify, impair, supersede, or authorize the modification, impairment, or



*supersession of, any State or local tax law.'*

**(g) CONFORMING AMENDMENTS FOR RETRANSMISSION-**

**(1) Section 325(b) (47 U.S.C. 325(b)) is amended--**

*(A) by striking 'cable system' in paragraph (1) and inserting 'video service provider'; and*

*(B) by inserting 'The term 'video service provider' has the meaning given it in section 602(25) of this Act.' after 'title.' in the matter following subparagraph (E) of paragraph (2).*

**(2) Section 336(b) (47 U.S.C. 336(b)) is amended by striking 'section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;' and inserting 'section 614 or 615;'**

**Subtitle D--Effective Dates and Transition Rules**

**SEC. 381. EFFECTIVE DATES; PHASE-IN.**

**(a) In General-**

*(1) 6-month delay- Except as provided in paragraph (2), the amendments made by the Video Competition and Savings for Consumers Act of 2006 shall take effect 180 days after the date of enactment of that Act.*

*(2) INITIATION OF CERTAIN PROCEEDINGS- Notwithstanding paragraph (1), the Federal Communications Commission shall initiate any proceeding required by title VI of the Communications Act of 1934, as amended by this Act, or made necessary by such amendment as soon as practicable after the date of enactment of this Act.*

**(b) Application to Existing Franchise Agreements-**

*(1) IN GENERAL- Except as provided in paragraph (2), the provisions of title VI of the Communications Act of 1934, as amended by this Act, shall not apply to a cable operator with a franchise agreement in effect on the date of enactment of this Act between a franchising authority and a cable operator before the expiration date of the agreement, as determined without regard to any renewal or extension of the agreement. The provisions of title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.), as in effect on the day before the date of enactment of this Act, shall continue to apply to any such franchise agreement and the cable operator as provided by subsection (c) until the earlier of--*

*(A) the expiration date of the agreement; or*

*(B) the date on which a new franchise agreement that replaces the existing franchise agreement takes effect.*

*(2) Competition trigger-*

*(A) NOTIFICATION OF EXISTING FRANCHISEE REQUIRED- If a franchising authority authorizes a video service provider to provide video service in an area in which cable service is already being provided under an existing franchise agreement, the franchising authority shall--*

*(i) require the video service provider to notify the franchising authority when the video service provider commences video service in that area; and*

*(ii) immediately notify any cable operator providing cable service in that area upon receipt of the notice required under clause (i).*

*(B) NEW FRANCHISE AGREEMENT SUPERSEDES EXISTING AGREEMENT- Upon receipt of notice under subparagraph (A)(ii), a cable operator with an existing franchise to provide cable service in that area may submit an application for a franchise under section 603 of the Communications Act of 1934, as amended by this Act. When the franchise is granted--*

*(i) the terms and conditions of the new franchise agreement supersede the existing franchise agreement; and*

*(ii) the provisions of title VI of the Communications Act of 1934, as amended by this Act, shall apply.*

*(c) Limited Application of Prior Law-*

*(1) IN GENERAL- Except as provided in subsection (b) or otherwise explicitly provided in new title VI, the provisions of old title VI (and all regulations, rulings, waivers, orders, and franchise agreements under old title VI) shall continue in effect after the date of enactment of this Act with respect to any cable operator to which they applied before that date until the earlier of--*

*(A) the expiration date of the franchise agreement under which the cable operator was operating on the date of enactment of this Act; or*

*(B) that date on which a new franchise agreement takes effect that replaces a cable operator's franchise agreement described in subparagraph (A).*

*(2) PRESERVATION OF BASIC TIER REGULATION- Notwithstanding any other provision of this subsection, section 623 of old title VI shall continue to apply in any franchise area until a franchising authority receives a notice under subsection (b)(2)(A)(i).*

*(d) DEFINITIONS- In this section:*

*(1) CABLE OPERATOR- The term 'cable operator' includes a local exchange carrier that provides video services to video service subscribers in its telephone service area through an open video system that complies with the requirements of section 653 of the Communications Act of 1934 (47 U.S.C. 573).*

*(2) NEW TITLE VI- The term 'new title VI' means title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.) as amended by this Act.*

*(3) OLD TITLE VI- The term 'old title VI' means title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.) as in effect on the day before the date of enactment of this Act.*

#### **TITLE IV--VIDEO CONTENT**

##### **Subtitle A--National Satellite**

### **SEC. 401. AVAILABILITY OF CERTAIN LICENSED SERVICES IN NONCONTIGUOUS STATES.**

*(a) IN GENERAL- Section 335 (47 U.S.C. 335) is amended by adding at the end thereof the following:*

*`(c) Alaska and Hawaii Obligations-*

*`(1) IN GENERAL- Each satellite carrier shall, to the extent technically feasible given the carrier's satellite constellation in use, provide a comparable consumer product to subscribers in Alaska and Hawaii at prices and terms comparable to those made available to subscribers in the contiguous United States.*

*`(2) Conditions on new licenses-*

*`(A) IN GENERAL- Before the Commission grants a license for a*

*new satellite used for service in the contiguous United States to a satellite carrier, it shall ensure that, to the extent technically feasible, the following minimum conditions are met:*

*`(i) If the satellite is used for direct-to home video services, the satellite shall be--*

*`(I) capable of providing services to consumers in the cities of Anchorage, Fairbanks, and Juneau, Alaska, using signal power levels of at least 45 dBW effective isotropic radiated power; and*

*`(II) capable of providing services to consumers in the islands of Oahu, Maui, Kauai, Molokai, and Hawaii, Hawaii, using signal power levels of at least 46 dBW effective isotropic radiated power.*

*`(ii) If the satellite is used for any other direct-to-consumer service--*

*`(I) with respect to services offered on beams covering substantially the entire contiguous United States, the carrier must make best efforts to ensure that the effective isotropic radiated power of the satellite on the downlink and, where applicable, the efficiency of the satellite receive antenna (G/T) can allow the use of a commercially available antenna in Alaska and Hawaii with a gain that is no more than 4 dB greater than that used to provide the service in the contiguous United States; and*

*`(II) with respect to services offered over spot beams covering portions of the contiguous United States, the carrier must make best efforts to ensure that the effective isotropic radiated power of the satellite on the downlink and, where applicable, the efficiency of the satellite receive antenna (G/T) shall allow the use of the same antenna in Alaska and Hawaii as provided in the contiguous United States for the service.*

*`(B) TECHNICAL FEASIBILITY- It is deemed not technically feasible for a satellite with a look angle to any area of less than 8.25 degrees to provide service to such area at the signal power levels described in subparagraph (A).*

*`(3) SATELLITE CARRIER DEFINED- In this subsection, the term 'satellite carrier' means an entity that uses the facilities of a satellite in the Fixed-Satellite Service, the Direct Broadcast Satellite service, the*

*Broadcast Satellite Service, the Mobile-Satellite Service, or the Digital Audio Radio Service that is licensed by the Commission under part 25 of title 47, Code of Federal Regulations, or is licensed or authorized by a foreign government.'*

*(b) EFFECTIVE DATE-* Section 335(c) of the Communications Act of 1934, as added by subsection (a), shall take effect 36 months after the date of enactment of this Act.

*(c) Exception-* Nothing in this section, nor any amendment made by this section, shall require any satellite carrier to take any action that the Commission determines will materially impact the signal quality or availability of programming available to subscribers of such carrier in the continental United States.

*(d) Implementation by Commission-*

*(1) IN GENERAL-* The Federal Communications Commission shall adopt such rules and policies as are necessary to implement and enforce section 335(c) of the Communications Act of 1934 (47 U.S.C. 335(c)).

*(2) AMENDMENT OF RULES-* Within 30 days after the date of enactment of this Act, the Commission shall amend section 1.4000(a)(1)(i)(B) of its rules (47 C.F.R. 1.4000(a)(1)(i)(B)) to insert 'and Hawaii' after 'Alaska'.

### **Subtitle B--Video and Audio Flag**

## **SEC. 451. SHORT TITLE.**

*This subtitle may be cited as the 'Digital Content Protection Act of 2006'.*

## **SEC. 452. PROTECTION OF DIGITAL BROADCAST VIDEO CONTENT.**

*(a) IN GENERAL-* Section 303 (47 U.S.C. 303) is amended by adding at the end the following:

*'(z) Have authority with respect to digital television receivers to adopt such regulations and certifications as are necessary to implement the Report and Order in the matter of Digital Broadcast Content Protection, FCC 03-273, as ratified by the Congress in section 102(b) of the Consumer Competition and Broadband Promotion Act, with the exclusive purpose of limiting the indiscriminate redistribution of digital television content over the Internet or similar distribution platforms, including the authority to reconsider, amend, repeal, supplement, and otherwise modify any such regulations and*

*certifications, in whole or in part, only for that purpose.'*

*(b) RATIFICATION OF FCC REPORT AND ORDERS- The Report and Order in the matter of Digital Broadcast Content Protection, FCC 03-273, and the Order in the matter of Digital Output Protection Technology and Recording Method Certifications, FCC 04-193, are ratified, subject to the limitations set forth in subsection (d), and shall become effective 12 months after the date of enactment of this Act.*

*(c) EXPEDITED PROCEEDING FOR CERTIFYING TECHNOLOGIES FOR USE IN DISTANCE EDUCATION- Within 30 days after the date of enactment of this Act, the Federal Communications Commission shall initiate a further proceeding for the approval of digital output protection technologies and recording methods for use in the course of distance learning activities. The proceeding shall be conducted in accordance with the expedited procedures established for the Interim Approval of Authorized Digital Output Protection Technologies and Authorized Recording Methods in the Report and Order described in subsection (b). The proceeding shall have no effect on certifications made pursuant to the Order in the matter of Digital Output Protection Technology and Recording Method Certifications described in subsection (b), as ratified in that subsection.*

*(d) LIMITATIONS-*

*(1) IN GENERAL- Nothing in this Act or section 303(z) of the Communications Act of 1934 (47 U.S.C. 303(z)), or in regulations of the Commission adopted pursuant thereto, shall--*

*(A) limit the Commission's authority to approve digital output protection technologies and recording methods that allow for the redistribution of digital broadcast content within the home or similar environment, or the use of the Internet to transmit digital broadcast content, where such technologies and recording methods adequately protect such content from indiscriminate redistribution; or*

*(B) be construed to affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under title 17, United States Code.*

*(2) USE OF REDISTRIBUTION CONTROL DESCRIPTOR- Licensees of television broadcast stations may not utilize the Redistribution Control Descriptor, as adopted by the Report and Order described in subparagraph (b), to limit the redistribution of news and public affairs programming the primary commercial value of which depends on timeliness. The Federal Communications Commission shall allow each broadcaster or broadcasting network to determine whether the primary*

*commercial value of a particular news program depends on timeliness. The Commission may review any such determination by a broadcaster or broadcasting network if it receives bona fide complaints alleging, or otherwise has reason to believe, that particular broadcast digital television content has violated this subsection.*

*(3) PROPERTY RIGHTS- The Commission shall require that any authorized redistribution control technology and any authorized recording method technology approved by the Commission under this section that is publicly offered for adoption by licensees, be licensed on reasonable and nondiscriminatory terms and conditions, including terms preserving a licensee's ability to assert any patent rights necessary for implementation of the licensed technology.*

### **SEC. 453. PROTECTION OF DIGITAL AUDIO BROADCASTING CONTENT.**

*Part I of title III (47 U.S.C. 301 et seq.) is amended by adding at the end the following:*

### **SEC. 342. PROTECTION OF DIGITAL AUDIO BROADCASTING CONTENT.**

*(a) IN GENERAL- Subject to section 454(d)(2) of the Digital Content Protection Act of 2006, the Commission may promulgate regulations governing the distribution of audio content with respect to--*

- (1) digital radio broadcasts;*
- (2) satellite digital radio transmissions; and*
- (3) digital radios.*

#### **(b) Monitoring Organizations-**

*(1) IN GENERAL- The Commission shall ensure that a performing rights society or a mechanical rights organization, or any entity acting on behalf of such a society or organization, is granted a license for free or for a de minimis fee to cover only the reasonable costs to the licensor of providing the license, and on reasonable, nondiscriminatory terms and conditions, to access and retransmit as necessary any content contained in such transmissions protected by content protection or similar technologies, if--*

- (A) the license is used to carry out the activities of such society, organization, or entity in monitoring the public performance or*

*other uses of copyrighted works; and*

*`(B) such society, organization, or entity employs reasonable methods to protect any such content accessed from further distribution.*

*`(2) PROTECTED ACTIVITIES- Nothing shall preclude or prevent a performing rights organization, a mechanical rights organization, a monitoring service, a measuring service, or any entity owned in whole or in part by, or acting on behalf of, such an organization or service, from monitoring or measuring public performances or other uses of copyrighted works, advertisements, or announcements contained in performances or other uses, or other information concerning the content or audience of such performances or other uses.*

*`(3) ALTERNATIVE LICENSING LANGUAGE- The Commission may require that any such organization, service, or entity be given a license on either a gratuitous basis or for a de minimis fee to cover only the reasonable costs to the licensor of providing the license, and on reasonable, nondiscriminatory terms, to access, record, and retransmit as necessary any content contained in any such performance or use protected by content protection or similar technology, if--*

*`(A) the license is used for carrying out the activities of such organizations, services, or entities in monitoring or measuring the public performance or other use of copyrighted works, advertisements, or announcements, or other information concerning the content or audience of such performances or uses; and*

*`(B) the organizations, services, or entities employ reasonable methods to protect any such content accessed from further distribution.'.*

#### **SEC. 454. DIGITAL AUDIO REVIEW BOARD.**

*(a) ESTABLISHMENT- The Federal Communications Commission shall establish an advisory committee, to be known as the Digital Audio Review Board.*

*(b) MEMBERSHIP- Members of the Board shall be appointed by the chairman of the Commission and shall include representatives nominated by--*

*(1) the information technology industry;*

*(2) the software industry;*



- (3) the consumer electronics industry;*
- (4) the radio broadcasting industry;*
- (5) the satellite radio broadcasting industry;*
- (6) the cable industry;*
- (7) the audio recording industry;*
- (8) the music publishing industry;*
- (9) performing rights societies, including--*
  - (A) the American Society of Composers, Authors and Publishers;*
  - (B) Broadcast Music, Inc.; and*
  - (C) SESAC, Inc.;*
- (10) public interest organizations;*
- (11) organizations representing recording artists, performers and musicians;*
- (12) organizations representing songwriters; and*
- (13) any other group that the Commission determines will be directly affected by adoption of broadcast flag technology regulations.*

*(c) DUTY-*

- (1) IN GENERAL- Within 1 year after the date of enactment of this Act, the Board shall submit to the Commission a proposed regulation under section 343 of the Communications Act of 1934 (47 U.S.C. 343) that--*
  - (A) represents a consensus of the members of the Board; and*
  - (B) is consistent with fair use principles.*
- (2) Extension of 1-year period- The Commission may extend, for good cause shown, the 1-year period described in paragraph (1) for a period of not more than 6 months, if the Commission determines that--*
  - (A) substantial progress has been made by the Board toward the development of a proposed regulation;*

(B) the members of the Board are continuing to negotiate in good faith; and

(C) there is a reasonable expectation that the Board will draft and submit a proposed regulation before the expiration of the extended period of time.

(d) COMMISSION TREATMENT OF PROPOSED REGULATION-

(1) DRAFT REGULATION- Within 30 days after the Commission receives a proposed regulation from the Board under this section the Commission shall initiate a rulemaking proceeding to implement the proposed regulation.

(2) DEFERENCE; DEADLINE- If the Board submits a proposed regulation under this section the Commission, in promulgating a regulation under section 343 of the Communications Act of 1934, shall--

(A) give substantial deference to the proposed regulation submitted by the Board; and

(B) issue a final rule not later than 6 months after the date on which the proceeding was initiated.

(3) COMMISSION ACTION IF NO BOARD ACTION- If the Board does not submit a proposed regulation to the Commission within 1 year after the date of enactment of this Act, plus any extension granted by the Commission under subsection (c)--

(A) the Commission may initiate a proceeding to determine what, if any, regulations under section 343 of the Communications Act of 1934 regarding digital audio copy protection are necessary; and

(B) if the Commission determines that such regulations are necessary, the Commission may promulgate a rule implementing such protections as long as such regulations do not harm or delay the continued roll-out of HD radio.

(e) ADMINISTRATIVE PROVISIONS-

(1) MEETINGS- The Board shall meet at the call of the Chairman of the Commission.

(2) EXECUTIVE DIRECTOR- The Chairman of the Commission may, without regard to civil service laws and regulations, appoint and terminate an Executive Director and such other additional personnel as may be necessary to enable the Board to perform its duties. The

*Executive Director shall be compensated at a rate not to exceed the rate of pay payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.*

*(3) TEMPORARY AND INTERMITTENT SERVICES- In carrying out its duty, the Board may procure temporary and intermittent services of consultants and experts under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.*

*(4) DETAIL OF GOVERNMENT EMPLOYEES- Upon request of the Board, the head of any Federal agency may detail any Federal Government employee to the Board without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.*

*(5) ADMINISTRATIVE SUPPORT- Notwithstanding section 7(c) of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall provide the Board with such administrative and supportive services as are necessary to ensure that the Board can carry out its functions.*

*(6) TERMINATION- The Board shall terminate on the date on which it submits a proposed regulation to the Commission or at the discretion of the Chairman of the Federal Communications Commission, but no later than 18 months after the Board's first meeting.*

## **TITLE V--MUNICIPAL BROADBAND**

### **SEC. 501. SHORT TITLE.**

*This title may be cited as the 'Community Broadband Act'.*

### **SEC. 502. STATE REGULATION OF MUNICIPAL BROADBAND NETWORKS.**

*Section 706 of the Telecommunications Act of 1996 (47 U.S.C. 157 note) is amended--*

*(1) by redesignating subsection (c) as subsection (i);*

*(2) by inserting after subsection (b) the following:*

*'(c) Local Government Provision of Advanced Communications Capability and Services- No State statute, regulation, or other State legal requirement may prohibit or have the effect of prohibiting any public provider from providing, to any person or any public or private entity, advanced telecommunications*

*capability or any service that utilizes the advanced telecommunications capability provided by such public provider.*

*`(d) Safeguards-*

*`(1) ANTIDISCRIMINATION- To the extent any public provider regulates competing providers of advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such providers, the public provider shall apply its ordinances, rules, policies, and fees, including those relating to public rights-of-way, permitting, performance bonding, and reporting, without discrimination in favor of itself or any other advanced telecommunications capability provider that such public provider owns or is affiliated with, as compared to other providers of such capability or services.*

*`(2) APPLICATION OF GENERAL LAWS- Nothing in this subsection or subsections (e) through (g) shall exempt a public provider from any Federal or State telecommunications law or regulation that applies to all providers of--*

*`(A) advanced telecommunications capability; or*

*`(B) any service that utilizes the advanced telecommunications capability provided by such public provider.*

*`(e) Public-Private Partnerships Encouraged- Each public provider that intends to provide advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public shall consider the potential benefits of a public-private partnership prior to providing such capability or services.*

*`(f) Notice and Opportunity To Bid for the Private Sector-*

*`(1) NOTICE AND OPPORTUNITY TO BID REQUIRED- If a public provider decides not to initiate a project to provide advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public through a public-private partnership, then, before the public provider may provide such advanced telecommunications capability or any such service that utilizes the advanced telecommunications capability provided by such public provider to the public, the public provider shall--*

*`(A)(i) publish notice of its intention in media generally available to the public in the area in which it intends to provide such capability or service; or*

*` (ii) utilize such notice procedures as such provider already had in effect as of the date of enactment of the Community Broadband Act, if such notice has the effect of making such notice generally known to the public; and*

*` (B) provide an opportunity for commercial enterprises to bid to provide such capability or service during the 30-day period following publication of the notice.*

*` (2) NOTICE REQUIREMENTS- The public provider shall include in the notice required by paragraph (1) a description of the proposed scope of the advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to be provided, including--*

*` (A) the services to be provided (including network capabilities);*

*` (B) the coverage area;*

*` (C) service tiers and pricing; and*

*` (D) any proposal for providing advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to low-income areas, or other demographically or geographically defined areas.*

*` (3) PUBLIC NOTICE AND INPUT ON PROPOSED PROJECTS-*

*` (A) IN GENERAL- Each public provider shall--*

*` (i) publish notice of each proposal to provide advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public by a commercial enterprise under paragraph (1)(B); and*

*` (ii) provide local citizens in the jurisdiction of that public provider and such commercial enterprises with information on the specifics of each such project, including--*

*` (I) the cost to taxpayers, and the benefits of, the proposed public provider project; and*

*` (II) any potential alternatives to the proposed public provider project, including any public-private partnerships.*

*`(B) 30-DAY PERIOD- In order to provide local citizens and commercial enterprises with an adequate opportunity to be informed, a public provider shall provide additional notice requesting that any public comments on the proposed public provider project be filed not later than 30 days after the date of publication of the notice required under subparagraph (A).*

*`(4) APPROVAL PROCESS- If a public provider decides to proceed with its own project to provide advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public despite bids by commercial enterprises received in accordance with paragraph (1)(B), such public provider shall authorize that project by whatever process typically would be utilized by such public provider to approve projects of comparable cost in the jurisdiction of such public provider.*

*`(5) APPLICATION TO EXISTING ARRANGEMENTS AND PENDING PROPOSALS- This subsection does not apply to--*

*`(A) any contract or other arrangement under which a public provider is providing or upgrading advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public as of April 20, 2006; or*

*`(B) any public provider proposal to provide advanced communications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public that, as of April 20, 2006--*

*`(i) is in the request-for-proposals process;*

*`(ii) is in the process of being built; or*

*`(iii) has been approved by referendum but is the subject of a lawsuit brought before March 1, 2006.*

*`(g) No Receipt of Federal Funds- If any project to provide advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by a public provider under this section fails whether due to bankruptcy, insufficient funds, or any other reason, no Federal funds may be provided to such public provider to assist such public provider in maintaining, reviving, or renewing such project, except if such failure occurred in any jurisdiction that is subject to a declaration by the President of a major disaster, as defined under section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122).*

*`(h) Temporary Services During States of Emergency- Nothing in subsections (c) through (g) shall preclude a public provider from--*

*`(1) immediately deploying a temporary advanced telecommunications capability or any service that utilizes the advanced telecommunications capability provided by such public provider to the public during a state of emergency declared by the President or the Governor of the State in which such public provider is located; and*

*`(2) continuing the operation of such capability or service until the emergency situation is resolved.'; and*

*(3) by adding at the end of subsection (i), as redesignated, the following:*

*`(3) PUBLIC PROVIDER- The term `public provider' means--*

*`(A) a State or political subdivision thereof;*

*`(B) any agency, authority, or instrumentality of a State or political subdivision thereof;*

*`(C) an Indian tribe (as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)); or*

*`(D) any entity that is owned, controlled, or otherwise affiliated with a State, political subdivision thereof, agency, authority, or instrumentality, or Indian tribe.'*

## **TITLE VI--WIRELESS INNOVATION NETWORKS**

### **SEC. 601. SHORT TITLE.**

*This title may be cited as the `Wireless Innovation Act of 2006' or the `WIN Act of 2006'.*

### **SEC. 602. ELIGIBLE TELEVISION SPECTRUM MADE AVAILABLE FOR WIRELESS USE.**

*Part I of title III (47 U.S.C. 301 et seq.), as amended by section 453 of this Act, is further amended by adding at the end the following:*

### **`SEC. 343. ELIGIBLE BROADCAST TELEVISION SPECTRUM MADE AVAILABLE FOR WIRELESS USE.**

*`(a) IN GENERAL- Effective 270 days after the date of enactment of the WIN Act of 2006, a certified unlicensed device may use eligible broadcast television frequencies in a manner that protects licensees from harmful interference.*

*`(b) COMMISSION TO FACILITATE USE- Within 270 days after the date of enactment of that Act, the Commission shall adopt technical and device rules in ET Docket No. 04-186 to facilitate the efficient use of eligible broadcast television frequencies by certified unlicensed devices, which shall include rules and procedures--*

*`(1) to protect licensees from harmful interference from certified unlicensed devices;*

*`(2) to require certification of unlicensed devices designed to be operated in the eligible broadcast television frequencies that includes testing, which may include testing in an independent laboratory certified by the Commission and field testing, that demonstrates--*

*`(A) compliance with the requirements set forth pursuant to this paragraph; and*

*`(B) that such compliance effectively protects licensees from harmful interference;*

*`(3) to require manufacturers of such devices to include a means of disabling or modifying the device remotely if the Commission determines that certain certified unlicensed devices may cause harmful interference to licensees;*

*`(4) to act immediately on any bona fide complaints from licensees that a certified unlicensed device causes harmful interference including verification, in the field, of actual harmful interference; and*

*`(5) to limit the operation or use of certified unlicensed devices within any geographic area in which a public safety entity is authorized to operate as a primary licensee within the eligible broadcast television frequencies.*

*`(c) DEFINITIONS- In this section:*

*`(1) CERTIFIED UNLICENSED DEVICE- The term 'certified unlicensed device' means a device certified under subsection (b)(2).*

*`(2) ELIGIBLE BROADCAST TELEVISION FREQUENCIES- The term 'eligible broadcast television frequencies' means the following frequencies:*



- `(A) All frequencies between 54 and 72 megaHertz, inclusive.*
- `(B) All frequencies between 76 and 88 megaHertz, inclusive.*
- `(C) All frequencies between 174 and 216 megaHertz, inclusive.*
- `(D) All frequencies between 470 and 608 megaHertz, inclusive.*
- `(E) All frequencies between 614 and 698 megaHertz, inclusive.*

*`(3) LICENSEE- The term 'licensee' means a licensee, as defined in section 3(24), that is operating in a manner that is not inconsistent with its license.'*

## **TITLE VII--DIGITAL TELEVISION**

### **SEC. 701. ANALOG AND DIGITAL TELEVISION SETS AND CONVERTER BOXES; CONSUMER EDUCATION AND REQUIREMENTS TO REDUCE THE GOVERNMENT COST OF THE CONVERTER BOX PROGRAM.**

*(a) Consumer Education Requirements- Section 330 (47 U.S.C. 330) is amended--*

*(1) by redesignating subsection (d) as subsection (e); and*

*(2) by inserting after subsection (c) the following new subsection:*

*`(d) Consumer Education Requirements Regarding Analog Receivers-*

*`(1) REQUIREMENTS FOR MANUFACTURERS- The manufacturer of any analog only television set manufactured in the United States or shipped in interstate commerce shall--*

*`(A) place the appropriate removable label described in paragraph (3) on the screen of such television set; and*

*`(B) display the label required by paragraph (3) on the outside of the retail packaging of the television set--*

*`(i) in a clear and conspicuous manner; and*

*`(ii) in a manner that cannot be removed.*

*`(2) Requirements for retailers-*

*`(A) IN GENERAL- A retailer of analog only television sets that sells such television sets via direct mail, catalog, or electronic means, shall include in all advertisements or descriptions of such television set the product and the information described in paragraph (3) within 120 days after the date of enactment of the Advanced Telecommunications and Opportunities Reform Act.*

*`(B) DUTY TO ADEQUATELY INFORM CONSUMERS- Notwithstanding the requirement in subparagraph (A), it shall be a violation of this Act for any retailer of analog-only television sets--*

*`(i) to fail to adequately inform consumers about the availability of digital-to-analog converter boxes; or*

*`(ii) to provide misleading information about the availability and cost of such converter boxes.*

*`(3) Product and digital television transition information-*

*`(A) LABEL REQUIREMENT- The following product and digital television transition information shall be displayed as a label on analog television sets, in both English and Spanish:*

***` CONSUMER ALERT***

*` This TV has only an `analog' broadcast tuner and will require a converter box after February 17, 2009 to receive over-the-air broadcasts with an antenna because of the Nation's transition to digital broadcasting on that date as required by Federal law. It should continue to work as before with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.'*

*`(B) BLOCKING TECHNOLOGY- All television sets, analog or digital, that have a picture screen 13 inches or greater in size (measured diagonally), shall be equipped with a feature designed to enable viewers to block display of all programs with a common rating. For additional information on such technology, visit <http://www.tvguidelines.org>.*

*`(4) COMMISSION OUTREACH-*

*`(A) IN GENERAL- Beginning within 1 month after the date of enactment of the Advanced Telecommunications and Opportunities Reform Act, the Commission shall initiate a public outreach program the purpose of which is to educate consumers about the digital*

*television transition. Not later than October 15, 2007, the Commission shall complete and submit a national plan to Congress on how to best carry out such public outreach program. Such plan shall include a description of how such public outreach program will carry out the purposes, recommendations, and requirements described in subparagraphs (A), (B), and (C) of section 701(b)(3) of the Advanced Telecommunications and Opportunities Reform Act.*

*“(B) WEBSITE- The Commission shall maintain and publicize a website, or an easily accessible page on its website, containing such consumer information as well as any links to other websites the Commission determines to be appropriate.*

*“(C) TELEPHONE INFORMATION HOTLINE- The Commission shall establish, maintain, and make public a toll-free information hotline regarding the digital television transition.*

*“(5) PUBLIC SERVICE ANNOUNCEMENTS-*

*“(A) IN GENERAL- Each television broadcast licensee or permittee shall broadcast at least 2 30-second public service announcements daily--*

*“(i) during the 3-month period beginning December 1, 2007, such date being 1 month prior to the commencement of the digital-to-analog converter box subsidy program authorized under 3005 of the Digital Television Transition and Public Safety Act of 2005 (Public Law 109-171; 120 Stat. 24); and*

*“(ii) during the 3-month period beginning on November 17, 2008, such date being 3 months prior to the Nation's transition to digital broadcasting as required under section 309(j)(14) of the Communications Act of 1934 (47 U.S.C. 309(j)(14)).*

*“(B) MULTILINGUAL NOTICES- The information required to be provided to consumers under this paragraph shall be provided in English and Spanish and may be provided in such other languages as may be appropriate to the marketing segments of the public to which the information is addressed.*

*“(C) TIME OF BROADCAST- The public service announcements required under subparagraph (A) shall be broadcast at such times as the Commission, in accordance with the Working Group established under section 701(b)(3) of the Advanced Telecommunications and Opportunities Reform Act, may require in order to assure the widest possible audience.*

*`(D) CONTENT OF BROADCAST- The public service announcements required under subparagraph (A) shall, at least--*

*`(i) notify the public of the--*

*`(I) date of the digital transition; and*

*`(II) starting date of the digital-to-analog converter box subsidy program described in subparagraph (A); and*

*`(ii) contain the address of the website and toll-free information hotline provided by the Commission under subparagraphs (B) and (C) of paragraph (4).*

*`(6) PENALTY- In addition to any other civil or criminal penalty provided by law, the Commission shall issue civil forfeitures for violations of the requirements of this subsection in an amount equal to not more than 3 times the amount of the forfeiture penalty established by section 503(a)(2)(A).*

*`(7) SUNSET- The requirements of this subsection, excluding the consumer alert labeling provision described in paragraph (3), shall cease to apply to manufacturers and retailers on December 1, 2009.'*

*(b) DTV Working Group on Consumer Education, Outreach, and Technical Assistance-*

*(1) IN GENERAL- Within 60 days after the date of enactment of this Act, the Federal Communications Commission shall establish an advisory committee, to be known as the DTV Working Group, to consult with State and local governments and the National Telecommunications and Information Administration to promote consumer outreach and to provide logistical assistance on a market-by-market basis to consumers with special needs, including the converter box subsidy program. The Working Group shall ensure that the digital-to-analog converter box subsidy program authorized under section 3005 of Digital Television Transition and Public Safety Act of 2005 (Public Law 109-171; 120 Stat. 24) includes a means by which to reach and assist elderly, disabled, low-income, and non-English speaking households with the delivery and installation of such converter boxes.*

*(2) MEMBERSHIP- The Commission shall appoint to the DTV Working Group representatives of groups involved with the transition to digital television, including the Commission, the National Telecommunications and Information Administration, other Federal agencies, commercial and noncommercial television broadcasters, multichannel video programming distributors, consumer electronics manufacturers and manufacturers of*

*peripheral devices, broadcast antenna and tuner manufacturers, retail providers of consumer electronics equipment, as well as providers of low-income assistance programs, educational institutions, community groups, consumers, and public interest groups (including the Television Ratings Oversight Monitoring Board, the American Association of Retired Persons, the American Association of People with Disabilities, and the Seniors Coalition). Members of the DTV Working Group shall serve without compensation and shall not be considered Federal employees by reason of their service on the advisory committee.*

*(3) PURPOSES- The purposes of the DTV Working Group are--*

*(A) to advise the Commission through written recommendations submitted not later than July 15, 2007, about the creation and implementation of a national plan to inform consumers about the digital television transition as required by section 330(d)(4) of the Communications Act of 1934 (47 U.S.C. 330(d)(6));*

*(B) to ensure that the Commission's national plan includes--*

*(i) at a minimum, recommended procedures for public service announcements by broadcasters, toll-free information hotlines, and retail displays or notices, and any other media or non-media outreach methods the Commission determines necessary, including methods for reaching consumers after February 17, 2009;*

*(ii) a requirement that all licensed broadcasters in a designated market area submit a joint plan to the Commission and the DTV Working Group, not later 4 months after the Commission initiates its public outreach program under section 330(d) of the Communications Act of 1934 (47 U.S.C. 330(d)), that addresses the public outreach and public service announcement requirements required by this title to inform consumers in those areas of the transition to digital television and that--*

*(I) includes a description of how each commercial television broadcaster will fulfill the public service announcement requirements required under section 330(d)(7) of the Communications Act of 1934 (47 U.S.C. 330(d)(7));*

*(II) includes market research by each commercial television broadcaster regarding projected consumer demand for converter boxes in their designated market area; and*

*(III) will be shared with retailers inside their designated market area so that such retailers may stock the appropriate amount of converter boxes to meet the needs of consumers within each designated market area;*

*(C) to work with the Commission and the National Telecommunications and Information Administration to ensure that the digital-to-analog converter box subsidy program is administered in a manner such that those consumers with the greatest need, including analog-only consumers, are adequately served;*

*(D) to monitor and advise the Commission through 2 DTV Progress Reports regarding the course of the outreach program during calendar year 2008; such reports shall describe planned efforts by the private sector, both nationally and in various television broadcast markets, to inform consumers about the digital transition, and shall evaluate the effectiveness of the outreach program and the digital-to-analog converter box subsidy program authorized under section 3005 of Digital Television Transition and Public Safety Act of 2005 (public Law 109-171; 120 Stat. 24);*

*(E) to advise the Commission about modifications necessary to the national plan to minimize potential disruption to consumers attributable to the transition to digital broadcasting required under section 309(j)(14) of the Communications Act of 1934 (47 U.S.C. 309(j)(14)); and*

*(F) to recommend to the Commission procedures for contacting persons with disabilities, which shall include--*

*(i) use of telecommunications relay services for persons who are deaf, hard of hearing, or with speech disabilities;*

*(ii) distribution of printed items available in alternative formats for persons with vision and learning disabilities; and*

*(iii) other alternative formats, including accessible websites for persons with disabilities.*

**(c) REQUIREMENTS TO PROMOTE SALE OF DIGITAL TELEVISIONS AND CONVERTER BOXES-**

**(1) DIGITAL TUNER MANDATE-** Part I of title III (47 U.S.C. 301 et seq.) is amended by inserting after section 303 the following:

**SEC. 303A. REQUIREMENTS FOR DIGITAL TELEVISION SETS AND**

**CERTAIN OTHER EQUIPMENT.**

*'After March 1, 2007, it is unlawful for a manufacturer or importer to import into the United States or ship in interstate commerce for sale or resale to the public, a television broadcast receiver (as defined in section 15.3(w) of the Commission's regulations (47 C.F.R. 15.3(w))) that is not equipped with a tuner capable of receiving and decoding digital signals.'*

*(2) COMMISSION NOT TO CHANGE SCHEDULE- The Federal Communications Commission may not revise the digital television reception capability implementation schedule under section 15.117(i) of its regulations (47 C.F.R. 15.117(i)) except to conform that section to the requirements of section 303A of the Communications Act of 1934.*

*(3) Converter boxes-*

*(A) ENERGY STANDARDS- Within 1 year after the date of enactment of this Act, the Assistant Secretary of Commerce for Communications and Information, in consultation with the Secretary of Energy, shall set the energy standards for digital-to-analog converter boxes (as defined in section 3005(d) of the Digital Television Transition and Public Safety Act of 2005 (47 U.S.C. 309 note)), taking into consideration the cost of the converter box. The standards shall meet the criteria specified in section 325(o) of the Energy Policy and Conservation Act (42 U.S.C. 6295(o)).*

*(B) APPLICATION- Notwithstanding any other provision of law, the standards set under subparagraph (A) shall solely govern the energy standards for converter boxes manufactured or imported for use in the United States on and after the effective date established by the Assistant Secretary. This paragraph shall not apply after May 17, 2010.*

*(C) CONFORMING AMENDMENT- Section 3005(d) of the Digital Television Transition and Public Safety Act of 2005 (47 U.S.C. 309 note)) is amended by inserting 'a clock, other incidental features, or' after 'include'.*

*(d) Downconversion From Digital Signals to Analog Signals-*

*(1) DIGITAL-TO-ANALOG CONVERSION- Section 614(b)(4) (47 U.S.C. 534(b)(4)) is amended--*

*(A) by redesignating subparagraph (B) as subparagraph (I); and*

*(B) by inserting after subparagraph (A) the following:*

*`(B) DIGITAL VIDEO SIGNAL- With respect to any television station that is transmitting broadcast programming exclusively in the digital television service in a local market, a cable operator of a cable system in that market shall carry any digital video signal requiring carriage under this section and program-related material in the digital format transmitted by that station, without material degradation, if the licensee for that station relies on this section or section 615 to obtain carriage of the digital video signal and program-related material on that cable system in that market.*

*`(C) MULTIPLE FORMATS PERMITTED- A cable operator of a cable system may offer the digital video signal and program-related material of a local television station described in subparagraph (A) in any analog or digital format or formats, whether or not doing so requires conversion from the format transmitted by the local television station, so long as--*

*`(i) the cable operator offers the digital video signal and program-related material in the converted analog or digital format or formats without material degradation; and*

*`(ii) also offers the digital video signal and program-related material in the manner or manners required by this paragraph.*

*`(D) TRANSITIONAL CONVERSIONS- Notwithstanding the requirement in subparagraph (B) to carry the digital video signal and program-related material in the digital format transmitted by the local television station, but subject to the prohibition on material degradation, until February 17, 2014--*

*`(i) a cable operator--*

*`(I) shall offer the digital video signal and program-related material in the format or formats necessary for such signal and material to be viewable on analog and digital televisions; and*

*`(II) may convert the digital video signal and program-related material to standard-definition digital format in lieu of offering it in the digital format transmitted by the local television station; and*

*`(ii) notwithstanding clause (i), a cable operator of a cable system with an activated capacity of 550 megahertz or less--*

*`(I) shall offer the digital video signal and program-related material of the local television station described in*



*subparagraph (A), converted to an analog format; and*

*' (II) may, but shall not be required to, offer the digital video signal and program-related material in any digital format or formats.*

*' (E) LOCATION AND METHOD OF CONVERSION- A cable operator of a cable system may perform any conversion permitted or required by this paragraph at any location, from the cable head-end to the customer premises, inclusive.*

*' (F) CONVERSIONS NOT TREATED AS DEGRADATION- Any conversion permitted or required by this paragraph shall not, by itself, be treated as a material degradation.*

*' (G) CARRIAGE OF PROGRAM-RELATED MATERIAL- The obligation to carry program-related material under this paragraph is effective only to the extent technically feasible.*

*' (H) DEFINITION OF STANDARD-DEFINITION FORMAT- For purposes of this paragraph, a signal shall be in standard definition digital format if such signal meets the criteria for such format specified in the standard recognized by the Commission in section 73.682 of its rules (47 C.F.R. 73.682) or a successor regulation.'*

**(2) TIERING-**

*(A) AMENDMENT TO COMMUNICATIONS ACT- Clause (iii) of section 623(b)(7)(A) (47 U.S.C. 543(b)(7)(A)(iii)) is amended to read as follows:*

*' (iii) Any analog signal and any digital video signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.'*

*(B) EFFECTIVE DATE- With respect to any television broadcast station, this subsection and the amendments made by this paragraph shall take effect on the date the broadcaster ceases transmissions in the analog television service.*

**(3) MATERIAL DEGRADATION- Section 614 (47 U.S.C. 534) is amended-**

*(A) by redesignating subsection (h) as subsection (i); and*

*(B) by inserting after subsection (g) the following:*

*'(h) MATERIAL DEGRADATION- For purposes of this section and section 615, transmission of a digital signal over a cable system in a compressed bitstream shall not be considered material degradation as long as such compression does not materially affect the picture quality the consumer receives.'*

*(e) SATELLITE DOWNCONVERSION- Section 338 (47 U.S.C. 338) is amended by adding at the end the following:*

*'(l) Specific Carriage Obligations After Digital Transition-*

*'(1) DIGITAL VIDEO SIGNAL- With respect to any television broadcast station that is transmitting broadcast programming exclusively in the digital television service in a local market in the United States, a satellite carrier carrying the digital signal of any other television broadcast station in that local market shall carry the station's primary video required to be carried and program-related material without material degradation, if the licensee for that station relies on this section to obtain carriage of the station's video signal and program-related material on that satellite carrier's system in that market.*

*'(2) FORMATTING OF PRIMARY VIDEO- A satellite carrier shall offer the primary video and program-related material of a local television station described in paragraph (1) in the digital format transmitted by the station if the satellite carrier carries the primary video of any other television broadcast station in that local market in the same digital format.*

*'(3) MULTIPLE FORMATS PERMITTED- A satellite carrier may offer the primary video and program-related material of a local television broadcast station described in paragraph (1) in any analog or digital format or formats, whether or not doing so requires conversion from the format transmitted by the local television broadcast station, so long as--*

*'(A) the satellite carrier offers the primary video and program-related material in the converted analog or digital format or formats without material degradation; and*

*'(B) also offers the primary video and program-related material in the manner or manners required by this paragraph.*

*'(4) TRANSITIONAL CONVERSIONS- Notwithstanding any requirement in paragraph (1) or (2) to carry the primary video and program-related material in the digital format transmitted by the local television station, but subject to the prohibition on material degradation, until February 17, 2014, a satellite carrier--*

*`(A) shall offer the primary video and program-related material of any local television broadcast station required to be carried under paragraph (1) in the format or formats necessary for such primary video and program-related material to be viewable on analog and digital televisions; and*

*`(B) may convert the primary video and program-related material to standard-definition digital format in lieu of offering it in the digital format transmitted by the local television station.*

*`(5) LOCATION AND METHOD OF CONVERSION- A satellite carrier may perform any conversion permitted or required by this paragraph at any location, from the local receive facility to the customer premises, inclusive.*

*`(6) CONVERSIONS NOT TREATED AS DEGRADATION- Any conversion permitted or required by this paragraph shall not, by itself, be treated as a material degradation.*

*`(7) CARRIAGE OF PROGRAM-RELATED MATERIAL- The obligation to carry program-related material under this paragraph is effective only to the extent technically feasible.*

*`(8) DEFINITION OF STANDARD-DEFINITION FORMAT- For purposes of this subsection, the primary video shall be in standard definition digital format if such primary video meets the criteria for such format specified in the standard recognized by the Commission in section 73.682 of its rules (47 C.F.R. 73.682) or a successor regulation.*

*`(9) MATERIAL DEGRADATION- For purposes of this subsection, transmission of a digital signal over a satellite system in a compressed bitstream shall not be considered material degradation as long as such compression does not materially affect the picture quality the consumer receives.'*

## **SEC. 702. DIGITAL STREAM REQUIREMENT FOR THE BLIND.**

*(a) RULES REINSTATED- The video description rules of the Federal Communications Commission contained in the report and order identified as Implementation of Video Description of Video Programming, Report and Order, 15 F.C.C.R. 15,230 (2000), shall, notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in Motion Picture Association of America, Inc., et al., v. Federal Communications Commission, et al. (309 F. 3d 796, November 8, 2002), be considered to be authorized and ratified by law.*

*(b) CONTINUING AUTHORITY OF COMMISSION- The Federal Communications Commission--*

*(1) shall, within 45 days after the date of enactment of this Act, republish its video description rules contained in the report and order Implementation of Video Description of Video Programming, Report and Order, 15 F.C.C.R. 15,230 (2000);*

*(2) may amend, repeal, or otherwise modify such rules;*

*(3) shall initiate a proceeding within 120 days after the date of enactment of this Act, and complete that proceeding within 1 year, to consider incorporating accessible information requirements in its video description rules; and*

*(4) shall extend the video description rules under this section to digital broadcast programming and video programming (as defined in section 602(23) of the Communications Act of 1934), as appropriate, in the public interest.*

*(c) ACCESSIBLE INFORMATION DEFINED- In this section, the term 'accessible information' may include written information displayed on television screens during regular programming, hazardous warnings and other emergency information, local and national news bulletins, and any other information the Commission deems appropriate.*

**SEC. 703. STATUS OF INTERNATIONAL COORDINATION.**

*Until the date on which the international coordination with Canada and Mexico of the DTV table of allotments is complete (as determined by the Federal Communications Commission), the Federal Communications Commission shall submit a report every 6 months on the status of that international coordination to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce.*

**SEC. 704. CERTAIN BORDER STATIONS.**

*Section 309(j)(14) (47 U.S.C. 309(j)(14)) is amended by adding at the end the following:*

*'(D) BORDER STATIONS- An analog broadcast television station, whose programming is broadcast entirely in the Spanish-language, that prior to February 17, 2009, is licensed by the Commission to serve communities located within 50 miles of the common border with the United Mexican States and can establish to the satisfaction*

*of the Federal Communications Commission that its continued operation in analog is in the public interest, shall be entitled to the renewal of its television broadcast license authorizing analog television service and to operate on a channel between 2 and 51 that complies with the following provisions through February 17, 2011:*

*`(i) The channel used for analog operation may not--*

*`(I) prevent the auction of recovered spectrum, as provided for in paragraph (15) of this subsection;*

*`(II) prevent the use of recovered spectrum by public safety services, as provided for by section 337(a)(1) of this Act; and*

*`(III) encumber nor interfere with any channels reserved for public safety use as designated in FCC ET Docket No. 97-157.*

*`(ii) The station shall operate on its assigned analog channel as of February 16, 2009, if that channel--*

*`(I) is designated between 2 and 51;*

*`(II) has not been assigned to the station itself or another station for digital operation after the digital transition; and*

*`(III) could be used by that station for analog operation after the digital transition without causing interference to previously authorized digital television stations.*

*`(iii) If the station does not meet the criteria of clause (ii) for operation on its assigned analog channel as of February 16, 2009, the station may request, and the Commission shall promptly act upon such request, to be assigned a new channel for its analog operation, if the requested channel--*

*`(I) is shall between channels 2 and 51; and*

*`(II) allows the station to operate on a primary basis without causing interference to other analog or digital television stations or to stations licensed to operate in other radio services that also operate on channels between 2 and 51. Where mutually exclusive applications are submitted for analog television operation on a channel*

*under the provisions of this section, the Commission shall award the authority to use that channel through the application of the procedures of this subsection and giving due consideration to the alternative resolution procedures of paragraph (6)(E) of this subsection.*

*`(iv) The station shall, from February 16, 2009, through February 17, 2011, regularly broadcast Spanish-language public service announcements that serve to educate the station's viewers to the digital transition and the need to secure digital converters or monitors so that the station's viewers can receive the station's digital signal after February 17, 2011.'*

## **TITLE VIII--PROTECTING CHILDREN**

### **SEC. 801. VIDEO TRANSMISSION OF CHILD PORNOGRAPHY.**

*Section 621 (47 U.S.C. 541) is amended by adding at the end the following:*

*`(g) CHILD PORNOGRAPHY-*

*`(1) IN GENERAL- A video service provider authorized to provide video service in a local franchise area shall comply with the regulations on child pornography promulgated pursuant to paragraph (2).*

*`(2) Regulations- Not later than 180 days after the date of enactment of the Advanced Telecommunications and Opportunities Reform Act, the Commission shall promulgate regulations to require a video service to prevent the offering of child pornography (as such term is defined in section 254(h)(7)(F)).'*

### **SEC. 802. ADDITIONAL CHILD PORNOGRAPHY AMENDMENTS.**

*(a) INCREASE IN FINE FOR FAILURE TO REPORT- Section 227(b)(4) of the Crime Control Act of 1990 (42 U.S.C. 13032(b)(4)) is amended--*

*(1) by striking ` \$50,000;' in subparagraph (A) and inserting ` \$150,000;'; and*

*(2) by striking ` \$100,000.' in subparagraph (B) and inserting ` \$300,000.'*

*(b) Warning Labels for Websites Depicting Sexually Explicit Material-*

*(1) In general-*

(A) NOTICE REQUIREMENT- It is unlawful for the operator of a website that is primarily operated for commercial purposes knowingly, and with knowledge of the character of the material, to place sexually explicit material on the website unless--

(i) the first page of the website viewable on the Internet does not include any sexually explicit material; and

(ii) each page or screen of the website that does contain sexually explicit material also displays the matter prescribed by the Federal Trade Commission under paragraph (2).

(B) EXCEPTION FOR RESTRICTED ACCESS WEBSITES-

Subparagraph (A)(ii) does not apply to any website access to which is restricted to a specific set of individuals through a password or other access restriction mechanism.

(2) MARKS OR NOTICES- Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall, in consultation with the Attorney General, promulgate regulations establishing clearly identifiable marks or notices to be included in the code, if technologically feasible, or on the pages or screens of a website that contains sexually explicit material to inform any person who accesses that website of the nature of the material and to facilitate the filtering of such pages or screens.

(3) INAPPLICABILITY TO CARRIERS AND OTHER SERVICE PROVIDERS- Subsection (a) does not apply to a person to the extent that the person is--

(A) a telecommunications carrier (as defined in section 3(44) of the Communications Act of 1934 (47 U.S.C. 153(44)));

(B) engaged in the business of providing an Internet access service; or

(C) engaged in the transmission, storage, retrieval, hosting, formatting, or translation of a communication made by another person, without selection or alteration of the content (other than by translation or by lawful selection or deletion of matter).

(4) DEFINITIONS- In this subsection:

(A) WEBSITE- The term 'website' means any collection of material placed in a computer server-based file archive so that it is publicly accessible over the Internet using hypertext transfer protocol, or any successor protocol.

(B) *SEXUALLY EXPLICIT MATERIAL*- The term `sexually explicit material' means material that depicts sexually explicit conduct (as defined in section 2256(2)(A) of section 2256 of title 18, United States Code), unless that depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

(C) *INTERNET*- The term `Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Internet protocol or any successor protocol to transmit information.

(D) *INTERNET ACCESS SERVICE*- The term `Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to the public other than telecommunications service (as defined in section 3(46) of the Communications Act of 1934 (47 U.S.C. 153(46))).

(5) *PENALTY*- Violation of this subsection is punishable by a fine under title 18, United States Code, or imprisonment for not more than 5 years, or both.

(c) *Prohibition on Deceptive Website Devices To Trick Individuals Into Accessing Matter That Is Obscene or Harmful to Children-*

(1) *IN GENERAL*- Chapter 110 of title 18, United States Code, is amended by inserting after section 2252B the following:

***Sec. 2252C. Misleading words or images on the Internet***

*(a) In General-*

*(1) MATTER THAT IS OBSCENE*- It is unlawful for any person knowingly to embed words, symbols, or digital images into the source code of a website with the intent to deceive another person into viewing material that is obscene.

*(2) MATTER THAT IS HARMFUL TO CHILDREN*- It is unlawful for any person knowingly to embed words, symbols, or digital images into the source code of a website with the intent to deceive a minor into viewing material that is harmful to minors.

*(3) IDENTIFIED MATTER NOT DECEPTIVE*- For purposes of this section,



*a word, symbol, or image that clearly indicates the sexual content of a website as sexual, pornographic, or similar terms shall not be considered to be misleading or deceptive.*

*`(b) DEFINITIONS- In this section:*

*`(1) MATERIAL HARMFUL TO MINORS- The term `material that is harmful to minors' means a communication consisting of nudity, sex, or excretion that, taken as a whole and with reference to its content--*

*`(A) predominantly appeals to a prurient interest of a minor;*

*`(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and*

*`(C) lacks serious literary, artistic, political, or scientific value for minors.*

*`(2) SEX- The term `sex' means acts of masturbation, sexual intercourse, or physical contact with a person's genitals, or the condition of human male or female genitals when in a state of sexual stimulation or arousal.*

*`(3) SOURCE CODE- The term `source code' means the combination of text and other characters comprising the content, both viewable and nonviewable, of a web page, including any website publishing language, programming language, protocol, or functional content.*

*`(c) Penalties-*

*`(1) OBSCENE MATERIAL- Violation of subsection (a)(1) is punishable by a fine under this title, or imprisonment for not more than 2 years, or both.*

*`(2) MATERIAL HARMFUL TO MINORS- Violation of subsection (a)(2) is punishable by a fine under this title, or imprisonment for not more than 4 years, or both.'*

*(2) CONFORMING AMENDMENT- The chapter analysis for chapter 110 of title 18, United States Code, is amended by inserting after the item relating to section 2252B the following:*

*`2252C. Misleading words or images on the Internet.'*

*(d) Civil Remedies-*

(1) *IN GENERAL*- Section 2255(a) of title 18, United States Code, is amended--

(A) by striking '(a) Any minor who is' in the first sentence and inserting '(a) *IN GENERAL*- Any person who, while a minor, was';

(B) by striking 'such violation' in the first sentence and inserting 'such violation, regardless of whether the injury occurred while such person was a minor,';

(C) by striking 'such minor' in the first sentence and inserting 'such person';

(D) by striking 'Any minor' in the second sentence and inserting 'Any person'; and

(E) by striking '\$50,000' in the second sentence and inserting '\$150,000'.

(2) *CONFORMING AMENDMENT*- Section 2255(b) of title 18, United States Code, is amended by striking '(b) Any action' and inserting '(b) *STATUTE OF LIMITATIONS*- Any action'.

### **SEC. 803. PREVENTION OF INTERACTIVITY WITH COMMERCIAL MATTER DURING CHILDREN'S PROGRAMMING.**

(a) *In General*- It shall be the duty of each cable operator, video service provider, multichannel video programming distributor, satellite carrier, or any other provider of cable or over-the-air broadcast programming to prevent interactivity with commercial matter during any children's programming whether on, broadcast, cable, satellite television, or any other means of delivering programming to children, as well as during advertisements aired during or adjacent to such programs.

(b) *Rule of Construction*- For purposes of this section, the term 'commercial matter' means any interactivity designed with the purpose of selling or promoting a product, service, or brand..AEMD23AF

### **SEC. 804. FCC STUDY OF BUS-CASTING.**

(a) *IN GENERAL*- The Federal Communications Commission shall conduct a study of commercial proposals to broadcast radio or television programs for reception onboard specially equipped school buses operated by, or under contract with, local public educational agencies. In the study, the Commission shall examine--

(1) the nature of the material proposed to be broadcast and whether it is age appropriate for the passengers;

(2) the amount and nature of commercial advertising to be broadcast; and

(3) whether such broadcasts for reception by public school buses are in the public interest.

(b) *REPORT*- The Commission shall report its findings and recommendations to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce within 6 months after the date of enactment of this Act.

## **TITLE IX--INTERNET CONSUMER BILL OF RIGHTS ACT**

### **SEC. 901. SHORT TITLE.**

This title may be cited as the 'Internet Consumer Bill of Rights Act of 2006'.

### **SEC. 902. FINDINGS.**

Congress finds that the Federal Communications Commission should seek to--

(1) preserve the free-flow of ideas and information on the Internet;

(2) promote public discourse on the Internet;

(3) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation;

(4) encourage investment and innovation in Internet networks and applications markets through a diversity of business models; and

(5) promote deployment of broadband networks nationwide.

### **SEC. 903. CONSUMER INTERNET BILL OF RIGHTS.**

(a) *In General*- Except as otherwise provided in this title, with respect to Internet services, each Internet service provider shall allow each subscriber to--

(1) access and post any lawful content of that subscriber's choosing;

(2) access any web page of that subscriber's choosing;

(3) access and run any voice application, software, or service of that subscriber's choosing;

(4) access and run any video application, software, or service of that subscriber's choosing;

(5) access and run any email application, software, or service of that subscriber's choosing;

(6) access and run any search engine of that subscriber's choosing;

(7) access and run any other application, software, or service of that subscriber's choosing;

(8) connect any legal device of that subscriber's choosing to the Internet access equipment of that subscriber, if such device does not harm the network of the Internet service provider; and

(9) receive clear and conspicuous information, in plain language, about the estimated speeds, capabilities, limitations, and pricing of any Internet service offered to the public.

(b) *No Interference With the Internet*- A subscriber may exercise any of the rights enumerated in subsection (a)--

(1) without interference from any Federal, State, or local government, except as specifically authorized by law;

(2) without interference from an Internet service provider, except as otherwise provided by law;

(3) for any legal purpose; and

(4) subject to the limitations of the Internet service such subscriber has purchased.

## **SEC. 904. APPLICATION OF THE FIRST AMENDMENT.**

Consistent with the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution--

(1) no Federal, State, or local government may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of the religious views, political views, or any other views expressed in such content unless specifically authorized by law; and

*(2) no Internet service provider engaged in interstate commerce may limit, restrict, ban, prohibit, or otherwise regulate content on the Internet because of the religious views, political views, or any other views expressed in such content unless specifically authorized by law.*

**SEC. 905. STAND-ALONE INTERNET SERVICE SHALL BE OFFERED TO THE PUBLIC.**

*An Internet service provider shall offer to any potential subscriber any Internet service such provider offers without requiring that subscriber to purchase or use any telecommunications service, information service, IP-enabled voice service, video service, or other service offered by such Internet service provider.*

**SEC. 906. NETWORK SECURITY, WORMS, VIRUSES, DENIAL OF SERVICE, PARENTAL CONTROLS, AND BLOCKING CHILD PORNOGRAPHY.**

*An Internet service provider may--*

*(1) protect the security, privacy, or integrity of the network or facilities of such provider, the computer of any subscriber, or any service, including by--*

*(A) blocking worms or viruses; or*

*(B) preventing denial of service attacks;*

*(2) facilitate diagnostics, technical support, maintenance, network management, or repair of the network or service of such provider;*

*(3) prevent or detect unauthorized, fraudulent, or otherwise unlawful uses of the network or service of such provider;*

*(4) block access to content, applications, or services that Federal or State law expressly authorizes to be blocked, including child pornography;*

*(5) provide consumers Parental Control applications, devices, or services, including--*

*(A) blocking access to websites with obscene or adult content;*

*(B) blocking display of video content based on a common rating; or*

*(C) offering a family friendly tier of service; and*

*(6) allow a subscriber to elect to have content, applications, or services blocked at the request of such subscriber.*

## **SEC. 907. ENFORCEMENT.**

*(a) In General-* The Federal Communications Commission shall, by rule, establish an adjudicatory enforcement procedure under which--

*(1) any subscriber aggrieved by a violation of the requirements of section 903 may initiate an enforcement action by filing a complaint, in such form and in such manner as the Commission may prescribe; and*

*(2) the Commission shall make a determination, after notice and an opportunity for a hearing, with respect to any bona fide complaint not later than 120 days after the date on which such complaint is received.*

*(b) PENALTY FOR VIOLATIONS-* Any person who violates any provision of this title shall be subject to enforcement action by the Commission under title IV and section 503 of the Communications Act of 1934. For purposes of any forfeiture imposed pursuant to section 503 for such a violation, the maximum forfeiture for a violation of this title shall be \$500,000 for each such violation.

*(c) Equitable Relief Available-* In response to any complaint of a violation of this title, the Commission may--

*(1) issue an injunction or temporary restraining order; or*

*(2) provide such other equitable relief as the Commission determines appropriate.*

## **SEC. 908. COMMISSION PROHIBITED FROM ISSUING REGULATIONS.**

*Except as provided in section 907(a), the Commission shall not--*

*(1) promulgate any regulations implementing this title; nor*

*(2) enlarge or modify the obligations imposed on Internet service providers through the adjudicatory process under section 907.*

## **SEC. 909. FCC REVIEW.**

*(a) In General-* Beginning 1 year after the date of enactment of this Act, the Federal Communications Commission shall report annually to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives regarding--

(1) the developments in Internet traffic processing, routing, peering, transport, and interconnection;

(2) how such developments impact the free-flow of information over the public Internet and the consumer and small business experience using the public Internet;

(3) business relationships between Internet service providers and applications and online user service providers; and

(4) the development of and services available over public and private Internet offerings.

(b) *Determinations and Recommendations-* The Federal Communications Commission shall make such recommendations under subsection (a), as the Commission determines appropriate.

## **SEC. 910. EXCEPTIONS.**

Nothing in this title shall--

(1) preclude an Internet service provider from displaying advertisements in connection with a broadband service; or

(2) apply to a service in which Internet service is not the primary service, such as a video service offered under Title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.).

## **SEC. 911. FCC TO REVISIT BROADBAND SPEEDS.**

Within 90 days after the date of enactment of this Act and biennially thereafter, the Federal Communications Commission shall revise its definition of broadband to reflect a data rate--

(1) greater than the 200 kilobits per second standard established in its Section 706 Report (14 FCC Rec. 2406); and

(2) consistent with data rates for broadband communications services generally available to the public on the date of enactment of this Act and thereafter, upon the date of the Commission's review.

## **SEC. 912. PROTECTION OF EMERGENCY COMMUNICATIONS.**

An Internet service provider shall prioritize, to the extent technically feasible, 911 and E-911 emergency communications to ensure timely and effective emergency communications in a manner that is not inconsistent with other

*priority levels needed in times of Federal, State, and local emergencies and for other public safety and homeland security needs or requirements.*

## **SEC. 913. DEFINITIONS.**

*In this title:*

*(1) INTERNET SERVICE- The term 'Internet service' means any service that provides access to the public Internet directly to the public.*

*(2) SUBSCRIBER- The term 'subscriber' means a retail end user that purchases Internet service.*

## **TITLE X--MISCELLANEOUS**

## **SEC. 1001. COMMISSIONER PARTICIPATION IN FORUMS AND MEETINGS.**

*(a) IN GENERAL- Section 5 (47 U.S.C. 155) is amended by adding at the end the following:*

*`(f) Meetings-*

*`(1) ATTENDANCE REQUIRED- Notwithstanding 552b of title 5, United States Code, and section 4(h) of this Act, the Commission may conduct a meeting that is not open to the public if the meeting is attended by--*

*`(A) all members of the Commission; or*

*`(B) at least 1 member of the political party whose members are in the minority.*

*`(2) VOTING PROHIBITED- The Commission may not vote or make any final decision on any matter pending before it in a meeting that is not open to the public, unless--*

*`(A) otherwise authorized by section 552b(b) of title 5, United States Code; or*

*`(B) the Commission has moved its operations outside Washington, D.C., pursuant to a Continuity of Operations Plan.*

*`(3) PUBLICATION OF SUMMARY- If the Commission conducts a meeting that is not open to the public under this section, the Commission shall promptly publish an executive summary describing the matters discussed at that meeting after the meeting ends, except for such*



*matters as the Commission determines may be withheld under section 552b(c) of title 5, United States Code. This paragraph does not apply to a meeting described in paragraph (4).*

*'(4) QUORUM UNNECESSARY FOR CERTAIN MEETINGS- Neither section 552b of title 5, United States Code, nor paragraph (1) of this subsection applies to--*

*'(A) a meeting of 3 or more members of the Commission with the President, any person employed by the Office of the President, any official of a Federal, State, or local agency, a Member of Congress or his staff;*

*'(B) the attendance, by 3 or more members of the Commission, at a forum or conference to discuss general communications issues; or*

*'(C) a meeting of 3 or more members of the Commission when the Continuity of Operations Plan is in effect and the Commission is operating under the terms of that Plan.*

*'(5) SAVINGS CLAUSE- Nothing in this subsection shall be construed to prohibit the Commission from doing anything authorized by section 552b of title 5, United States Code.'*

## **SEC. 1002. OFFICE OF INDIAN AFFAIRS.**

*(a) IN GENERAL- There is established within the Federal Communications Commission an Office of Indian Affairs.*

*(b) RELATIONSHIP TO TRIBAL GOVERNMENTS- The Office shall recognize--*

*(1) that the Federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various Federal statutes;*

*(2) that the Federal government has a trust responsibility to and a government-to-government relationship with recognized tribes;*

*(3) its own general trust relationship with, and responsibility to, Federally-recognized Indian Tribes; and*

*(4) the rights of Tribal governments to establish and implement their own communications priorities and goals for the welfare of their membership.*

*(c) PURPOSES- The Office shall--*

- (1) work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through regulations and policy initiatives, and consistent with section 1 of the Communications Act of 1934 (47 U.S.C. 151), that Indian Tribes have adequate access to communications services and to further the goals and priorities herein;*
- (2) consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their members, land, and resources;*
- (3) advise directly the Commission, offices, and Bureaus on matters of Tribal law and sovereignty, conducting outreach to Indian Tribes, coordinating and preparing an annual report on status of telecommunications in Indian country, and such other duties as the Commission shall determine;*
- (4) strive to develop working relationships with Tribal governments, and endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands;*
- (5) endeavor to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes and seek to remove those impediments to the extent authorized by law;*
- (6) assist Indian Tribes in complying with Federal communications statutes and regulations;*
- (7) seek to identify and establish procedures and mechanisms to educate Commission staff about Tribal governments and Tribal cultures, sovereignty rights, Indian law, and Tribal communications needs;*
- (8) work cooperatively with other Federal departments and agencies, Tribal, State, and local governments to further the goals of this policy and to address communications problems, such as low penetration rates and poor quality services on reservations, and other problems of mutual concern;*
- (9) welcome submission from Tribal governments and other concerned parties as to other actions the Commission might take to further the goals and principles presented herein;*
- (10) facilitate incorporation of these Indian policy goals into the Commission's ongoing and long-term planning and management*

*activities, including its policy proposals, management accountability system, and ongoing policy development processes; and*

*(11) perform such other tasks as are necessary to preserve and advance the trust relationship between the Federal government and Tribal governments.*

### **SEC. 1003. OFFICE OF CONSUMER ADVOCATE.**

*(a) IN GENERAL- There is established within the Federal Communications Commission an Office of Consumer Advocate. The Office shall be headed by a Director, appointed by the Commission.*

*(b) INDEPENDENCE OF THE OFFICE- The Office shall be independent of the other bureaus and offices of the Commission. The Office and its staff shall be bound by the same code of conduct, personnel practices, procurement procedures, contracting procedures, and other relevant practices and procedures as the Commission.*

*(c) Appointment of Director; Grounds for Removal from Office-*

*(1) IN GENERAL- The Director shall be appointed by the Commissioners of the Commission, in consultation with each other and with the advisory committee established under subsection (h).*

*(2) INITIAL APPOINTMENT- The initial Director shall be appointed within 180 days after the date of enactment of this Act.*

*(3) TERM; REMOVAL- The Director--*

*(A) shall be appointed for a term of 4 years;*

*(B) may be removed by the Chairman of the Commission only for cause, such as malfeasance or the failure to carry out the duties of the position; and*

*(C) shall be eligible for reappointment.*

*(4) QUALIFICATIONS- The Director shall--*

*(A) be a citizen of the United States;*

*(B) be admitted to the practice of law;*

*(C) be knowledgeable about the various areas within the Commission's jurisdiction;*

*(D) have experience in public interest advocacy; and*

*(E) be independent of, and have no substantial pecuniary interest in, any business regulated by the Commission for at least 3 years preceding appointment.*

*(5) COMPENSATION- The Director shall be compensated at the rate established for GS-15 of the General Schedule under section 5104 of title 5, United States Code. The salaries paid to any members of the staff of the Office shall be consistent with and in the range applicable to salaries paid to employees of the Commission.*

*(d) DUTIES- The Director of the Office shall act as an attorney for and represent all residential consumers generally, in any matters relating to matters within the jurisdiction of the Commission.*

*(e) AUTHORITY- The Director may--*

*(1) comment, intervene, or otherwise be a party in any Commission proceeding or investigation concerning matters within the Commission's jurisdiction that affect residential consumers;*

*(2) have the same access to Commission records as enjoyed by other Commission officials;*

*(3) appeal any determination, finding, or order of the Commission in any proceeding in which the Office has participated;*

*(4) appear on behalf of residential consumers before other Federal agencies and Federal courts in cases as the Director may determine is consistent with the Office's goals;*

*(5) participate in any Commission-established committees or other bodies that consider or review matters that affect residential consumers of services within the Commission's jurisdiction; and*

*(6) appear and testify before Congress regarding matters within the scope of the Office's duties.*

*(f) RESPONSIBILITIES OF DIRECTOR- The Director shall be responsible for effectuating the purpose, goals, and administration of the Office, including the provision of any necessary technical and professional staff, equipment and other facilities. The members of the staff of the Office shall be subject to the same protections and privileges as other equivalent staff of the Commission. The Director shall have the authority to conduct or contract for studies, surveys, research, or expert witness testimony relating to matters affecting the interests of residential consumers of services within the*

*Commission's jurisdiction. The Director shall have the authority to request the assistance of personnel from State consumer advocate offices to effectuate its responsibilities, so that Commission resources are not overburdened. On no less frequent than an annual basis, the Office shall issue a written report that contains a description of its activities and budget allocation for the previous fiscal year, and a proposed budget and description of priorities for the following fiscal year.*

*(g) REPRESENTATION OF CONSUMERS- In exercising the discretion of whether the Office will represent or refrain from representing residential consumers in a particular matter, the Director shall consider the importance and extent of residential consumers' interests and whether those interests would be adequately represented. If the Director determines there may be a conflict among or between classes of residential consumers in a particular matter, the Director may choose to represent one of the interests or none of the interests.*

*(h) Advisory Committee-*

*(1) APPOINTMENT- There is established an Advisory Committee to assist the Director in carrying out the Director's duties, as appropriate and reasonable. The Advisory Committee shall be composed of--*

*(A) 3 members chosen by a national association of State utility consumer advocates; and*

*(B) 4 members chosen by the Chairman of the Commission.*

*(2) QUALIFICATIONS- Each member of the advisory committee shall have experience in consumer interests in matters within the jurisdiction of the Commission.*

*(3) COMPENSATION AND REIMBURSEMENT FOR EXPENSES- Members of the advisory committee shall serve without compensation and may not be reimbursed for travel or related expenses even while engaged in official business of the advisory committee.*

*(i) FUNDING- The annual budget of the Commission shall include an account separate from the other bureaus and offices of the Commission, which account shall be used exclusively by the Office in the performance of its duties. The budget for the Office shall be separately identified in the Commission's annual budget request. There are authorized to be made available to the Office for fiscal year \$200,000.*

*(j) STANDING OF STATE OFFICIALS- The creation of the Office shall in no way derogate the standing of any State consumer advocate or any national association of State utility consumer advocates to appear before the*

*Commission, or appeal any Commission decision.*

**SEC. 1004. DATA ON LOCAL COMPETITION IN DIFFERENT PRODUCT MARKETS.**

*(a) INQUIRY- Not later than 180 days after the date of enactment of this Act, and every year thereafter, the Commission shall conduct an inquiry regarding the extent to which providers of communications service have deployed their own local transmission facilities.*

*(b) DATA COLLECTION- In connection with its inquiry, the Commission shall require that all providers of communications service submit annual reports to the Commission describing the extent to which they have deployed their own local transmission facilities. At a minimum, providers shall report separately on their deployment of loop facilities in each wire center used to provide service in different product markets served by communications service providers. In defining product markets for these purposes, the Commission shall utilize the methodology set forth in the United States Department of Justice and Federal Trade Commission Horizontal Merger Guidelines and shall, at a minimum, distinguish among the products demanded by--*

*(1) residential customers;*

*(2) small and medium-sized business customers; and*

*(3) large business customers.*

*(c) REPORT TO CONGRESS- Not later than one year after the date of enactment of this Act, and each year thereafter, the Commission shall submit a report to Congress describing the extent to which providers of telecommunications service, broadband service, and IP-enabled voice service have deployed their own local transmission facilities. Such report shall analyze separately the extent of actual facilities-based competition in each wire center in the product markets described in subsection (b).*

*(d) DEFINITIONS- In this section:*

*(1) BROADBAND SERVICE- The term 'broadband service' means any service used for transmission of information of a user's choosing with a transmission speed of at least 200 kilobits per second in at least 1 direction, regardless of the transmission medium or technology employed, that connects to the public Internet for a fee directly--*

*(A) to the public; or*

*(B) to such classes of users as to be effectively available directly to*

*the public.*

*(2) COMMUNICATIONS SERVICE- The term 'communications service' means telecommunications service, broadband service, or IP-enabled voice service (whether offered separately or as part of a bundle of services).*

*(3) IP-ENABLED VOICE SERVICE- The term 'IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using Internet protocol, or a successor protocol, for a fee (whether part of a bundle of services or separately) with 2-way interconnection capability such that the service can originate traffic to, and terminate traffic from, the public switched telephone network.*

*(4) LOCAL TRANSMISSION FACILITIES- The term 'local transmission facilities' means wireless and wireline transmission facilities used to transmit information or signals to, from or among locations within a wire center.*

## **SEC. 1005. IMPROVED ENFORCEMENT OPTIONS.**

*(a) INCREASED PENALTIES- Section 503(b)(2)(B) (47 U.S.C. 503(b)(2)(B)) is amended--*

*(1) by striking '\$100,000' and inserting '\$1,000,000'; and*

*(2) by striking '\$1,000,000' and inserting '\$10,000,000'.*

*(b) STATUTE OF LIMITATIONS- Section 503(b)(6) (47 U.S.C. 503(b)(6)) is amended--*

*(1) by striking 'or' after the semicolon in subparagraph (A)(ii);*

*(2) redesignating subparagraph (B) as subparagraph (C); and*

*(3) inserting after subparagraph (A) the following:*

*'(B) such person is a common carrier subject to the provisions of this Act or an applicant for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission and if the violation charged occurred more than 3 years prior to the date of issuance of the required notice or notice of apparent liability; or'.*

*(c) INDEPENDENT NETWORK AFFILIATES- Section 503(b) (47 U.S.C. 503(b)), as amended by section 338, is further amended by adding at the end the*

following:

*`(8) INDEPENDENT NETWORK AFFILIATES-*

*`(A) IN GENERAL- No forfeiture penalty shall be determined or imposed under paragraph (2) of this subsection against an independent network affiliate for a violation of any section of title 18, United States Code, referred to in paragraph (1)(D) with respect to network-originated programming--*

*`(i) that the affiliate has not been afforded the reasonable opportunity to preview prior to its scheduled air time; or*

*`(ii) for which the network has failed to advise the affiliate prior to the scheduled air time that the programming contains content that could be in violation of any such section.*

*`(B) INDEPENDENT NETWORK AFFILIATE DEFINED- In this paragraph, the term 'independent network affiliate' means a television broadcast station licensee that is neither owned nor controlled by a television network (as defined in section 340(d)(5) of this Act.'*

**SEC. 1006. MOBILE SERVICES TERMS AND CONDITIONS.**

*(a) IN GENERAL- Subparagraph (A) of section 332(c)(3) (47 U.S.C. 332(c)(3)) is amended--*

*(1) by striking the first sentence and inserting `(i) Notwithstanding sections 2(b) and 221(b) or any other provision of law, a State or local government shall not regulate or adjudicate--*

*`(I) the entry of or the rates charged by any provider of commercial mobile service or private mobile service for any such mobile service or any or any other service that is primarily intended for receipt on or use with a wireless device that is utilized by a customer of such mobile service in connection with such mobile service; or*

*`(II) any terms and conditions of such mobile service or any other such service, except pursuant to a law or regulation generally applicable to businesses in the State other than a law or regulation that regulates or has the effect of regulating the entry or rates for any such service.';*

*(2) by inserting after the first sentence, as so amended the following:*



*`(ii) Nothing in this section shall affect the authority of the Commission under this Act to adopt consumer protection requirements applicable to providers of commercial mobile service or private mobile services.';*

*(3) by indenting the sentence beginning `Nothing in this subparagraph' 4 ems from the left margin and inserting `(iii)' before `Nothing'; and*

*(4) by redesignating clauses (i) and (ii) in the third sentence as subclauses (I) and (II), respectively, and indenting them 6 ems from the left margin.*

*(b) RULEMAKING- Within 1 year after the date of enactment of this Act, the Federal Communications Commission shall adopt a final rule establishing customer service and consumer protection requirements for providers of commercial mobile service or private mobile service (as such terms are defined in section 332(d)(1) and (3), respectively, of the Communications Act of 1934 (47 U.S.C. 332(d)(1) and (3))).*

*(c) EFFECTIVE DATE- The amendments made by subsection (a) shall take effect 180 days after the date on which the Commission adopts the final rule described in subsection (b).*

*(d) Truth in Billing-*

*(1) FINDINGS- Congress finds the following:*

*(A) In recent years, carriers have significantly increased their use of separate, line-item fees for so called `regulatory compliance' charges, that are generally not included in the advertised price of communications services.*

*(B) These line-item fees often fail to adequately inform consumers of the specific costs being recovered through such charges and as to whether such charges are required by government law or rule, or alternatively, are imposed at the discretion of the carrier.*

*(C) The proliferation of discretionary line item surcharges and fees can lead to consumer confusion and can impede the delivery of basic information necessary for consumers to compare the cost of communications services offered by different carriers and to make informed decisions.*

*(D) The proper functioning of competitive markets is predicated on consumers having access to accurate, meaningful information in a format that they can understand.*

*(E) The Federal Communications Commission has an obligation*

*under the Communications Act of 1934 and that Act's Truth-in-Billing principles to ensure that consumers receive clear, accurate, and understandable bills from providers of communications services.*

**(2) COMMISSION TO ISSUE TRUTH-IN-TELEPHONE-BILLING**

*REGULATIONS- Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall initiate and conclude a proceeding under part I of title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) to prevent a telecommunications carrier from listing any charge or fee on the billing statement or other billing charge of a subscriber as a separately stated charge or fee other than a charge or fee--*

*(A) for telecommunications service or other services provided to a subscriber;*

*(B) for nonpayment, early termination of service, or other lawful penalty;*

*(C) for Federal, State, or local sales, excise, or other taxes; or*

*(D) expressly authorized by a Federal, State, or local statute, regulation, or rule to appear on a subscriber's billing statement or other billing charge as a separately stated charge or fee.*

**(3) ENFORCEMENT-** *The Commission may enforce the regulations promulgated under paragraph (2) under section 220 and other appropriate provisions of the Communications Act of 1934 (47 U.S.C. 151 et seq.).*

**(4) DEFINITIONS-** *In this subsection:*

**(A) COMMISSION-** *The term 'Commission' means the Federal Communications Commission.*

**(B) TELECOMMUNICATIONS CARRIER-** *The term 'telecommunications carrier' has the meaning given that term by section 3(44) of the Communications Act of 1934 (47 U.S.C. 153 (44)).*

**(C) TELECOMMUNICATIONS SERVICE-** *The term 'telecommunications service' has the meaning given that term by section 3(46) of the Communications Act of 1934 (47 U.S.C. 153 (46)).*

**SEC. 1007. SEVERABILITY.**

*If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such provisions to any person or circumstance shall not be affected thereby.*

#### **SEC. 1008. CLARIFICATION OF CERTAIN JURISDICTIONAL ISSUES.**

*(a) In General-* Notwithstanding any other provision of law, the Commission shall have authority to issue, and shall not undermine, alter, or amend decisions made in Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (November 9, 2004) or Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (February, 19, 2004), except to apply such decisions to other similar services that share similar basic characteristics.

*(b) Pending Challenges-* Any pending challenges to the decisions described in subsection (a) shall be dismissed.

*(c) Clarification-* Nothing in this section shall be construed to supersede or preempt the consumer protection laws of any State, including any privacy or anti-child pornography law of a State, except to the extent that such laws regulate the rates for entry or exit by a provider of such services.

#### **SEC. 1009. FCC TO ISSUE A FURTHER NOTICE OF PROPOSED RULEMAKING BEFORE CHANGING BROADCAST MEDIA OWNERSHIP RULES.**

*(a) IN GENERAL-* Before making any changes to section 73.3555 of its regulations (47 C.F.R. 73.3555), as those regulations were in effect on June 1, 2003, the Federal Communications Commission shall issue a further Notice of Proposed Rulemaking with respect to any such changes.

*(b) CLARIFICATION OF APPLICABLE REGULATIONS-* The cross-media limits rule adopted by the Federal Communications Commission on June 2, 2003, pursuant to its proceeding on broadcast media ownership rules, Report and Order FCC-03-127, is declared null and void, and section 73.3555 of the Commission's regulations (47 C.F.R. 73.3555), as those regulations were in effect before the adoption of the rule, are reinstated with effect from June 2, 2003.

#### **SEC. 1010. DIVERSITY IN MEDIA OWNERSHIP.**

*The Federal Communications Commission shall not promulgate rules regarding media ownership without first completing regulatory action in its proceeding DA 04-1690, entitled 'Media Bureau Seeks Comment on Ways to Further Section 257 Mandate and to Build on Earlier Studies,' initiated on June 15, 2004.*

## **SEC. 1011. BROADBAND REPORTING REQUIREMENTS.**

### **(a) REPORTING REQUIREMENTS-**

*(1) GENERAL REQUIREMENTS- The Commission shall revise FCC Form 477 reporting requirements within 180 days after the date of enactment of this Act to require broadband service providers to report the following information:*

*(A) Identification of where the provider provides broadband service to customers, identified by zip code plus four digit location (hereinafter referred to as 'service area').*

*(B) Percentage of households and businesses in each service area that are offered broadband service by the provider, and the percentage of such households that subscribe to each service plan offered.*

*(C) The average price per megabyte of download speed and upload speed in each service area.*

*(D) Identification by service area of the provider's broadband service's--*

*(i) actual average throughput; and*

*(ii) contention ratio of the number of users sharing the same line.*

*(2) EXCEPTION- The Commission shall exempt a broadband service provider from the requirements in subsection (1) if the Commission determines that a provider's compliance with the reporting requirements is cost prohibitive, as defined by the Commission.*

*(b) DEMOGRAPHIC INFORMATION FOR UNSERVED AREAS- The Commission, using available Census Bureau data, shall provide to Congress on an annual basis a report containing the following information for each service area that is not served by any broadband service provider--*

*(1) population;*

- (2) *population density; and*
- (3) *average per capita income.*

### **SEC. 1012. APPLICATION OF ONE-YEAR RESTRICTIONS TO CERTAIN POSITIONS.**

*For purposes of section 207 of title 18, United States Code, an individual serving in any of the following positions, or in any successor position, at the Federal Communications Commission is deemed to be a person described in section 207(c)(2)(A)(ii) of that title, regardless of the individual's rate of basic pay:*

- (1) *Chief, Office of Engineering and Technology.*
- (2) *Director, Office of Legislative Affairs.*
- (3) *Inspector General, Office of Inspector General.*
- (4) *Managing Director, Office of Managing Director.*
- (5) *General Counsel, Office of General Counsel.*
- (6) *Chief, Office of Strategic Planning and Policy Analysis.*
- (7) *Chief, Consumer and Governmental Affairs Bureau.*
- (8) *Chief, Enforcement Bureau.*
- (9) *Chief, International Bureau.*
- (10) *Chief, Media Bureau.*
- (11) *Chief, Wireline Competition Bureau.*
- (12) *Chief, Wireless Telecommunications Bureau.*
- (13) *Any position for which the individual was appointed under section 4 (f)(2) of the Communications Act of 1934 (47 U.S.C. 4(f)(2)).*

### **SEC. 1013. INTERNET TAX FREEDOM ACT AMENDMENT.**

*Section 1101(a) of the Internet Tax Freedom Act (47 U.S.C. 151 note) is amended by striking 'taxes during the period beginning November 1, 2003, and ending November 1, 2007:' and inserting 'taxes:'.*

**SEC. 1014. STATUS OF E-911 IMPLEMENTATION AND COORDINATION OFFICE.**

*Within 90 days after the date of enactment of this Act, the Assistant Secretary of the National Telecommunications and Information Administration (NTIA) and the Administrator of the National Highway Traffic Safety Administration (NHTSA) shall submit a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives on the progress of the E-911 Implementation and Coordination Office and plans of the Office to meet the requirements of the Office established in Public Law 108-494.*

**SEC. 1015. FEDERAL COMMUNICATIONS COMMISSION  
TELEMEDICINE REPORT.**

*The Commission shall conduct a study and report to Congress within 180 days after the date of enactment of this Act of the following:*

- (1) Speed of a broadband connection necessary to run low, medium, and high capacity telemedicine applications.*
- (2) Precise statistics of availability of broadband connections capable of running telemedicine applications in any given service area (zip code plus four digit area).*
- (3) Number of providers in any given service area (zip code plus four digit area) offering broadband connections capable of running telemedicine applications.*
- (4) Average monthly price per megabit of download and upload speeds for broadband connections capable of running telemedicine applications in any given service area (zip code plus four digit area).*

**SEC. 1016. FEDERAL INFORMATION AND COMMUNICATIONS  
TECHNOLOGY RESEARCH.**

*(a) Advanced Information and Communications Technology Research-*

- (1) NATIONAL SCIENCE FOUNDATION INFORMATION AND COMMUNICATIONS TECHNOLOGY RESEARCH- The Director of the National Science Foundation shall establish a program of basic research in advanced information and communications technologies focused on enhancing or facilitating the availability and affordability of advanced communications services to all Americans. In developing and carrying out the program, the Director shall consult with the Board established under paragraph (2).*

(2) *FEDERAL ADVANCED INFORMATION AND COMMUNICATIONS TECHNOLOGY RESEARCH BOARD-* There is established within the National Science Foundation a Federal Advanced Information and Communications Technology Board which shall advise the Director of the National Science Foundation in carrying out the program authorized by paragraph (1). The Board Shall be composed of individuals with expertise in information and communications technologies, including representatives from the National Telecommunications and Information Administration, the Federal Communications Commission, the National Institute of Standards and Technology, and the Department of Defense.

(3) *GRANT PROGRAM-* The Director, in consultation with the Board, shall award grants for basic research into advanced information and communications technologies that will contribute to enhancing or facilitating the availability and affordability of advanced communications services to all Americans. Areas of research to be supported through these grants include--

(A) *affordable broadband access, including wireless technologies;*

(B) *network security and reliability;*

(C) *communications interoperability;*

(D) *networking protocols and architectures, including resilience to outages or attacks;*

(E) *trusted software;*

(F) *privacy;*

(G) *nanoelectronics for communications applications;*

(H) *low-power communications electronics; and*

(I) *such other related areas as the Director, in consultation with the Board, finds appropriate.*

(4) *CENTERS-* The Director shall award multiyear grants, subject to the availability of appropriations, to institutions of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), nonprofit research institutions, or consortia thereof to establish multidisciplinary Centers for Communications Research. The purpose of the Centers shall be to generate innovative approaches to problems in communications and information technology research, including the research areas described in paragraph (3). Institutions of higher education nonprofit research, institutions, or consortia receiving

*such grants may partner with 1 or more government laboratories or for-profit institutions, or other institutions of higher education or nonprofit research institutions.*

*(5) APPLICATIONS- The Director, in consultation with the Board, shall establish criteria for the award of grants under paragraphs (3) and (4). Grants shall be awarded under the program on a merit-reviewed competitive basis. The Director shall give priority to grants that offer the potential for revolutionary rather than evolutionary breakthroughs.*

*(6) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated to the National Science Foundation to carry out this subsection--*

*(A) \$40,000,000 for fiscal year 2007;*

*(B) \$45,000,000 for fiscal year 2008;*

*(C) \$50,000,000 for fiscal year 2009;*

*(D) \$55,000,000 for fiscal year 2010; and*

*(E) \$60,000,000 for fiscal year 2011.*

*(b) Spectrum-Sharing Innovation Testbed-*

*(1) SPECTRUM-SHARING PLAN- Within 1 year after the date of enactment of this Act, the Federal Communications Commission and the Assistant Secretary of Commerce for Communications and Information, in coordination with other Federal agencies, shall--*

*(A) develop a plan to increase sharing of spectrum between Federal and non-Federal government users; and*

*(B) establish a pilot program for implementation of the plan.*

*(2) TECHNICAL SPECIFICATIONS- The Commission and the Assistant Secretary--*

*(A) shall each identify a segment of spectrum of equal bandwidth within their respective jurisdiction for the pilot program that is approximately 10 megahertz in width for assignment on a shared basis to Federal and non-Federal government use; and*

*(B) may take the spectrum for the pilot program from bands currently allocated on either an exclusive or shared basis.*



(3) *REPORT-* The Commission and the Assistant Secretary shall transmit a report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce 2 years after the inception of the pilot program describing the results of the program and suggesting appropriate procedures for expanding the program as appropriate.

(c) *NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY RESPONSIBILITIES-* The Director of the National Institute of Standards and Technology shall continue to support research and support standards development in advanced information and communications technologies focused on enhancing or facilitating the availability and affordability of advanced communications services to all Americans, in order to implement the Institute's responsibilities under section 2(c)(12) of the National Institute of Standards and Technology Act (15 U.S.C. 272(c)(12)). The Director shall support intramural research and cooperative research with institutions of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) and industry.

#### **SEC. 1017. FORBEARANCE.**

Section 10(c) (47 U.S.C. 160(c)) is amended--

(1) by striking 'deemed granted' and inserting 'voted on by the Commission'; and

(2) by inserting 'by majority vote' after 'part' in the last sentence.

#### **SEC. 1018. DEADLINE FOR CERTAIN COMMISSION PROCEEDINGS.**

The Federal Communications Commission shall complete its proceedings on special access rates (FCC Docket Nos. 05-25 and 01-321) not later than 270 days after the date of enactment of this Act.

### **TITLE XI--LOCAL COMMUNITY RADIO ACT**

#### **SEC. 1101. SHORT TITLE.**

This title may be cited as the 'Local Community Radio Act of 2006'.

#### **SEC. 1102. REPEAL OF PRIOR LAW.**

Section 632 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001 (Public Law 106-553; 114 Stat. 2762A-111), is repealed.

**SEC. 1103. MINIMUM DISTANCE SEPARATION REQUIREMENTS.**

*The Federal Communications Commission shall modify its rules to eliminate third-adjacent minimum distance separation requirements between--*

- (1) low-power FM stations; and*
- (2) full-service FM stations, FM translator stations, and FM booster stations.*

**SEC. 1104. PROTECTION OF RADIO READING SERVICES.**

*The Federal Communications Commission shall retain its rules that provide third-adjacent channel protection for full-power non-commercial FM stations that broadcast radio reading services via a subcarrier frequency from potential low-power FM station interference.*

**SEC. 1105. ENSURING AVAILABILITY OF SPECTRUM FOR LPFM STATIONS.**

*The Federal Communications Commission when licensing FM translator stations shall ensure--*

- (1) that licenses are available to both FM translator stations and low-power FM stations; and*
- (2) that such decisions are made based on the needs of the local community.*

**SEC. 1106. FEDERAL COMMUNICATIONS COMMISSION RULES.**

*The Federal Communications Commission shall retain its rules that provide third-adjacent channel protection for full-power FM stations that are licensed in significantly populated States with more than 3,000,000 housing units and a population density greater than 1,000 people per square mile land area.*

**TITLE XII--CELL PHONE TAX MORATORIUM****SEC. 1201. SHORT TITLE.**

*This title may be cited as the 'Cell Phone Tax Moratorium Act of 2006'.*

**SEC. 1202. MORATORIUM.**

*(a) In General- No State or political subdivision thereof shall impose a new discriminatory tax on or with respect to mobile services, mobile services*

*providers, or mobile services property, during the 3-year period beginning on the date of enactment of this Act.*

*(b) Definitions- In this title:*

*(1) MOBILE SERVICE- The term `mobile service' means commercial mobile radio service, as such term is defined in section 20.3 of title 47, Code of Federal Regulations, as in effect on June 22, 2006, or any other service that is primarily intended for receipt on or use with a mobile telephone.*

*(2) MOBILE SERVICE PROVIDER- The term `mobile service provider' means any entity that markets, sells, or provides mobile services.*

*(3) MOBILE SERVICE PROPERTY- The term `mobile services property' means any equipment used in the transmission, reception, coordination, or switching of mobile services.*

*(4) NEW DISCRIMINATORY TAX-*

*(A) IN GENERAL- The term `new discriminatory tax' means any tax imposed by a State or political subdivision thereof that--*

*(i) is imposed on or with respect to--*

*(I) any mobile service and is not generally imposed, or is generally imposed at a lower rate, on or with respect to other services or on or with respect to transactions involving property or goods;*

*(II) any mobile service provider and is not generally imposed, or is generally imposed at a lower rate, on other persons that provide services other than mobile services; or*

*(III) any mobile service property and is not generally imposed, or is generally imposed at a lower rate, on or with respect to other commercial or industrial property that is devoted to a commercial or industrial use and subject to a property tax levy;*

*(ii) was not generally imposed and actually enforced prior to the date of enactment of this Act.*

*(B) RULE OF CONSTRUCTION- For purposes of subparagraph (A), all exemptions, deductions, credits, incentives, exclusions, and other similar factors shall be taken into account in determining*

*whether a tax is a 'new discriminatory tax'.*

**(5) TAX-**

*(A) IN GENERAL- The term 'tax' means any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred.*

*(B) EXCLUSION- The term 'tax' does not include any fee or charge-*

*(i) used to preserve and advance Federal universal service or similar State programs authorized by section 254 of the Communications Act of 1934 (47 U.S.C. 254); or*

*(ii) specifically dedicated by a State or political subdivision thereof for the support of E-911 communications systems.*

**TITLE XII--TRUTH IN CALLER ID**

**SEC. 1301. SHORT TITLE.**

*This title may be cited as the 'Truth in Caller ID Act of 2006'.*

**SEC. 1302. PROHIBITION REGARDING MANIPULATION OF CALLER IDENTIFICATION INFORMATION.**

*Section 227 (47 U.S.C. 227) is amended--*

*(1) by redesignating subsections (e), (f), and (g) as subsections (f), (g), and (h), respectively; and*

*(2) by inserting after subsection (d) the following new subsection:*

*'(e) Prohibition on Provision of Inaccurate Caller Identification Information-*

*'(1) IN GENERAL- It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to transmit misleading or inaccurate caller identification information, unless such transmission is exempted pursuant to paragraph (3)(B).*

*'(2) PROTECTION FOR BLOCKING CALLER IDENTIFICATION INFORMATION- Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller*

*identification service to transmit caller identification information.*

*`(3) REGULATIONS-*

*`(A) IN GENERAL- Not later than 6 months after the enactment of the Truth in Caller ID Act of 2006, the Commission shall prescribe regulations to implement this subsection.*

*`(B) CONTENT OF REGULATIONS-*

*`(i) IN GENERAL- The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines appropriate.*

*`(ii) SPECIFIC EXEMPTION FOR LAW ENFORCEMENT AGENCIES, NATIONAL SECURITY ACTIVITIES, OR COURT ORDERS- The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with--*

*`(I) any authorized law enforcement or national security activity of an agency of the United States, a State, or a political subdivision of a State; or*

*`(II) a court order that specifically authorizes the use of caller identification manipulation.*

*`(4) REPORT- Not later than 6 months after the enactment of the Truth in Caller ID Act of 2006, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.*

*`(5) PENALTIES-*

*`(A) CIVIL FORFEITURE-*

*`(i) IN GENERAL- Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b), to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed \$10,000 for each violation, or 3 times that amount for each*

*day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act.*

*`(ii) RECOVERY- Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a).*

*`(iii) PROCEDURE- No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) or section 503(b)(4).*

*`(iv) 2-year STATUTE OF LIMITATIONS- No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.*

*`(B) CRIMINAL FINE- Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than \$10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 for such a violation. This subparagraph does not supersede the provisions of section 501 relating to imprisonment or the imposition of a penalty of both fine and imprisonment.*

*`(6) ENFORCEMENT BY STATES-*

*`(A) IN GENERAL- The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.*

*`(B) NOTICE- The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.*

*`(C) AUTHORITY TO INTERVENE- Upon receiving the notice required by subparagraph (B), the Commission may intervene in such civil action and upon intervening--*

*`(i) be heard on all matters arising in such civil action; and*

*`(ii) file petitions for appeal of a decision in such civil action.*

*`(D) CONSTRUCTION- For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.*

*`(E) VENUE; SERVICE OF PROCESS-*

*`(i) VENUE- An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code.*

*`(ii) SERVICE OF PROCESS- In an action brought under subparagraph (A)--*

*`(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and*

*`(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.*

*`(F) LIMITATION ON STATE ACTION WHILE FEDERAL ACTION IS PENDING- If the Commission has instituted an enforcement action or proceeding for violation of this subsection, the chief legal officer or other State officer of the State in which the violation occurred may not bring an action under this section during the pendency of the proceeding against any person with respect to whom the Commission has instituted the proceeding.*

*`(7) DEFINITIONS- For purposes of this subsection:*

*`(A) CALLER IDENTIFICATION INFORMATION- The term 'caller identification information' means information provided by a caller*

*identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.*

*`(B) CALLER IDENTIFICATION SERVICE- The term `caller identification service' means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.*

*`(C) IP-ENABLED VOICE SERVICE- The term `IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using Internet protocol, or a successor protocol, for a fee (whether part of a bundle of services or separately) with interconnection capability such that the service can originate traffic to, or terminate traffic from, the public switched telephone network.*

*`(8) LIMITATION- Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.'*

## **TITLE XIV--RURAL WIRELESS AND BROADBAND SERVICE**

### **SEC. 1401. SHORT TITLE.**

*This title may be cited as the `Rural Wireless and Broadband Service Act of 2006'.*

### **SEC. 1402. SMALL GEOGRAPHIC LICENSING AREAS.**

*Section 309(j)(4)(C) (47 U.S.C. 309(j)(4)(C)) is amended--*

*(1) by striking `service, prescribe' and inserting the following: `service--*

*`(i) prescribe';*

*(2) by striking `(i) an' and inserting `(I) an';*

*(3) by striking `(ii)' and inserting `(II)';*

*(4) by striking `(iii)' and inserting `(III)';*



(5) by striking *'services;'* and inserting *'services; and';* and

(6) by adding at the end the following:

*'(ii) consider the use of licensing spectrum in smaller geographic areas in order to encourage wireless deployment and build-out in rural and underserved areas of licensing spectrum in smaller geographic areas;'*

### **SEC. 1403. REPORT ON THE IMPACT OF SECONDARY MARKET TRANSACTIONS.**

Section 309(j) (47 U.S.C. 309(j)) is amended by adding at the end the following:

*'(17) REPORT ON THE IMPACT OF SECONDARY MARKET TRANSACTIONS- Not later than 2 years after the date of enactment of the Rural Wireless and Broadband Service Act of 2006, and every 2 years thereafter until the database developed under paragraph (18) is available to the public, the Commission shall submit a report to Congress analyzing and evaluating the impact of the Commission's--*

*'(A) spectrum leasing; and*

*'(B) spectrum partitioning and disaggregation rules in facilitating, through the development of secondary markets, the deployment of spectrum-based services to the public, particularly to those members of the public residing in rural and underserved areas.*

*'(18) PUBLICLY ACCESSIBLE INTEGRATED DATA BASE- The Commission, in coordination with the Assistant Secretary of Commerce for Communications and Information, shall develop an integrated national database, accessible by the public, that identifies by name, address, and contact information for each licensee, the spectrum assigned to each such licensee, and the geographic area to which the spectrum is assigned or licensed. The database may not provide public access to information protected from public disclosure under chapter 5 of title 5, United States Code, or the disclosure of which would compromise national security.'*

### **SEC. 1404. RADIO SPECTRUM REVIEW.**

Part I of title III (47 U.S.C. 301 et seq.), as amended by sections 453 and 602 of this Act, is further amended by adding at the end the following:

### ***'SEC. 344. RADIO SPECTRUM REVIEW.***

*`(a) In General- Not later than 5 years after the date of enactment of the Rural Wireless and Broadband Service Act of 2006, and every 5 years thereafter, the Federal Communications Commission and the National Telecommunications and Information Administration shall--*

*`(1) conduct a band-by-band analysis of the spectrum managed by each such agency; and*

*`(2) report to the Congress any such bands identified, in the determination of each such agency, as not being utilized in an effective or efficient manner.*

*`(b) Agency Authority-*

*`(1) COLLECTION OF INFORMATION- In conducting the analysis required under subsection (a)(1), the Federal Communications Commission and the National Telecommunications and Information Administration may require licensees and other spectrum users to provide information regarding spectrum usage.*

*`(2) EXEMPTION FROM PAPERWORK REDUCTION ACT- The collection of any information required under paragraph (1) shall be exempt from the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).'*

#### **SEC. 1405. 700 MHZ LICENSE AREAS.**

*The Federal Communications Commission shall, within 180 days after the date of enactment of this Act, initiate a rulemaking to reconfigure the band plans for the upper 700 megaHertz band (currently designated Auction 31) and for the unauctioned portions of the lower 700 megaHertz band (currently designated as Channel Blocks A, B, and E) so as to designate up to 6 megaHertz of recovered analog spectrum (as defined in section 309(j)(15)(C)(vi) of the Communications Act of 1934 (47 U.S.C. 309(j)(15)(C)(vi))) for small geographic license areas, taking into consideration--*

*(1) the January 28, 2008, commencement date for the auction of recovered analog spectrum as required by section 3003 of Public Law 109-171 (47 U.S.C. 309 note); and*

*(2) the desire to promote infrastructure build-out and service to rural and insular areas and the competitive benefits, unique characteristics, and special needs of regional and smaller wireless carriers.*

#### **SEC. 1406. NO INTERFERENCE WITH DTV TRANSITION.**

*The Commission shall not undertake any reconfiguration of the band plans*

*described in section 1605 if that reconfiguration is determined to be likely to delay the auction of recovered spectrum or the terminations of analog licenses required by section 3002(b) of Public Law 109-171 (47 U.S.C. 309 note) to occur by February 18, 2009.*

**SEC. 1407. EFFECTIVE DATE.**

*This title and the amendments made by this title shall take effect on the expiration of the date which is 90 days after the date of enactment of this Act.*

Calendar No. 652

109th CONGRESS

2d Session

**H. R. 5252**

**[Report No. 109-355]**

**AN ACT**

To promote the deployment of broadband networks and services.

**September 29, 2006**

**Reported with an amendment**

*END*

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**H.R.5252**

**Title:** To promote the deployment of broadband networks and services.

**Sponsor:** Rep Barton, Joe [TX-6] (introduced 5/1/2006)      [Cosponsors](#) (55)

**Related Bills:** [H.RES.850](#), [S.2686](#)

**Latest Major Action:** 9/29/2006 Placed on Senate Legislative Calendar under General Orders. Calendar No. 652.

**House Reports:** [109-470](#), [109-470 Part 2](#); **Senate Reports:** [109-355](#)

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**SUMMARY AS OF:**

9/29/2006--Reported to Senate amended. (There are 2 [other summaries](#))

Advanced Telecommunications and Opportunities Reform Act or the Communications Act of 2006 - **Title I: War on Terrorism - Subtitle A: Call Home** - (Sec. 101) Directs the Federal Communications Commission (FCC) to reduce the cost of calling home for U.S. military personnel stationed outside the United States in support of military operations, training exercises, or other approved purposes. Repeals provisions of the Telecommunications Authorization Act of 1992 that are similar but applicable only to specified countries.

**Subtitle B: Interoperability** - (Sec. 151) Amends the Digital Television Transition and Public Safety Act of 2005 to direct the Secretary of Homeland Security to allocate a portion of the funds available under such Act for: (1) interoperable communications system equipment grants for equipment that can use, or enable interoperability with systems or networks that can use, reallocated public safety spectrum; (2) interoperable emergency communications coordination, planning, and training grants; and (3) establishing a strategic technology reserve to preposition or secure interoperable communications systems for immediate deployment in an emergency or major disaster, including using prenegotiated contracts for rapid deployment rather than warehousing.

Requires the FCC to report to Congress on the technical feasibility of creating a back-up emergency communications system providing a framework for development of a resilient interoperable communications system for emergency responders in an emergency.

Directs the Secretary to reserve a portion of funds under the Digital Television Transition and Public Safety Act of 2005 to provide grants for projects to public safety answering points that enable interoperability and that advance E-911 deployment.

(Sec. 152) Amends the Digital Television Transition and Public Safety Act of 2005 to substitute references to the Secretary of Homeland Security for references to the Assistant Secretary for Communications and Information of the Department of Commerce in provisions relating to grants for public safety interoperable

communications.

(Sec. 153) Directs the Secretary of Homeland Security to award at least \$1 billion for public safety interoperable communications grants by September 30, 2006.

(Sec. 154) Amends the National Telecommunications and Information Administration Organization Act to direct the Assistant Secretary for Communications and Information and the Administrator of the National Highway Traffic Safety Administration to facilitate coordination and communication between specified groups regarding the migration to an IP-enabled emergency network that provides E-911 services.

**Title II: Universal Service Reform; Interconnection** - Internet and Universal Service Act of 2006 - **Subtitle A: Contributions to Universal Service** - (Sec. 201) Amends the Communications Act of 1934 to require each communications service provider to contribute to support universal service (the provision of communications service in rural, insular, and high-cost areas), subject to specified exemptions.

(Sec. 212) Modifies requirements regarding interconnection and rural telephone companies.

(Sec. 213) Imposes on facilities-based IP-enabled voice service providers the same rights, duties, and obligations as a requesting telecommunications carrier if the provider elects to assert those rights. Prohibits a carrier from refusing to transport or terminate IP-enabled voice traffic solely because it is IP-enabled and prohibits a provider originating, transmitting, or terminating IP-enabled voice traffic from being exempted from paying compensation for interstate traffic solely because the traffic is IP-enabled. Regulates IP-enabled voice service regarding: (1) accessibility for the disabled community; and (2) alarm or security systems or personal security or medical monitoring systems.

(Sec. 214) Applies universal service provisions to any services under FCC jurisdiction that can effectively substitute for interexchange telecommunications services, including any such substitute classified as an information service that uses telecommunications.

**Subtitle B: Distributions From Universal Service** - (Sec. 251) Requires biennial reports from eligible communications carriers concerning households offered and subscribing to broadband service in each of its service areas, as well as service plans and technologies.

(Sec. 252) Establishes the Broadband for Unserved Areas Program to provide financial assistance for the deployment of broadband equipment and infrastructure to unserved areas throughout the United States.

(Sec. 253) Declares that universal service support mechanisms and rules should be competitively neutral in terms of providers and technologies.

(Sec. 255) Imposes additional requirements in order for a telecommunications carrier, after enactment of this title, to be eligible to receive universal service support.

(Sec. 256) Prohibits the FCC from limiting the distribution and use of federal universal service support to a single connection or primary line. Makes all residential and business

lines served by an eligible communications carrier eligible for such support.

(Sec. 257) Requires telecommunications and IP-enabled voice service providers to ensure, as technically possible, that all traffic contains or preserves identification information.

(Sec. 258) Mandates remedial action as the FCC deems necessary, including fines, for improper use of universal service support.

(Sec. 259) Makes a vendor that has been convicted of criminal fraud connected to specified portions of universal service provisions ineligible to provide goods or services to any entity under those portions.

(Sec. 260) Requires a telecommunications carrier to provide services, including infrastructure deployment, to rural health care providers at rates comparable to urban rates.

(Sec. 261) Makes certain entities ineligible for preferential rates or treatment, including for-profit businesses, schools with endowments over a specified level, and some libraries.

(Sec. 262) Mandates a predictable and sufficient support mechanism for eligible carriers in insular areas.

**Title III: Streamlining the Franchising Process** - Video Competition and Savings for Consumers Act of 2006 - **Subtitle A: Updating the 1934 Act and Leveling the Regulatory Playing Field** - (Sec. 312) Requires a franchising authority to grant a franchise to provide video service to a video service provider within a specified time after receiving a complete application, subject to exception, and deems the application granted if the time limit is exceeded.

Prohibits state and local governments from regulating direct broadcast satellite services, except for taxation of direct-to-home service.

(Sec. 313) Requires the FCC to promulgate a standard franchise application form and regulates the form's contents.

(Sec. 315) Requires multichannel video programming distributors to report annually to the FCC regarding family tiers.

**Subtitle B: Streamlining the Provision of Video Services** - (Sec. 331) Prohibits awarding an exclusive franchise and requires franchises to be between five and 15 years long. Requires state and local laws to be reasonable, competitively neutral, nondiscriminatory, and consistent with police powers. Requires any permitting fees to be for compensating the government for managing public rights-of-way. Requires franchises to be constructed over public rights-of-way and through easements. Regulates the fee charged by the franchising authority to the video service provider.

Allows requiring a provider to pay a fee to support public, educational, and governmental (PEG) access facilities and institutional networks.

(Sec. 332) Provides for renewal and revocation of franchises.

(Sec. 333) Requires providers to provide a specified level of PEG use channels.

(Sec. 335) Removes provisions regulating compensation to an operator when a franchise renewal is denied or revoked.

Prohibits a video service programming vendor in which a provider has an attributable interest from denying a provider with a franchise access to programming solely because that provider uses a shared headend.

(Sec. 336) Removes provisions authorizing a franchising authority to establish operators' customer service and construction-related requirements.

Makes it unlawful for a video service provider to charge a subscriber more than one month's subscription fee for terminating a subscription before it ends.

(Sec. 337) Prohibits a provider from denying video service access to any group of residential subscribers because of income, race, or religion.

(Sec. 339) Amends provisions relating to: (1) unauthorized publication or use of communications to add a reference to video service providers; (2) syndicated exclusivity to add a reference to video service; and (3) the Telecommunications Development Fund to add a reference to video service.

(Sec. 340) Amends provisions of the Children's Television Act of 1990 relating to standards for children's television programming to add a reference to video service providers.

**Subtitle C: Miscellaneous and Conforming Amendments** - (Sec. 351) Amends the Communications Act of 1934 to remove provisions prohibiting construing the Act to require a local or municipal authority that is, or is affiliated with, a franchising authority to secure a franchise to operate as a multichannel video programming distributor.

Extends until October 5, 2012, the expiration date of provisions prohibiting exclusive contracts for satellite cable programming or satellite broadcast programming.

Exempts operators holding any combination of legally-held interests as of the date of enactment of title III of this Act from existing provisions relating to ownership restrictions. (Current law exempts such owners' interests as of July 1, 1984.) Removes provisions making it unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by the operator's cable system.

Removes provisions: (1) requiring a franchising authority to make a final decision on a sale or transfer request within 120 days of the request; (2) relating to coordination of federal, state, and local authority; and (3) continuing in effect any franchises in effect on October 30, 1984.

Declares that, notwithstanding any other provision of law, IP-enabled video service is an interstate service and is subject only to federal regulations.

Removes from Broadcast spectrum flexibility provisions a prohibition on deeming ancillary or supplementary service to be a multichannel video programming distributor for purposes of provisions relating to development of competition and diversity in video programming distribution.

**Subtitle D: Effective Dates and Transition Rules** - (Sec. 381) Provides for effective dates and transition rules.

**Title IV: Video Content - Subtitle A: National Satellite** - (Sec. 401) Requires satellite carriers, as technically feasible, to provide a comparable consumer product to Alaskan and Hawaiian subscribers at prices and terms comparable to those made in the contiguous United States. Requires that services to Alaska and Hawaii be a condition in the granting of new satellite licenses.

**Subtitle B: Video and Audio Flag** - Digital Content Protection Act of 2006 - (Sec. 452) Authorizes the FCC to adopt regulations and certifications as necessary to implement a specified Report and Order with the exclusive purpose of limiting the indiscriminate redistribution of digital television content over the Internet or similar platforms. Requires the FCC to initiate an expedited further proceeding for the approval of digital output protection technologies and recording methods for distance learning activities. Prohibits broadcast station licensees from using the Redistribution Control Descriptor to limit the redistribution of news and public affairs programming that depends on timeliness for its primary commercial value. Allows each broadcaster or network to determine whether this applies to a particular program.

(Sec. 453) Permits regulations governing the distribution of audio content with respect to digital audio broadcasting. Requires that a performing rights society or a mechanical rights organization be granted a license for free or for a de minimis fee for monitoring the public performance or other uses of copyrighted works and reasonable methods are employed to prevent further distribution.

(Sec. 454) Establishes the Digital Audio Review Board to submit to the FCC a proposed regulation allowing a certified unlicensed device to use specified broadcast television frequencies in a way that protects licensees from harmful interference.

**Title V: Municipal Broadband** - Community Broadband Act - (Sec. 502) Amends the Telecommunications Act of 1996 to prohibit any state legal requirement from prohibiting any entity from providing advanced telecommunications capability. Prohibits the requirements of any public provider (a state or its subdivision, an Indian tribe, or related entities) from discriminating in favor of itself or any other advanced telecommunications capability provider it owns or is affiliated with. Requires a public provider that decides not to provide such capability through a public-private partnership to publish public notice and allow commercial enterprises an opportunity to provide that capability. Prohibits the use of federal funds to assist a public provider in maintaining, reviving, or renewing a failed project.

**Title VI: Wireless Innovation Networks** - Wireless Innovation Act of 2006 - WIN Act of 2006 - (Sec. 602) Amends the Communications Act of 1934 to allow a certified



unlicensed device to use specified broadcast television frequencies in a way that protects licensees from harmful interference.

**Title VII: Digital Television** - (Sec. 701) Requires manufacturers and certain retailers of analog only televisions to inform consumers that converter boxes will be necessary after February 17, 2009.

Requires analog and digital televisions with screens at least 13 inches in size to be able to block display of all programs with a common rating.

Mandates specified activities to educate consumers about the digital television transition. Establishes the DTV Working Group to consult with state and local governments and the National Telecommunications and Information Administration to promote consumer outreach and provide logistical assistance on a market-by-market basis to consumers with special needs, including the converter box subsidy program.

Makes it unlawful, after a specified date, to import into the United States or ship in interstate commerce for sale to the public a television that cannot receive and decode digital signals.

Requires establishing converter box energy standards.

Amends the Digital Television Transition and Public Safety Act of 2005 to allow boxes to contain a clock and other incidental features.

Amends the Communications Act of 1934 to require cable operators to carry digital signals in the digital format transmitted by a station that is transmitting only digital signals. Allows operators to offer such signals in additional formats.

Requires an operator to carry, in its basic tier, any analog and digital video signals (currently, any signal) of any television broadcast station that the operator provides to any subscriber.

Requires satellite carriers that are carrying the digital signals of any other television broadcast station to carry the primary video and program-related material for a station broadcasting exclusively digitally in the local market. Requires that the signal be carried in the format transmitted by the station if the carrier carries the signal of any other broadcast in that local market in that format. Allows additional formats.

(Sec. 702) Authorizes and ratifies by law the FCC's rules regarding video description (for people with visual impairments) in a specified Report and Order, notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in *Motion Picture Association of America, Inc., et al., v. Federal Communications Commission, et al.*

(Sec. 703) Requires an annual FCC report to specified congressional committees on international coordination with Canada and Mexico of the DTV table of allotments.

(Sec. 704) Allows certain Spanish-only analog broadcast television stations near the Mexican border to renew their analog licenses through February 17, 2011, if certain conditions are met.

**Title VIII: Protecting Children** - (Sec. 801) Requires regulations that prevent video services from offering child pornography.

(Sec. 802) Amends the Crime Control Act of 1990 to triple the fines on providers of electronic communication services or remote computing services who knowingly and willfully fail to report child pornography.

Makes it unlawful for a commercial website to contain sexually explicit material unless the first page of the website does not include any such material and each page that does contain such material also displays marks or notices prescribed by the Federal Trade Commission (FTC) to inform people who access the website and to facilitate filtering.

Amends the federal criminal code to make it unlawful to knowingly embed material in the source code of a website with the intent to deceive: (1) another person into viewing obscene material; or (2) a minor into viewing material that is harmful to minors.

Revises provisions allowing victims of certain sex-related crimes to seek civil remedies to: (1) allow adults as well as minors to sue for injuries; and (2) increase from \$50,000 to \$150,000 the minimum level of damages.

(Sec. 803) Requires each provider of cable or over-the-air broadcast programming to prevent interactivity with commercial matter during any children's programming and during advertisements during or adjacent to such programs.

(Sec. 804) Mandates a study of commercial proposals to broadcast radio or television programs for reception onboard public school buses.

**Title IX: Internet Consumer Bill of Rights Act** - Internet Consumer Bill of Rights Act of 2006 - (Sec. 903) Requires Internet service providers (ISPs) to allow each subscriber to: (1) access and post any lawful content and any web page; (2) access and run any application, software, or service; (3) connect any legal device (if the device does not harm the ISP's network); and (4) receive clear information, in plain language, about estimated speeds, capabilities, limitations, and pricing.

(Sec. 904) Prohibits (consistent with the First Amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment to the U.S. Constitution) federal, state, and local governments and ISPs from regulating Internet content based on the views expressed, unless specifically authorized by law.

(Sec. 905) Requires ISPs to offer any potential subscriber any Internet service the provider offers without requiring the subscriber to purchase any other service offered by the ISP.

(Sec. 906) Allows ISPs to take certain actions, including providing consumers with parental control applications, devices, or services, offering a family friendly tier, and blocking content, applications, or services at the request of a subscriber.

(Sec. 907) Requires the FCC to establish an adjudicatory enforcement procedure for this title. Subjects violators to FCC enforcement under specified provisions of the Communications Act of 1934, including provisions authorizing forfeiture of up to \$500,000 for each violation. Authorizes equitable relief. Prohibits the FCC from

promulgating any regulations (other than those specified in this section) to implement this title.

(Sec. 911) Requires the FCC to biennially revise its definition of broadband to reflect data rates generally available to the public.

(Sec. 912) Requires ISPs to prioritize, as technically feasible, 911 and E-911 communications to ensure timely and effective emergency communications in a way that is consistent with other priority levels needed in emergencies and for other public safety and homeland security needs or requirements.

**Title X: Miscellaneous** - (Sec. 1001) Amends the Communications Act of 1934 to authorize the FCC to conduct closed meetings if at least one minority party commissioner attends, but prohibits voting or making any final decision at such a meeting. Requires publication of an executive summary of such meetings.

(Sec. 1002) Establishes in the FCC the Office of Indian Affairs to take certain actions, including working with Indian Tribes on a government-to-government basis to ensure that tribes have adequate access to communications services.

(Sec. 1003) Establishes in the FCC the Office of Consumer Advocate, to be independent of other FCC bureaus and offices. Requires that the Office's director act as an attorney for, and represent, all residential consumers generally in any matters relating to the FCC's jurisdiction. Allows the director, when there is a conflict between residential consumer classes, to choose to represent one or none of the interests. Establishes an advisory committee to assist the director. Declares that creation of the Office does not derogate the standing of any state consumer advocate or any national association of state utility consumer advocates to appear before the FCC or appeal any FCC decision.

(Sec. 1004) Requires the FCC to report annually to Congress on the extent to which providers of telecommunications service, broadband service, and IP-enabled voice service have deployed their own local transmission facilities.

(Sec. 1005) Increases tenfold the maximum forfeiture penalties for common carriers or applicants who have violated the Communications Act of 1934 or specified provisions of the federal criminal code. Shields independent network affiliates, in some circumstances, from penalties relating to network-originated programming.

(Sec. 1006) Prohibits, notwithstanding any other provision of law (currently, notwithstanding specified provisions), a state or local government from regulating or adjudicating the entry of or the rates charged by any provider of commercial mobile service or private mobile service.

Requires the FCC to conclude a proceeding regulating the content and presentation of telecommunications carriers' billing statements.

(Sec. 1008) Gives the FCC, notwithstanding any other provision of law, authority to issue decisions made in two specified petitions for declaratory rulings. Prohibits it from undermining, altering, or amending those decisions and requires dismissal of any related pending challenges.

(Sec. 1009) Requires the FCC to issue a further Notice of Proposed Rulemaking before making any changes to a specified regulation relating to multiple ownership of broadcast stations. Declares null and void a specified cross-media limits rule and reinstates, effective June 2, 2003, certain regulations as they were in effect before adoption of that rule.

(Sec. 1010) Prohibits the FCC from promulgating rules regarding media ownership without first completing regulatory action in a specified proceeding.

(Sec. 1011) Requires broadband service providers to report to the FCC where the provider provides service, the percentage of households and businesses in each service area offered service, and related price, throughput, and contention ratio information. Requires the FCC to report to Congress annually on the demographics of each service area that is not served by any broadband service provider.

(Sec. 1012) Penalizes, for one year after leaving the FCC, anyone who held specified FCC positions (regardless of basic rate of pay) if they communicate with or appear before any FCC officer or employee, on behalf of another person in connection with any matter on which such person seeks official action by any FCC officer or employee.

(Sec. 1013) Amends the Internet Tax Freedom Act to make permanent provisions prohibiting states and their subdivisions from imposing taxes on Internet access and from imposing multiple or discriminatory taxes on electronic commerce.

(Sec. 1014) Mandates reports to Congress on: (1) E-911 implementation progress and plans; and (2) telemedicine.

(Sec. 1016) Establishes in the National Science Foundation: (1) a program of basic research, including mandated grants, in advanced information and communications technologies focused on facilitating availability and affordability of services to all Americans; and (2) the Federal Advanced Information and Communications Technology Board. Mandates, subject to appropriations, multiyear grants to establish multidisciplinary Centers for Communications Research to generate innovative approaches to communications and information technology research.

Requires development of a plan to increase spectrum sharing between federal and nonfederal government users. Establishes a pilot program for plan implementation.

Requires the National Institute of Standards and Technology (NIST) to support: (1) research and standards development in advanced information and communications technologies focused on facilitating availability and affordability of services to all Americans; and (2) intramural research and cooperative research with institutions of higher education and industry.

(Sec. 1017) Amends the Communications Act of 1934 to require the FCC to vote on a petition for forbearance from applying FCC regulations within one year of receiving the petition. (Current law deems the petition granted if not denied within one year.)

(Se. 1018) Requires the FCC to complete certain proceedings on special access rates by a specified period after enactment of this Act.

**Title XI: Local Community Radio Act** - Local Community Radio Act of 2006 - (Sec. 1102) Amends provisions of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001 to repeal specified provisions concerning low-power FM radio stations.

(Sec. 1103) Requires the FCC to modify its rules to eliminate third-adjacent minimum distance separation requirements between: (1) low-power FM stations; and (2) full-service FM stations, FM translator stations, and FM booster stations.

(Sec. 1104) Requires the FCC to: (1) retain its rules that provide third-adjacent channel protection for full-power noncommercial FM stations that broadcast radio reading services via a subcarrier frequency from potential low-power FM station interference; (2) ensure, when licensing FM translator stations, that licenses are available to both translator and low-power stations and that the decisions are made based on local community needs; and (3) retain its rules that provide third-adjacent channel protection for full-power FM stations licensed in significantly populated states.

**Title XII: Cell Phone Tax Moratorium** - Cell Phone Tax Moratorium Act of 2006 - (Sec. 1202) Prohibits any state or its subdivision from imposing a new discriminatory tax on or regarding mobile services providers or property for three years after enactment of this Act.

**Title XIII: Truth in Caller ID** - Truth in Caller ID Act of 2006 - (Sec. 1302) Amends the Communications Act of 1934 to make it unlawful for any person, regarding telecommunications or IP-enabled voice service, to cause any caller identification service to transmit misleading or inaccurate information (but allows caller identification blocking). Provides for civil forfeiture and criminal fines. Allows certain state officers to bring a civil action in federal court to enforce this provision or to impose the civil penalties for violations.

**Title XIV: Rural Wireless and Broadband Service** - Rural Wireless and Broadband Service Act of 2006 - (Sec. 1402) Amends provisions relating to competitive bidding for licenses to require the FCC to consider the use of licensing spectrum in smaller geographic areas to encourage wireless deployment and buildout in rural and underserved areas.

(Sec. 1403) Requires a biennial report to Congress on the impact of the Commission's spectrum leasing and spectrum partitioning and disaggregation rules in facilitating, through the development of secondary markets, the deployment of spectrum-based services to the public, particularly in rural and underserved areas. Requires the FCC to develop an integrated national database, accessible by the public, that identifies, for each licensee, the spectrum assigned to the licensee and the geographic area to which the spectrum is assigned or licensed.

(Sec. 1404) Requires the FCC and the National Telecommunications and Information Administration, every five years, to conduct a band-by-band analysis of the spectrum managed by each such agency and report to Congress any bands identified as not being used in an effective or efficient way.

(Sec. 1405) Requires the FCC, by rule, to reconfigure the band plans for the upper 700 megahertz band and for the unauctioned portions of the lower 700 megahertz band so as

to designate up to six megahertz of recovered analog spectrum for small geographic license areas. Prohibits the FCC from any reconfiguration of those band plans if that reconfiguration is determined to be likely to delay the auction of recovered spectrum or the termination of analog licenses required by specified provisions of law.

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**MAJOR ACTIONS:** *m□P*

- 5/1/2006 Introduced in House
- 5/17/2006 Reported by the Committee on Energy and Commerce. H. Rept. 109-470.
- 6/6/2006 Supplemental report filed by the Committee on Energy and Commerce, H. Rept. 109-470, Part II.
- 6/8/2006 Passed/agreed to in House: On passage Passed by the Yeas and Nays: 321 - 101 (Roll no. 241).
- 9/29/2006 Committee on Commerce, Science, and Transportation. Reported by Senator Stevens with an amendment in the nature of a substitute. With written report No. 109-355. Additional views filed.
- 9/29/2006 Placed on Senate Legislative Calendar under General Orders. Calendar No. 652.

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**ALL ACTIONS:****5/1/2006:**

Referred to the House Committee on Energy and Commerce.

**5/17/2006 6:09pm:**

Reported by the Committee on Energy and Commerce. H. Rept. 109-470.

**5/17/2006 6:09pm:**

Placed on the Union Calendar, Calendar No. 259.

**6/6/2006 8:28pm:**

Supplemental report filed by the Committee on Energy and Commerce, H. Rept. 109-470, Part II.

**6/7/2006 10:17pm:**

Rules Committee Resolution H. Res. 850 Reported to House. Rule provides for consideration of H.R. 5252 with 1 hour of general debate. Previous question shall be considered as ordered without intervening motions except motion to recommit with or without instructions. Measure will be considered read. Specified amendments are in order.

**6/8/2006 5:37pm:**

Rule H. Res. 850 passed House.

**6/8/2006 5:56pm:**

Considered under the provisions of rule H. Res. 850. (consideration: CR H3551-3558; text of measure as reported in House: CR H3563-3569)

**6/8/2006 5:57pm:**

House resolved itself into the Committee of the Whole House on the state of the Union pursuant to H. Res. 850 and Rule XVIII.

**6/8/2006 5:57pm:**

The Speaker designated the Honorable Tom Price to act as Chairman of the Committee.

**6/8/2006 7:16pm:**

H.AMDT.981 Amendment (A001) offered by Mr. Barton (TX). (consideration: CR H3569-3570; text: CR H3569)

Manager's amendment consists of the text of the amendment contained in House Report 109-491 and printed on page H3569 in the Congressional Record for June 8, 2006.

**6/8/2006 7:23pm:**

H.AMDT.981 On agreeing to the Barton (TX) amendment (A001) Agreed to by voice vote.

**6/8/2006 7:24pm:**

H.AMDT.982 Amendment (A002) offered by Ms. Jackson-Lee (TX). (consideration: CR H3570-3571; text: CR H3570)

An amendment numbered 2 printed in House Report 109-491 to reduce the fee paid to local franchise authorities for PEG/iNet support by women-owned, small businesses, and socially and economically disadvantaged firms from 1% to 0.5%.

**6/8/2006 7:32pm:**

H.AMDT.982 By unanimous consent, the Jackson-Lee (TX) amendment was withdrawn.

**6/8/2006 7:32pm:**

H.AMDT.983 Amendment (A003) offered by Mr. Wynn. (consideration: CR H3571-3573; text: CR H3571-3572)

Amendment allows an individual to file a complaint with the FCC or with the local franchising authority; provides that the local franchising authority may initiate on their own a complaint proceeding and file that complaint with the FCC regarding a violation of the rules promulgated by the FCC, and may issue an order requiring that the franchisee comply with the FCC's consumer protection rules.

**6/8/2006 7:39pm:**

H.AMDT.983 On agreeing to the Wynn amendment (A003) Agreed to by voice vote.

**6/8/2006 7:40pm:**

H.AMDT.984 Amendment (A004) offered by Ms. E. B. Johnson. (consideration: CR H3573-3574; text: CR H3573)

Amendment increases the discrimination penalty from \$500,000 to \$750,000 for a cable operator that denies access to cable service to residents because of the income of that group..

**6/8/2006 7:50pm:**

H.AMDT.984 On agreeing to the Johnson, E. B. amendment (A004) Agreed to by voice vote.

**6/8/2006 7:50pm:**

H.AMDT.985 Amendment (A005) offered by Mr. Rush. (consideration: CR H3574-3575; text: CR H3574)

Amendment establishes a dispute resolution process for monetary disputes between local franchise authorities and cable operators.

**6/8/2006 7:55pm:**

H.AMDT.985 On agreeing to the Rush amendment (A005) Agreed to by voice vote.

**6/8/2006 7:55pm:**

H.AMDT.986 Amendment (A006) offered by Mr. Smith (TX). (consideration: CR H3575-3576, H3582-3583; text: CR H3575)

Amendment clarifies that the language in the bill that gives the FCC exclusive jurisdiction of network neutrality complaints does not displace the antitrust laws or the jurisdiction of the courts to hear antitrust cases in this area.

**6/8/2006 8:08pm:**

H.AMDT.987 Amendment (A007) offered by Mr. Markey. (consideration: CR H3576-3580, H3583; text: CR H3576-3577)

Amendment sought to add a new section to Title VII of the Communication Act of 1934 entitled "Network Neutrality".

**6/8/2006 8:37pm:**

H.AMDT.988 Amendment (A008) offered by Mr. Gutknecht. (consideration: CR [H3581-3582](#); text: CR [H3581](#))

Amendment preserves the right of the FCC to require VoIP providers to contribute to the universal service fund and pay appropriate intercarrier compensation fees.

**6/8/2006 8:48pm:**

H.AMDT.988 On agreeing to the Gutknecht amendment (A008) Agreed to by voice vote.

**6/8/2006 9:14pm:**

H.AMDT.986 On agreeing to the Smith (TX) amendment (A006) Agreed to by recorded vote: 353 - 68 (Roll no. [238](#)).

**6/8/2006 9:22pm:**

H.AMDT.987 On agreeing to the Markey amendment (A007) Failed by recorded vote: 152 - 269 (Roll no. [239](#)).

**6/8/2006 9:23pm:**

The House rose from the Committee of the Whole House on the state of the Union to report H.R. [5252](#).

**6/8/2006 9:23pm:**

The previous question was ordered pursuant to the rule. (consideration: CR [H3586](#))

**6/8/2006 9:23pm:**

The House adopted the amendments en gross as agreed to by the Committee of the Whole House on the state of the Union.

**6/8/2006 9:25pm:**

Ms. Solis moved to recommit with instructions to Energy and Commerce.

**6/8/2006 9:39pm:**

The previous question on the motion to recommit with instructions was ordered without objection. (consideration: CR [H3583-3586](#); text: CR [H3583-3584](#))

**6/8/2006 9:56pm:**

On motion to recommit with instructions Failed by the Yeas and Nays: 165 - 256 (Roll no. [240](#)).

**6/8/2006 10:05pm:**

On passage Passed by the Yeas and Nays: 321 - 101 (Roll no. [241](#)).

**6/8/2006 10:05pm:**

Motion to reconsider laid on the table Agreed to without objection.

**6/12/2006:**

Received in the Senate and Read twice and referred to the Committee on Commerce, Science, and Transportation.

**6/22/2006:**

Committee on Commerce, Science, and Transportation. Committee consideration and Mark Up Session held.

**6/27/2006:**

Committee on Commerce, Science, and Transportation. Committee consideration and Mark Up Session held.

**6/28/2006:**

Committee on Commerce, Science, and Transportation. Ordered to be reported with an amendment in the nature of a substitute favorably.

**9/29/2006:**

Committee on Commerce, Science, and Transportation. Reported by Senator Stevens with an amendment in the nature of a substitute. With written report No. [109-355](#). Additional views filed.



**9/29/2006:**

Placed on Senate Legislative Calendar under General Orders. Calendar No. 652.

**TITLE(S):** (*italics indicate a title for a portion of a bill*)

- POPULAR TITLE(S):  
COPE bill (identified by CRS)
- SHORT TITLE(S) AS INTRODUCED:  
Communications Opportunity, Promotion, and Enhancement Act of 2006
- SHORT TITLE(S) AS PASSED HOUSE:  
Communications Opportunity, Promotion, and Enhancement Act of 2006
- SHORT TITLE(S) AS REPORTED TO SENATE:  
Advanced Telecommunications and Opportunities Reform Act  
Communications Act of 2006  
*Cell Phone Tax Moratorium Act of 2006*  
*Community Broadband Act*  
*Digital Content Protection Act of 2006*  
*Internet and Universal Service Act of 2006*  
*Internet Consumer Bill of Rights Act of 2006*  
*Local Community Radio Act of 2006*  
*Rural Wireless and Broadband Service Act of 2006*  
*Truth in Caller ID Act of 2006*  
*Video Competition and Savings for Consumers Act of 2006*  
*WIN Act of 2006*  
*Wireless Innovation Act of 2006*
- OFFICIAL TITLE AS INTRODUCED:  
To promote the deployment of broadband networks and services.

**COSPONSORS(55), ALPHABETICAL** [followed by Cosponsors withdrawn]: (Sort: by date)

Rep Alexander, Rodney [LA-5] - 5/9/2006	Rep Baca, Joe [CA-43] - 5/17/2006
Rep Baker, Richard H. [LA-6] - 5/9/2006	Rep Barrow, John [GA-12] - 5/17/2006
Rep Bass, Charles F. [NH-2] - 5/2/2006	Rep Bishop, Sanford D., Jr. [GA-2] - 5/17/2006
Rep Blackburn, Marsha [TN-7] - 5/1/2006	Rep Bonner, Jo [AL-1] - 5/9/2006
Rep Bono Mack, Mary [CA-45] - 5/2/2006	Rep Boyd, Allen [FL-2] - 5/9/2006
Rep Brown, Henry E., Jr. [SC-1] - 5/11/2006	Rep Burgess, Michael C. [TX-26] - 5/1/2006
Rep Butterfield, G. K. [NC-1] - 5/2/2006	Rep Buyer, Steve [IN-4] - 5/1/2006
Rep Clay, Wm. Lacy [MO-1] - 5/9/2006	Rep Clyburn, James E. [SC-6] - 5/9/2006
Rep Crowley, Joseph [NY-7] - 5/9/2006	Rep Davis, Lincoln [TN-4] - 5/17/2006

<a href="#">Rep Diaz-Balart, Lincoln</a> [FL-21] - 5/9/2006	<a href="#">Rep Diaz-Balart, Mario</a> [FL-25] - 5/11/2006
<a href="#">Rep Everett, Terry</a> [AL-2] - 5/11/2006	<a href="#">Rep Feeney, Tom</a> [FL-24] - 5/11/2006
<a href="#">Rep Ferguson, Mike</a> [NJ-7] - 5/1/2006	<a href="#">Rep Foley, Mark</a> [FL-16] - 5/11/2006
<a href="#">Rep Fossella, Vito</a> [NY-13] - 5/2/2006	<a href="#">Rep Gillmor, Paul E.</a> [OH-5] - 5/1/2006
<a href="#">Rep Hall, Ralph M.</a> [TX-4] - 5/2/2006	<a href="#">Rep Hastings, Alcee L.</a> [FL-23] - 5/11/2006
<a href="#">Rep Hayes, Robin</a> [NC-8] - 5/17/2006	<a href="#">Rep Jefferson, William J.</a> [LA-2] - 5/9/2006
<a href="#">Rep Lewis, Ron</a> [KY-2] - 5/9/2006	<a href="#">Rep Mack, Connie</a> [FL-14] - 5/17/2006
<a href="#">Rep Meek, Kendrick B.</a> [FL-17] - 5/11/2006	<a href="#">Rep Meeks, Gregory W.</a> [NY-6] - 5/2/2006
<a href="#">Rep Miller, Jeff</a> [FL-1] - 5/11/2006	<a href="#">Rep Myrick, Sue Wilkins</a> [NC-9] - 5/1/2006
<a href="#">Rep Norwood, Charles W.</a> [GA-9] - 5/1/2006	<a href="#">Rep Oxley, Michael G.</a> [OH-4] - 5/9/2006
<a href="#">Rep Pickering, Charles W. "Chip"</a> [MS-3] - 5/1/2006	<a href="#">Rep Radanovich, George</a> [CA-19] - 5/1/2006
<a href="#">Rep Rogers, Mike D.</a> [AL-3] - 5/11/2006	<a href="#">Rep Rogers, Mike J.</a> [MI-8] - 5/1/2006
<a href="#">Rep Rush, Bobby L.</a> [IL-1] - 5/1/2006	<a href="#">Rep Scott, David</a> [GA-13] - 5/3/2006
<a href="#">Rep Shadegg, John B.</a> [AZ-3] - 5/1/2006	<a href="#">Rep Shimkus, John</a> [IL-19] - 5/1/2006
<a href="#">Rep Spratt, John M., Jr.</a> [SC-5] - 5/11/2006	<a href="#">Rep Stearns, Cliff</a> [FL-6] - 5/1/2006
<a href="#">Rep Thompson, Bennie G.</a> [MS-2] - 5/2/2006	<a href="#">Rep Upton, Fred</a> [MI-6] - 5/1/2006
<a href="#">Rep Wexler, Robert</a> [FL-19] - 5/11/2006	<a href="#">Rep Whitfield, Ed</a> [KY-1] - 5/1/2006
<a href="#">Rep Wicker, Roger F.</a> [MS-1] - 5/11/2006	<a href="#">Rep Wilson, Joe</a> [SC-2] - 5/9/2006
<a href="#">Rep Wynn, Albert Russell</a> [MD-4] - 5/2/2006	

**COMMITTEE(S):****Committee/Subcommittee: Activity:**[House Energy and Commerce](#) Referral, Reporting[Senate Commerce, Science, and Transportation](#) Referral, Markup, Reporting**RELATED BILL DETAILS: (additional related bills may be identified in Status)****Bill:**[H.RES.850](#)[S.2686](#)**Relationship:**

Rule related to H.R.5252 in House

Related bill identified by CRS

**AMENDMENT(S):**

1. [H.AMDT.981](#) to [H.R.5252](#) Manager's amendment consists of the text of the amendment contained in House Report 109-491 and printed on page H3569 in the Congressional Record for June 8, 2006.

**Sponsor:** Rep Barton, Joe [TX-6] (introduced 6/8/2006) **Cosponsors** (None)  
**Latest Major Action:** 6/8/2006 House amendment agreed to. Status: On agreeing to the Barton (TX) amendment (A001) Agreed to by voice vote.

2. H.AMDT.982 to H.R.5252 An amendment numbered 2 printed in House Report 109-491 to reduce the fee paid to local franchise authorities for PEG/iNet support by women-owned, small businesses, and socially and economically disadvantaged firms from 1% to 0.5%.

**Sponsor:** Rep Jackson-Lee, Sheila [TX-18] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 By unanimous consent, the Jackson-Lee (TX) amendment was withdrawn.

3. H.AMDT.983 to H.R.5252 Amendment allows an individual to file a complaint with the FCC or with the local franchising authority; provides that the local franchising authority may initiate on their own a complaint proceeding and file that complaint with the FCC regarding a violation of the rules promulgated by the FCC, and may issue an order requiring that the franchisee comply with the FCC's consumer protection rules.

**Sponsor:** Rep Wynn, Albert Russell [MD-4] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 House amendment agreed to. Status: On agreeing to the Wynn amendment (A003) Agreed to by voice vote.

4. H.AMDT.984 to H.R.5252 Amendment increases the discrimination penalty from \$500,000 to \$750,000 for a cable operator that denies access to cable service to residents because of the income of that group.

**Sponsor:** Rep Johnson, Eddie Bernice [TX-30] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 House amendment agreed to. Status: On agreeing to the Johnson, E. B. amendment (A004) Agreed to by voice vote.

5. H.AMDT.985 to H.R.5252 Amendment establishes a dispute resolution process for monetary disputes between local franchise authorities and cable operators.

**Sponsor:** Rep Rush, Bobby L. [IL-1] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 House amendment agreed to. Status: On agreeing to the Rush amendment (A005) Agreed to by voice vote.

6. H.AMDT.986 to H.R.5252 Amendment clarifies that the language in the bill that gives the FCC exclusive jurisdiction of network neutrality complaints does not displace the antitrust laws or the jurisdiction of the courts to hear antitrust cases in this area.

**Sponsor:** Rep Smith, Lamar [TX-21] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 House amendment agreed to. Status: On agreeing to the Smith (TX) amendment (A006) Agreed to by recorded vote: 353 - 68 (Roll no. 238).

7. H.AMDT.987 to H.R.5252 Amendment sought to add a new section to Title VII of the Communication Act of 1934 entitled "Network Neutrality".

**Sponsor:** Rep Markey, Edward J. [MA-7] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 House amendment not agreed to. Status: On agreeing to the Markey amendment (A007) Failed by recorded vote: 152 - 269 (Roll no. 239).

8. H.AMDT.988 to H.R.5252 Amendment preserves the right of the FCC to require VoIP

providers to contribute to the universal service fund and pay appropriate intercarrier compensation fees.

**Sponsor:** [Rep. Gutknecht, Gil](#) [MN-1] (introduced 6/8/2006) **Cosponsors** (None)

**Latest Major Action:** 6/8/2006 House amendment agreed to. Status: On agreeing to the Gutknecht amendment (A008) Agreed to by voice vote.

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# ATTACHMENT 11

**[STAFF WORKING DRAFT]**

MAY 24, 2006

109TH CONGRESS  
2ND SESSION

**S. ———**

To provide for increased competition in telecommunication services, promote the expanded use of broadband services, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

MAY —, 2006

Mr. ——— (for himself, Mr. ———, and Mr. ———  
) introduced the following bill; which was read twice and referred to the  
Committee on ———

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**A BILL**

To provide for increased competition in telecommunication services, promote the expanded use of broadband services, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Consumer Competition  
5 and Broadband Promotion Act”.

1 **SEC. 2. TABLE OF CONTENTS.**

2 The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.

**TITLE I—PROMOTING VIDEO COMPETITION**

**SUBTITLE A—VIDEO FRANCHISING**

- Sec. 101. Application of title VI to all facilities-based providers of video programming.
- Sec. 102. Accelerated disposition of franchise applications.
- Sec. 103. Conforming amendments; Effective date.

**SUBTITLE B—DIGITAL CONTENT PROTECTION; RELATED MATTERS**

- Sec. 151. Protection of digital broadcast video content.
- Sec. 152. Protection of digital audio broadcasting content.
- Sec. 153. Elimination of terrestrial loophole.
- Sec. 154. DBS services requirements.
- Sec. 155. Internet video.
- Sec. 156. TV Act/video description.

**TITLE II—PROMOTING VOICE AND DATA COMPETITION**

- Sec. 201. Internet nondiscrimination/network neutrality requirements.
- Sec. 202. Obligations of incumbent local exchange carriers.
- Sec. 203. Stand alone broadband requirement.
- Sec. 204. Better data on local competition in different product markets.
- Sec. 205. Improved enforcement options.
- Sec. 206. Competition in special access markets.
- Sec. 207. Customer contracts.
- Sec. 208. Competitive alternative pricing.
- Sec. 209. Forbearance.
- Sec. 210. Definitions.

**TITLE III—ENCOURAGING BROADBAND DEPLOYMENT AND BASIC COMMUNICATIONS RESEARCH**

- Sec. 301. Eligible broadcast television spectrum made available for wireless use.
- Sec. 302. Municipal broadband.
- Sec. 303. Federal information and communications technology research.
- Sec. 304. Community broadband grants for unserved areas and underserved communities.
- Sec. 305. Direct FCC to revisit broadband speeds.
- Sec. 306. Direct census to include question as part of its American Community Survey.

**TITLE IV—REFORM AND STRENGTHEN USF**

- Sec. 401. Universal Service Fund contribution requirements.
- Sec. 402. Treatment of substitute services under section 254.
- Sec. 403. Phantom traffic.
- Sec. 404. Permanent extension of ADA exemption.
- Sec. 405. Intercarrier compensation.

Sec. 406. Conditions for designation as an eligible telecommunications carrier;  
Broadband requirement..

Sec. 407. Rural health care support mechanisms.

Sec. 408. Telecommunications services for libraries.

Sec. 409. Audits.

# **TITLE I—PROMOTING VIDEO COMPETITION**

## **Subtitle A—Video Franchising**

### **SEC. 101. APPLICATION OF TITLE VI TO ALL FACILITIES- BASED PROVIDERS OF VIDEO PROGRAM- MING.**

(a) CABLE OPERATOR.—Section 602(5)(A) of the Communications Act of 1934 (47 U.S.C. 522(5)(A)) is amended by inserting “(regardless of whether such person provides such service separately or combined with a telecommunications service or information service)” after “over a cable system”.

(b) CABLE SERVICE.—Section 602(6) of the Communications Act of 1934 (47 U.S.C. 522(6)) is amended to read as follows:

“(6) the term ‘cable service’ means the transmission to subscribers of video programming or other programming service provided through a cable system (including any subscriber interaction required for the selection or use of such video programming or other programming service), except to the extent that such video programming or other programming service is provided as part of an Inter-



1 net access service (as such term is defined in section  
2 231(e)(4), and is not video programming provided  
3 via an Internet access service that is made available  
4 by a cable operator solely to its cable subscribers.”.

5 (c) CABLE SYSTEM.—Section 602(7) of the Commu-  
6 nications Act of 1934 (47 U.S.C. 522(7)) is amended—

7 (1) by striking “which includes video program-  
8 ming”; and

9 (2) by inserting after “cable service” the fol-  
10 lowing: “, without regard to delivery technology, in-  
11 cluding Internet protocol technology or any suc-  
12 cessor technology, which is located at least in part  
13 in the public rights-of-way”.

14 **SEC. 102. ACCELERATED DISPOSITION OF FRANCHISE AP-**  
15 **PLICATIONS.**

16 Part III of title VI of the Communications Act of  
17 1934 (47 U.S.C. 521 et seq.) is amended by adding at  
18 the end the following new sections:

19 **“SEC. 630. DEADLINES FOR FRANCHISING AUTHORITY AP-**  
20 **PROVALS.**

21 “(a) ACCELERATED APPROVAL.—If an applicant for  
22 an additional competitive franchise is an entity previously  
23 authorized to occupy the public rights-of-way, or an affil-  
24 iate of such entity, and proposes in writing to provide  
25 cable services using existing wireline facilities within the

1 public rights-of-way in the franchise area, and to provide  
2 cable service on the same terms and conditions as those  
3 contained in the franchise most recently granted to the  
4 incumbent cable operator for each local geographic area,  
5 respectively, covered by the application, the franchising  
6 authority shall grant the application within 30 business  
7 days of receipt of the completed application from the oper-  
8 ator, or at the first regular business meeting following  
9 public notice of the operator's application, whichever is  
10 later. If the franchising authority fails to act within the  
11 specified period, the application shall be deemed granted  
12 unless the applicant and the franchising authority have  
13 agreed to an extension of the deadline.

14       “(b) STANDARD FRANCHISE.—

15               “(1) ELECTION.—A person that is eligible  
16 under paragraph (6) may elect to obtain a franchise  
17 under section 631 (hereinafter, a ‘standard fran-  
18 chise’) for a franchise area from a franchising au-  
19 thority in lieu of a negotiating the terms and condi-  
20 tions of a franchise with a franchising authority.

21               “(2) PREREQUISITE NEGOTIATIONS.—

22                       “(A) IN GENERAL.—Prior to applying for  
23 a standard franchise, an eligible person shall re-  
24 quest and make itself available to negotiate the

1 terms and conditions of a franchise with a fran-  
2 chising authority.

3 “(B) EXCEPTION.— The prerequisite nego-  
4 tiation required in subparagraph (A) shall not  
5 be applicable if a franchising authority refuses  
6 to engage in negotiations at the request of an  
7 applicant or if the applicant already holds any  
8 cable franchise from the franchising authority  
9 and is eligible under subsection (b)(6)(B) of  
10 this section.

11 “(3) NOTICE.—If a mutually acceptable nego-  
12 tiated franchise agreement has not been executed 60  
13 days after the applicant makes such request, the ap-  
14 plicant shall file with the franchising authority writ-  
15 ten notice of its election to provide cable service  
16 under a standard franchise unless both the franchise  
17 authority and the applicant mutually agree to an ex-  
18 tension of time for such deadline. Such notice shall  
19 be filed at least 30 days before the cable operator  
20 commences providing cable service pursuant to the  
21 standard franchise, and shall contain the informa-  
22 tion required by paragraph (4). A cable operator  
23 that files such notice under this section shall update  
24 any information contained in such notice that is no

1 longer accurate and correct throughout the term of  
2 the standard franchise.

3 “(4) CONTENTS OF NOTICE.—The notice re-  
4 quired by paragraph (3) shall contain—

5 “(A) the name under which the operator is  
6 offering or intends to offer cable service;

7 “(B) the names and business addresses of  
8 the directors and principal executive officers, or  
9 the persons performing similar functions, of the  
10 operator;

11 “(C) the location of the operator’s prin-  
12 cipal business office;

13 “(D) the name, business address, elec-  
14 tronic mail address, and telephone and fax  
15 number of the operator’s local agent;

16 “(E) a declaration by the operator that the  
17 operator is eligible under subsection (d) to ob-  
18 tain a standard franchise under this section;

19 “(F) a geographical identification of the  
20 franchise area in which the operator intends to  
21 offer cable service pursuant to the standard  
22 franchise, including an identification of the ini-  
23 tial service area within the franchise area where  
24 the operator intends to offer cable service;

1           “(G) a declaration by the operator that the  
2           operator will comply with the lawful and non-  
3           discriminatory rights-of-way requirements of  
4           the franchising authority under subsection (f);

5           “(H) a declaration by the person that it  
6           will comply with all lawful and nondiscrim-  
7           inatory consumer protection and customer serv-  
8           ice rules authorized under section 632(b); and

9           “(I) a certification that the information  
10          contained in the notice is accurate and correct  
11          and that the operator will immediately notify  
12          the franchise authority of any material changes  
13          in that information during the franchise term.

14          “(5) EFFECTIVENESS.—

15                 “(A) EFFECTIVE DATE.—A standard fran-  
16          chise under this section shall be effective with  
17          respect to any franchise area 30 days after the  
18          date of the filing of a completed notice under  
19          paragraph (3).

20                 “(B) EFFECT ON STATE AND LOCAL  
21          LAW.—With respect to any person that obtains  
22          a standard franchise, any State or local law,  
23          regulation, or ordinance requiring such a cable  
24          operator to obtain a franchise other than a  
25          standard franchise is deemed preempted and

1           superseded except as provided under subpara-  
2           graph (C). If a cable operator that was pre-  
3           viously providing cable service in such area pur-  
4           suant to a negotiated franchise obtains a stand-  
5           ard franchise for a franchise area, any fran-  
6           chise agreement under section 621 or any State  
7           or local law, regulation, or ordinance for the  
8           provision of cable service by such operator in  
9           such franchise area shall be deemed null and  
10          void.

11                 “(C) REVERSION TO TRADITIONAL FRAN-  
12           CHISE UPON WITHDRAWAL OF COMPETITIVE  
13           FRANCHISE OPERATOR.—During the term of a  
14           standard franchise, if a cable operator providing  
15           cable service pursuant to a standard franchise  
16           becomes the sole provider of cable service within  
17           a franchise area, the franchise authority have  
18           the right to accelerate the term of the standard  
19           franchise via notice to such cable operator, but  
20           shall not be permitted to make the termination  
21           of such standard franchise earlier than 180  
22           days after such notice is received by the cable  
23           operator.

24                 “(6) ELIGIBILITY FOR STANDARD FRAN-  
25           CHISE.—The following persons or groups are eligible

1 to obtain a standard franchise under this section on  
2 or after the date of enactment of the Consumer  
3 Competition and Broadband Promotion Act:

4 “(A) NEW CABLE OPERATORS.—A person  
5 that, directly or through an affiliate, has pursu-  
6 ant to any Federal, State, or local law, any  
7 right, permission, or authority to establish or  
8 use lines in or across public rights-of-way with-  
9 in the franchise area, which right, permission or  
10 authority does not rely on, and is independent  
11 of, any cable franchise obtained pursuant to  
12 section 621.

13 “(B) EXISTING PROVIDERS OF CABLE  
14 SERVICE.—An incumbent cable operator that is  
15 providing cable service in a franchise area  
16 under a cable franchise obtained pursuant to  
17 section 621 may, in its discretion, elect to ter-  
18minate such negotiated franchise and obtain a  
19 standard franchise but shall only be eligible for  
20 such standard franchise after providing the rel-  
21 evant franchise authority with written notice of  
22 its election consistent with the requirements of  
23 subsections (b)(3) and (b)(4) of this section,  
24 and on or after the date that another cable op-  
25 erator within the franchise area operating pur-

1           suant to a standard franchise begins offering  
2           cable service to more than 5 percent of residen-  
3           tial households within such operator's franchise  
4           area.

5           “(C) UNAVAILABILITY IN CERTAIN  
6           STATES.—A person, group, or cable operator  
7           shall not be eligible for a standard franchise in  
8           any State in which—

9                   “(i) a single franchising authority is  
10                  solely responsible for the negotiation,  
11                  issuance and enforcement of franchise re-  
12                  quirements under section 621 or any State  
13                  or local law; or

14                  “(ii) a cable operator may obtain a  
15                  franchise by operation of law and in lieu of  
16                  negotiation under section 621 if—

17                   “(I) the terms of such franchise  
18                  are not inconsistent with the terms re-  
19                  quired in section 631 of this Act; and

20                   “(II) the grant of a such a fran-  
21                  chise is concurrently available to any  
22                  other cable operator operating within  
23                  such franchise authority upon the  
24                  entry of a new cable operator under  
25                  such terms.



1   **"SEC. 631. TERMS OF STANDARD FRANCHISE.**

2       “(a) INCLUSION OF REQUIREMENTS.—A standard  
3 franchise shall meet all of the requirements of this section.

4       “(b) TERM.—A standard franchise shall be effective  
5 in a franchise area for a term of 10 years.

6       “(c) FRANCHISE AREA.—The franchise area for  
7 standard franchise shall be the total geographic area in  
8 a general purpose political subdivision of a State within  
9 which a cable operator was providing cable service on the  
10 date of enactment of the Consumer Competition and  
11 Broadband Promotion Act or, in the case of an incumbent  
12 local exchange carrier (as such term is defined in section  
13 251(h)) or affiliate thereof, the area within such subdivi-  
14 sion in which such carrier provides telephone exchange  
15 service.

16       “(d) PEG AND I-NET REQUIREMENTS.—

17       “(1) CAPACITY.—A cable operator authorized  
18 under a standard franchise to provide cable service  
19 in a franchise area shall provide the same number  
20 of channels for public, educational or governmental  
21 use as is provided by the largest cable operator in  
22 such franchise area, or, if no such operator exists,  
23 then three channels. Upon renewal of a standard  
24 franchise, a franchising authority may require a  
25 cable operator to increase the channel capacity des-

1       ignated for public, educational, or governmental use.

2       The increase may not exceed the greater of—

3               “(A) 1 channel; or

4               “(B) 10 percent of the public, educational,  
5       or governmental channel capacity required of  
6       the cable operator before the required increase.

7       “(2) PEG PROGRAMMING.—A cable operator  
8       shall ensure that all subscribers receive any public,  
9       educational, or governmental programming carried  
10      by the operator within the subscriber’s franchise  
11      area.

12       “(3) PRODUCTION AND DELIVERY OF PRO-  
13      GRAMMING.—The production of any programming  
14      provided under this subsection and delivery of such  
15      programming to the signal origination point or  
16      points shall be the sole responsibility of the fran-  
17      chising authority.

18       “(4) INTERCONNECTION; COST-SHARING.—Un-  
19      less 2 cable operators (which may include a cable op-  
20      erator providing cable service under a standard fran-  
21      chise) otherwise agree to the terms for interconnec-  
22      tion and cost sharing, such video service providers  
23      shall comply with regulations prescribed by the Com-  
24      mission providing for—

1           “(A) the interconnection between cable op-  
2           erators in a franchise area for transmission of  
3           public, educational, or governmental program-  
4           ming, without material degradation in signal  
5           quality or functionality; and

6           “(B) the reasonable allocation of the costs  
7           of such interconnection between such cable op-  
8           erators.

9           “(5) DISPLAY OF PROGRAM INFORMATION.—A  
10          cable operator authorized under a standard franchise  
11          shall display the program information for public,  
12          educational, or governmental programming in any  
13          print or electronic program guide in the same man-  
14          ner in which it displays pro-gram information for  
15          other video programming in the franchise area. The  
16          video service provider shall not omit public, edu-  
17          cational, or governmental programming from any  
18          navigational device, guide, or menu containing other  
19          video programming that is available to subscribers in  
20          the franchise area.

21          “(6) FINANCIAL SUPPORT.—

22                 “(A) IN GENERAL.—A franchising author-  
23          ity for a franchise area shall require a cable op-  
24          erator with a standard franchise providing cable  
25          service in that franchise area to pay the fran-

1 chising authority annually, in general support  
2 of public, educational, and governmental use  
3 and institutional networks (as defined in section  
4 611(f)), the greater of—

5 “(i) an amount equal to 1 percent of  
6 the cable operator’s annual gross revenues  
7 in the franchise area; or

8 “(ii) a fee equivalent to the value, on  
9 a per subscriber basis, assessed monthly,  
10 of all monetary grants or in-kind services  
11 or facilities for public, educational, or gov-  
12 ernmental access channels provided annu-  
13 ally by the cable service provider in the  
14 franchise area with the most cable service  
15 subscribers, pursuant to that cable opera-  
16 tor’s franchise with the franchising author-  
17 ity or other persons as in effect on the  
18 date of enactment of the Consumer Com-  
19 petition and Broadband Promotion Act.

20 “(B) CALCULATION DATA.—A franchising  
21 authority for a franchising area may require a  
22 cable operator providing cable service in that  
23 franchise area to provide to the franchising au-  
24 thority information sufficient to calculate the  
25 per-subscriber equivalent fee allowed by sub-

1 paragraph (A)(ii). The information shall be en-  
2 titled to treatment as confidential and propri-  
3 etary business information. The payments made  
4 by a video service provider pursuant to subpara-  
5 graph (A) shall be assessed and collected in a  
6 manner consistent with section 622.

7 “(7) EXISTING INSTITUTIONAL NETWORKS.—

8 “(A) IN GENERAL.—A franchising author-  
9 ity may require a cable operator authorized to  
10 provide cable service under a standard franchise  
11 to continue to provide any institutional network  
12 provided by that cable operator before obtaining  
13 such franchise.

14 “(B) COST-SHARING.—If a franchising au-  
15 thority requires a cable operator to continue to  
16 provide such institutional network pursuant to  
17 subparagraph (A), the costs of operating such  
18 network shall be borne proportionately by all  
19 cable operators serving that franchise area.

20 “(8) EFFECT ON EXISTING LAW.—Except as  
21 expressly provided in this subsection, the provisions  
22 of section 611 shall apply to a cable operator au-  
23 thorized to provide cable service under a standard  
24 franchise.

25 “(e) GROSS REVENUES.—In this section:

1           “(1) IN GENERAL.—Subject to paragraphs (2)  
2           and (3), the term ‘gross revenues’ means all consid-  
3           eration of any kind or nature, including cash, cred-  
4           its, property, and in-kind contributions (services or  
5           goods) received by the cable operator from the provi-  
6           sion of cable service within the franchise area.

7           “(2) INCLUDED ITEMS.—Subject to paragraph  
8           (3), the term ‘gross revenues’ shall include the fol-  
9           lowing:

10           “(A) all charges and fees paid by sub-  
11           scribers for the provision of cable service, in-  
12           cluding fees attributable to cable service when  
13           sold individually or as part of a package or bun-  
14           dle, or functionally integrated, with services  
15           other than cable service;

16           “(B) any franchise fee imposed on the  
17           cable operator that is passed on to subscribers;

18           “(C) compensation received by the cable  
19           operator for promotion or exhibition of any  
20           products or services over the cable service, such  
21           as on ‘home shopping’ or similar programming;

22           “(D) revenue received by the cable oper-  
23           ator as compensation for carriage of video pro-  
24           gramming or other programming service on  
25           that operator’s cable service;

1           “(E) all revenue derived from the cable op-  
2           erator’s cable service pursuant to compensation  
3           arrangements for advertising; and

4           “(F) any advertising commissions paid to  
5           an affiliated third party for cable services ad-  
6           vertising.

7           “(3) EXCLUDED ITEMS.—The term ‘gross reve-  
8           nues’ shall not include—

9           “(A) any revenue not actually received,  
10          even if billed, such as bad debt net of any re-  
11          coveries of bad debt;

12          “(B) refunds, rebates, credits, or discounts  
13          to subscribers or a municipality to the extent  
14          not already offset by subparagraph (A) and to  
15          the extent such refund, rebate, credit, or dis-  
16          count is attributable to the cable service;

17          “(C) subject to paragraph (4), any reve-  
18          nues received by the cable operator or its affili-  
19          ates from the provision of services or capabili-  
20          ties other than cable service, including tele-  
21          communications services, Internet access serv-  
22          ices, and services, capabilities, and applications  
23          that may be sold as part of a package or bun-  
24          dle, or functionally integrated, with cable serv-  
25          ice;

1           “(D) any revenues received by the cable  
2           operator or its affiliates for the provision of di-  
3           rectory or Internet advertising, including yellow  
4           pages, white pages, banner advertisement, and  
5           electronic publishing;

6           “(E) any amounts attributable to the pro-  
7           vision of cable service to customers at no  
8           charge, including the provision of such service  
9           to public institutions without charge;

10          “(F) any tax, fee, or assessment of general  
11          applicability imposed on the customer or the  
12          transaction by a Federal, State, or local govern-  
13          ment or any other governmental entity, col-  
14          lected by the provider, and required to be remit-  
15          ted to the taxing entity, including sales and use  
16          taxes and utility user taxes;

17          “(G) any forgone revenue from the provi-  
18          sion of cable service at no charge to any person,  
19          except that any forgone revenue exchanged for  
20          trades, barter, services, or other items of value  
21          shall be included in gross revenue;

22          “(H) sales of capital assets or surplus  
23          equipment;

24          “(I) reimbursement by programmers of  
25          marketing costs actually incurred by the cable



1 operator for the introduction of new program-  
2 ming; and

3 “(J) the sale of cable services for resale to  
4 the extent the purchaser certifies in writing  
5 that it will resell the service and pay a franchise  
6 fee with respect thereto.

7 “(4) FUNCTIONALLY INTEGRATED SERVICES.—

8 In the case of a cable service that is bundled or inte-  
9 grated functionally with other services, capabilities,  
10 or applications, the portion of the cable operator’s  
11 revenue attributable to such other services, capabili-  
12 ties, or applications shall be included in gross rev-  
13 enue unless the cable operator can reasonably iden-  
14 tify the division or exclusion of such revenue from  
15 its books and records that are kept in the regular  
16 course of business.

17 “(5) AFFILIATE REVENUE.—Revenue of an af-  
18 filiate shall be included in the calculation of gross  
19 revenues to the extent the treatment of such revenue  
20 as revenue of the affiliate has the effect (whether in-  
21 tentional or unintentional) of evading the payment  
22 of franchise fees which would otherwise be paid for  
23 cable service.

24 “(f) AUDIT PROCEDURE.—

1           “(1) IN GENERAL.—A franchising authority  
2           that believes that it is not receiving the full amount  
3           of the franchise fee imposed under this section may  
4           commence an audit to ensure compliance with the  
5           definition of gross revenue and the calculation of  
6           fees under this section. A franchising authority may  
7           not conduct such audit more than once during any  
8           twelve-month period, and may not request a review  
9           for any 12-month period ending more than 48  
10          months before the date on which the request is sub-  
11          mitted.

12          “(2) EXCLUSIONS.— Notwithstanding any  
13          other provision of law or the terms of any franchise  
14          agreement, in any audit of the franchise fees paid by  
15          a cable operator with respect to any cable system  
16          pursuant to this section or a previous franchise  
17          agreement, a local franchising authority may request  
18          only information directly related to the calculation of  
19          gross revenues derived from that cable system.

20          “(g) EFFECT ON EXISTING LAW.—Except as ex-  
21          pressly provided in this subsection, the provisions of sec-  
22          tion 622 shall apply to a cable operator authorized to pro-  
23          vide cable service under a standard franchise.

24          “(h) BUILD-OUT AND ANTI-DISCRIMINATION.—

1           “(1) PROHIBITION.—A cable operator author-  
2           ized under a standard franchise to provide cable  
3           service in a franchise area shall not deny access to  
4           its cable service to any group of potential residential  
5           cable service subscribers in such franchise area be-  
6           cause of the race, color, religion, national origin, sex,  
7           or income of the residents of the local area in which  
8           such group resides.

9           “(2) NEGOTIATED BUILD-OUT.—Not later than  
10          30 days after the effective date of a standard fran-  
11          chise, the cable operator and the franchising author-  
12          ity shall establish a reasonable period of time and a  
13          deployment schedule within which such operator’s  
14          cable system shall become capable of providing cable  
15          service to all households in the franchise area. Any  
16          such schedule agreed to by the cable operator and  
17          the franchise authority shall be incorporated as part  
18          of the standard franchise and filed with the relevant  
19          franchise authority. Failure to reach agreement on  
20          such deployment schedule within 60 days shall result  
21          in the incorporation of buildout terms set forth in  
22          paragraph (3) as part of the standard franchise  
23          agreement for such operator.

24          “(3) DEFAULT BUILD-OUT.—

1           “(A) SCHEDULE.—If such cable operator  
2           is an incumbent local exchange carrier (or an  
3           affiliate thereof), it shall make its cable system  
4           capable of providing cable service to all house-  
5           holds in the franchise area in accordance with  
6           the following schedule:

7                   “(i) To all of the occupied households  
8                   in an initial service area identified by the  
9                   cable operator under the notice required in  
10                  section 630(b)(3) within no less than 18  
11                  months after the date of the grant of the  
12                  standard franchise.

13                  “(ii) To not less than 65 percent of  
14                  the households in its franchise area within  
15                  no more than 3 years after the date of the  
16                  effective date of the standard franchise.

17                  “(iii) To not less than 80 percent of  
18                  such households in its franchise area with-  
19                  in no more than 7 years after the effective  
20                  date of the standard franchise.

21           “(B) SPARSELY POPULATED AREAS.—In  
22           determining compliance with the percentages  
23           required under this paragraph, the total num-  
24           ber of households required to be served in any  
25           franchise area shall be reduced by the number

1 of households in any geographic part of the  
2 franchise area in which there are fewer than 20  
3 households per square mile.

4 “(4) MONITORING AND INSPECTION.—A fran-  
5 chising authority municipality shall have the right to  
6 monitor and inspect the deployment of cable services  
7 by such cable operator. The operator shall submit  
8 semiannual progress reports detailing the current  
9 provision of cable services in accordance with the de-  
10 ployment schedule established pursuant to para-  
11 graph (2), and the cable operator’s deployment plans  
12 for the next 6 months.

13 “(5) ENFORCEMENT.—If the franchise author-  
14 ity determines that a cable operator violated para-  
15 graph (1) or the deployment schedule established by  
16 paragraph (2), it may—

17 “(A) may assess a civil penalty in such  
18 amount as may be authorized under State law  
19 for the franchising area in which the violation  
20 occurred for violation of its anti discrimination  
21 laws; and

22 “(B)(i) revoke the standard franchise if it  
23 determines, after notice and an opportunity for  
24 a hearing, that the video service provider has  
25 willfully violated this section; or

1           “(ii) bring a civil action against the cable  
2           operator in any court of competent jurisdiction  
3           for damages, an order directing the cable oper-  
4           ator to rectify the noncompliance, or other ap-  
5           propriate relief.

6           “(6) EFFECT ON EXISTING LAW.—This sub-  
7           section shall apply to a cable operator authorized  
8           under a standard franchise to provide cable service  
9           in a franchise area, in lieu of paragraphs (3) and  
10          (4)(A) of subsection 621(a).

11          “(j) TITLE VI APPLICABILITY.—Except as expressly  
12          provided in this section, the requirements of title VI shall  
13          apply to a cable operator authorized to provide cable serv-  
14          ice under a standard franchise.

15          “(k) INCORPORATION OF STANDARD TERMS.—A  
16          franchise authority may include other standard terms or  
17          conditions as part of its standard franchise, provided how-  
18          ever that such standard terms—

19                 “(1) are publicly available to a person or group  
20                 applying for a standard franchise, and

21                 “(2) are materially equivalent to terms and con-  
22                 ditions that are included in the franchise agreements  
23                 of all other cable operators providing cable service  
24                 within the relevant franchise area.

1 **SEC. 103. CONFORMING AMENDMENTS; EFFECTIVE DATE.**

2 (a) **EXCLUSION OF PEG SUPPORT FROM DEFINITION**  
3 **OF FRANCHISE FEE.**—Section 622(g)(2) of the Commu-  
4 nications Act of 1934 (47 U.S.C. 542(g)(2)) is amended—

5 (1) by striking “in the case of any franchise in  
6 effect on the date of enactment of this title,” in sub-  
7 paragraph (B); and

8 (2) by striking subparagraph (C) and inserting  
9 the following:

10 “(C) any amounts required to be paid by  
11 a cable operators pursuant to section  
12 631(d)(5);”.

13 (b) **EFFECTIVE DATE.**—This Act and the amend-  
14 ments made by this Act shall take effect 120 days after  
15 date of enactment.

16 (c) **REGULATIONS.**—Prior to such effective date, the  
17 Federal Communications Commission shall, as necessary,  
18 adopt regulations under title VI or other provisions of the  
19 Communications Act of 1934 to reflect the amendments  
20 made by this Act.

1           **Subtitle B—Digital Content**  
2           **Protection; Related Matters**

3   **SEC. 151. PROTECTION OF DIGITAL BROADCAST VIDEO**  
4           **CONTENT.**

5           (a) IN GENERAL.—Section 303 of the Communica-  
6   tions Act of 1934 (47 U.S.C. 303) is amended by adding  
7   at the end the following:

8           “(z) Have authority with respect to digital television  
9   receivers to adopt such regulations and certifications as  
10   are necessary to implement the Report and Order in the  
11   matter of Digital Broadcast Content Protection, FCC 03–  
12   273, as ratified by the Congress in section 102(b) of the  
13   Consumer Competition and Broadband Promotion Act,  
14   with the exclusive purpose of limiting the indiscriminate  
15   redistribution of digital television content over the Inter-  
16   net or similar distribution platforms, including the author-  
17   ity to reconsider, amend, repeal, supplement, and other-  
18   wise modify any such regulations and certifications, in  
19   whole or in part, only for that purpose.”.

20           (b) RATIFICATION OF FCC REPORT AND ORDERS.—  
21   The Report and Order in the matter of Digital Broadcast  
22   Content Protection, FCC 03–273, and the Order in the  
23   matter of Digital Output Protection Technology and Re-  
24   cording Method Certifications, FCC 04–193, are ratified,  
25   subject to the limitations set forth in subsection (d), and



1 shall become effective 12 months after the date of enact-  
2 ment of this Act.

3 (c) EXPEDITED PROCEEDING FOR CERTIFYING  
4 TECHNOLOGIES FOR USE IN DISTANCE EDUCATION.—

5 Within 30 days after the date of enactment of this Act,  
6 the Federal Communications Commission shall initiate a  
7 further proceeding for the approval of digital output pro-  
8 tection technologies and recording methods for use in the  
9 course of distance learning activities. The proceeding shall  
10 be conducted in accordance with the expedited procedures  
11 established for the Interim Approval of Authorized Digital  
12 Output Protection Technologies and Authorized Recording  
13 Methods in the Report and Order described in subsection  
14 (b). The proceeding shall have no effect on certifications  
15 made pursuant to the Order in the matter of Digital Out-  
16 put Protection Technology and Recording Method Certifi-  
17 cations described in subsection (b), as ratified in that sub-  
18 section.

19 (d) LIMITATIONS.—

20 (1) IN GENERAL.—Nothing in this Act or sec-  
21 tion 303(z) of the Communications Act of 1934 (47  
22 U.S.C. 303(z)), or in regulations of the Commission  
23 adopted pursuant thereto, shall—

24 (A) limit the Commission's authority to ap-  
25 prove digital output protection technologies and

1 recording methods that allow for the redistribu-  
2 tion of digital broadcast content within the  
3 home or similar environment, or the use of the  
4 Internet to transmit digital broadcast content,  
5 where such technologies and recording methods  
6 adequately protect such content from indis-  
7 criminate redistribution; or

8 (B) be construed to affect rights, remedies,  
9 limitations, or defenses to copyright infringe-  
10 ment, including fair use, under title 17, United  
11 States Code.

12 (2) USE OF REDISTRIBUTION CONTROL  
13 DESCRIPTOR.—Licensees of television broadcast sta-  
14 tions may not utilize the Redistribution Control  
15 Descriptor, as adopted by the Report and Order de-  
16 scribed in subparagraph (b), to limit the redistribu-  
17 tion of news and public affairs programming the pri-  
18 mary commercial value of which depends on timeli-  
19 ness. The Federal Communications Commission  
20 shall allow each broadcaster or broadcasting network  
21 to determine whether the primary commercial value  
22 of a particular news program depends on timeliness.  
23 The Commission may review any such determination  
24 by a broadcaster or broadcasting network if it re-  
25 ceives bona fide complaints alleging, or otherwise

1       has reason to believe, that particular broadcast dig-  
2       ital television content has violated this subsection.

3           (3) PROPERTY RIGHTS.—The Commission shall  
4       require that any authorized redistribution control  
5       technology and any authorized recording method  
6       technology approved by the Commission under this  
7       section that is publicly offered for adoption by li-  
8       censees, be licensed on reasonable and nondiscrim-  
9       inatory terms and conditions, including terms pre-  
10      serving a licensee's ability to assert any patent  
11      rights necessary for implementation of the licensed  
12      technology.

13   **SEC. 152. PROTECTION OF DIGITAL AUDIO BROADCASTING**  
14           **CONTENT.**

15       Part I of title III (47 U.S.C. 301 et seq.) is amended  
16   by adding at the end the following:

17   **"SEC. 342. MARKETPLACE ADOPTION OF DIGITAL AUDIO**  
18           **BROADCAST PROTECTION TECHNOLOGY.**

19       “(a) ADOPTION OF DIGITAL AUDIO BROADCAST  
20   PROTECTION TECHNOLOGY IN THE MARKETPLACE.—Li-  
21   censees and permittees of the Commission providing dig-  
22   ital audio broadcast service, and providers of digital audio  
23   broadcast technology approved by the Commission, uti-  
24   lizing the in-band, on-channel technical standard for dig-  
25   ital audio broadcast transmissions under consideration in

1 MM Docket No. 99-235, or any successor regulations,  
2 shall adopt in the marketplace a digital audio broadcast  
3 protection technology that prevents the disaggregation and  
4 indiscriminate redistribution of content contained in such  
5 transmissions and in reception devices capable of receiving  
6 such digital audio broadcast transmissions before recep-  
7 tion devices capable of such disaggregation or indiscrimi-  
8 nate redistribution are marketed or made available in  
9 interstate commerce.

10 “(b) LIMITATIONS.—The digital audio broadcast pro-  
11 tection technology adopted in the marketplace pursuant  
12 to subsection (a)—

13 “(1) shall be applied in a manner consistent  
14 with title 17, United States Code, including the fair  
15 use provisions contained in section 107 of that title;

16 “(2) shall be developed in conjunction with  
17 copyright owners and other affected stakeholders;

18 “(3) shall not make obsolete devices already  
19 manufactured and distributed in the marketplace be-  
20 fore the adoption of such digital audio broadcast  
21 protection technology; and

22 “(4) shall be licensed on reasonable and non-  
23 discriminatory terms.

24 “(c) NO DELAY IN THE ROLLOUT OF HD RADIO.—  
25 Nothing in this section shall delay the adoption of final

1 operational rules for digital audio broadcasting by the  
2 Commission.

3       “(d) ACTIVITIES OF PERFORMING RIGHTS AND ME-  
4 CHANICAL RIGHTS ORGANIZATIONS.—Nothing shall pre-  
5 clude or prevent a performing rights organization or a me-  
6 chanical rights organization, or any entity owned in whole  
7 or in part by, or acting on behalf of, such organizations,  
8 from monitoring public performances or other uses of  
9 copyrighted works contained in such transmissions. The  
10 Commission may require that any such organization or en-  
11 tity be given a license on either a gratuitous basis or for  
12 a de minimus fee to cover only the reasonable costs to  
13 the licensor of providing the license, and on reasonable,  
14 non-discriminatory terms, to access and retransmit as nec-  
15 essary any content contained in such transmissions pro-  
16 tected by content protection or similar technologies, pro-  
17 vided that such licenses are for purposes of carrying out  
18 the activities of such organizations or entities in moni-  
19 toring the public performance or other uses of copyrighted  
20 works and that such organizations or entities employ rea-  
21 sonable methods to protect any such content accessed  
22 from further distribution.

23       “(e) RULEMAKING.—The Commission may adopt  
24 rules clarifying and implementing the provisions of this  
25 section, but may not approve any digital audio content

1 protection technology developed pursuant to subsection (a)  
2 except to the extent that the technology generates radio  
3 frequency energy subject to Part 15 of the Commission's  
4 rules (47 CFR 15.1 et seq.).”.

5 **SEC. 153. ELIMINATION OF TERRESTRIAL LOOPHOLE.**

6 (a) IN GENERAL.—

7 (1) DEFINITION OF SATELLITE CABLE PRO-  
8 GRAMMING.—Section 705(d)(1) of the Communica-  
9 tions Act of 1934 (47 U.S.C. 605(d)(1)) is amended  
10 by striking “which is transmitted via satellite and”.

11 (2) CONFORMING AMENDMENT.—Section  
12 628(i)(3) of the Communications Act of 1934 (47  
13 U.S.C. 548(h)(3)) is amended by striking “such pro-  
14 gramming is retransmitted by satellite and”.

15 (b) CERTAIN MULTICHANNEL VIDEO PROGRAMMING  
16 DISTRIBUTORS DISQUALIFIED FROM SECTION 628 REM-  
17 EDIES.—Section 628(c)(3) of the Communications Act of  
18 1934 (47 U.S.C. 548(c)(3)) is amended by adding at the  
19 end thereof the following:

20 “(C) COMPLAINANT ELIGIBILITY.—

21 “(i) IN GENERAL.—Notwithstanding  
22 any other provision of this Act, a multi-  
23 channel video programming distributor ag-  
24 grieved by conduct that it alleges con-  
25 stitutes a violation of subsection (b) or

1 (c)(2)(C) with respect to national sports  
2 programming may not commence an adju-  
3 dicatory proceeding at the Commission or  
4 avail itself of any other remedy under title  
5 V or any other provision of this Act if the  
6 aggrieved distributor provides any national  
7 sports programming under an exclusive  
8 contract to distribute that programming.

9 “(ii) NATIONAL SPORTS PROGRAM-  
10 MING.—In this subparagraph, the term  
11 ‘national sports programming’ means any  
12 live broadcast event involving teams of the  
13 National Football League, the National or  
14 American Baseball League, the National  
15 Hockey League, or the National Basketball  
16 Association, the National Collegiate Ath-  
17 letic Association, or any other equivalent  
18 national sports organization identified by  
19 the Commission by rule.”.

20 (c) REPEAL OF SECTION 628(c) SUNSET.—Section  
21 628(c) of the Communications Act of 1934 (47 U.S.C.  
22 548(c)) is amended by striking paragraph (5).

23 (d) PROCEDURE.—Section 628 of the Communica-  
24 tions Act of 1934 (47 U.S.C. 548) is amended by striking  
25 subsections (d), (e), and (f) and inserting the following:

1       “(d) ADJUDICATORY PROCEEDING.—

2               “(1) IN GENERAL.—Except as provided in sub-  
3       section (c)(3)(C), a multichannel video programming  
4       distributor aggrieved by conduct that it alleges con-  
5       stitutes a violation of subsection (b) or (c)(2)(C), or  
6       the regulations of the Commission under subsection  
7       (c), may commence an adjudicatory proceeding at  
8       the Commission.

9               “(2) REQUEST FOR PRODUCTION OF AGREE-  
10       MENTS.—In any proceeding commenced under para-  
11       graph (1), the Commission shall request from a  
12       party, and the party shall produce, such agreements  
13       between the party and a third party relating to the  
14       distribution of multichannel video programming dis-  
15       tributor programming that the Commission believes  
16       to be relevant to its decision regarding the matters  
17       at issue in such adjudicatory proceeding.

18               “(3) CONFIDENTIALITY TO BE MAINTAINED.—  
19       The production of any agreement under paragraph  
20       (2) and its use in a Commission decision in the ad-  
21       judicatory proceeding under paragraph (1) shall be  
22       subject to such provisions ensuring confidentiality as  
23       the Commission may by regulation determine.

24       “(e) REMEDIES FOR VIOLATIONS.—



1           “(1) REMEDIES AUTHORIZED.—Upon comple-  
2           tion of an adjudicatory proceeding under subsection  
3           (d), the Commission shall have the power to order  
4           appropriate remedies, including, if necessary, the  
5           power to establish prices, terms, and conditions of  
6           sale of programming to an aggrieved multichannel  
7           video programming distributor.

8           “(2) ADDITIONAL REMEDIES.—The remedies  
9           provided under paragraph (1) are in addition to any  
10          remedy available to an multichannel video program-  
11          ming distributor under title V or any other provision  
12          of this Act.

13          “(f) PROCEDURES.—

14               “(1) IN GENERAL.—The Commission shall pre-  
15               scribe regulations to implement this section.

16               “(2) CONTENT OF REGULATIONS.—The regula-  
17               tions required under paragraph (1) shall—

18                   “(A) provide for an expedited review of  
19                   any complaints made pursuant to this section,  
20                   including the issuance of a final order termi-  
21                   nating such review not later than 270 days  
22                   after the date on which the complaint was filed;

23                   “(B) establish procedures for the Commis-  
24                   sion to collect such data as the Commission re-  
25                   quires to carry out this section, including the

1 right to obtain copies of all contracts and docu-  
2 ments reflecting arrangements and under-  
3 standings alleged to violate this section; and

4 “(C) provide for penalties to be assessed  
5 against any person filing a frivolous complaint  
6 pursuant to this section.”.

7 **SEC. 154. DBS SERVICES REQUIREMENTS.**

8 (a) IN GENERAL.—Section 335 of the Communica-  
9 tions Act of 1934 (47 U.S.C. 335) is amended by adding  
10 at the end the following:

11 “(c) NATIONWIDE SERVICE REQUIREMENTS FOR  
12 DBS AND DIRECT-TO-HOME SATELLITE CARRIERS.—

13 “(1) IN GENERAL.—A satellite carrier that of-  
14 fers multichannel audio or video programming serv-  
15 ice or Internet access service directly to consumers  
16 and that has more than 250,000 subscribers in the  
17 United States shall make the service or services  
18 available at comparable prices and terms in non-  
19 contiguous states using any additional or replace-  
20 ment satellites or transponders that are purchased,  
21 leased, accessed, licensed, or otherwise used for the  
22 service following the date of the enactment of the  
23 Consumer Competition and Broadband Promotion  
24 Act.

1           “(2) NATIONWIDE COVERAGE OF DBS AND DI-  
2       RECT-TO-HOME SATELLITES.—The Commission may  
3       not grant a license to the operator of any satellite  
4       in the Fixed Satellite Service, the Direct Broadcast  
5       Satellite service, the Mobile-Satellite Service, or the  
6       Digital Audio Radio Service that is capable of pro-  
7       viding multichannel audio or video programming dis-  
8       tribution or Internet access services directly to con-  
9       sumers in the United States unless the Commission  
10      determines that, to the extent technically feasible,  
11      the satellite is capable of providing services to con-  
12      sumers in Alaska and Hawaii using signal power lev-  
13      els that are within 10 percent of the peak power lev-  
14      els that are available in the continental United  
15      States.

16           “(3) SATELLITE CARRIER DEFINED.—In this  
17      subsection, the term ‘satellite carrier’ means an enti-  
18      ty that uses the facilities of a satellite in the Fixed-  
19      Satellite Service, the Direct Broadcast Satellite serv-  
20      ice, the Broadcast Satellite Service, the Mobile-Sat-  
21      ellite Service, or the Digital Audio Radio Service  
22      that is licensed by the Commission under part 25 of  
23      title 47 of the Code of Federal Regulations, or is li-  
24      censed or authorized by a foreign government.”.

1 (b) IMPLEMENTATION.—The Federal Communica-  
2 tions Commission shall adopt such rules and policies as  
3 are necessary to implement and enforce section 335(c) of  
4 the Communications Act of 1934 (47 U.S.C. 335(c)).

5 **SEC. 155. INTERNET VIDEO.**

6 Section 616(a)(2) of the Communications Act of  
7 1934 (47 U.S.C. 536(a)(2)) is amended by striking “dis-  
8 tributors” and inserting “distributors, or against other  
9 video programming distributors using any medium or plat-  
10 form for such programming distribution including alter-  
11 native mediums or platforms offered by the vendor,”.

12 **SEC. 156. TV ACT/VIDEO DESCRIPTION.**

13 (a) RULES REINSTATED.—The video description  
14 rules of the Federal Communications Commission con-  
15 tained in the report and order identified as Implementa-  
16 tion of Video Description of Video Programming, Report  
17 and Order, 15 F.C.C.R. 15,230 (2000), shall, notwith-  
18 standing the decision of the United States Court of Ap-  
19 peals for the District of Columbia Circuit in *Motion Pic-  
20 ture Association of America, Inc., et al., v. Federal Commu-  
21 nications Commission, et al.* (309 F. 3d 796, November  
22 8, 2002), be considered to be authorized and ratified by  
23 law.

24 (b) CONTINUING AUTHORITY OF COMMISSION.—The  
25 Federal Communications Commission—

1           (1) shall, within 45 days after the date of en-  
2       actment of this Act, republish its video description  
3       rules contained in the report and order *Implementa-*  
4       *tion of Video Description of Video Programming*, Re-  
5       port and Order, 15 F.C.C.R. 15,230 (2000);

6           (2) may amend, repeal, or otherwise modify  
7       such rules; and

8           (3) shall initiate a proceeding within 120 days  
9       after the date of enactment of this Act, and com-  
10      plete that proceeding within 1 year, to consider in-  
11      corporating accessible information requirements in  
12      its video description rules.

13       (c) ACCESSIBLE INFORMATION DEFINED.—In this  
14      section, the term “accessible information” may include  
15      written information displayed on television screens during  
16      regular programming, hazardous warnings and other  
17      emergency information, local and national news bulletins,  
18      and any other information the Commission deems appro-  
19      priate.

1     **TITLE II—PROMOTING VOICE**  
2             **AND DATA COMPETITION**

3     **SEC. 201. INTERNET NONDISCRIMINATION/NETWORK NEU-**  
4             **TRALITY REQUIREMENTS.**

5             (a) INTERNET NEUTRALITY.—Title I of the Commu-  
6     nications Act of 1934 (47 U.S.C. 151 et seq.) is amended  
7     by adding at the end the following:

8     **“SEC. 12. INTERNET NEUTRALITY.**

9             “(a) DUTY OF BROADBAND SERVICE PROVIDERS.—  
10     With respect to any broadband service offered to the pub-  
11     lic, each broadband service provider shall—

12             “(1) not block, interfere with, discriminate  
13             against, impair, or degrade the ability of any person  
14             to use a broadband service to access, use, send, post,  
15             receive, or offer any lawful content, application, or  
16             service made available via the Internet;

17             “(2) not prevent or obstruct a user from at-  
18             taching or using any device to the network of such  
19             broadband service provider, only if such device does  
20             not physically damage or substantially degrade the  
21             use of such network by other subscribers;

22             “(3) provide and make available to each user  
23             information about such user’s access to the Internet,  
24             and the speed, nature, and limitations of such user’s  
25             broadband service;

1           “(4) enable any content, application, or service  
2       made available via the Internet to be offered, pro-  
3       vided, or posted on a basis that—

4           “(A) is reasonable and nondiscriminatory,  
5       including with respect to quality of service, ac-  
6       cess, speed, and bandwidth;

7           “(B) is at least equivalent to the access,  
8       speed, quality of service, and bandwidth that  
9       such broadband service provider offers to affili-  
10      ated content, applications, or services; and

11          “(C) does not impose a charge on the basis  
12      of the type of content, applications, or services  
13      made available via the Internet into the network  
14      of such broadband service provider;

15          “(5) only prioritize content, applications, or  
16      services accessed by a user that is made available via  
17      the Internet within the network of such broadband  
18      service provider based on the type of content, appli-  
19      cations, or services and the level of service purchased  
20      by the user, without charge for such prioritization;  
21      and

22          “(6) not install or utilize network features,  
23      functions, or capabilities that impede or hinder com-  
24      pliance with this section.

1       “(b) CERTAIN MANAGEMENT AND BUSINESS-RE-  
2 LATED PRACTICES.—Nothing in this section shall be con-  
3 strued to prohibit a broadband service provider from en-  
4 gaging in any activity, provided that such activity is not  
5 inconsistent with the requirements of subsection (a), in-  
6 cluding—

7           “(1) protecting the security of a user’s com-  
8 puter on the network of such broadband service pro-  
9 vider, or managing such network in a manner that  
10 does not distinguish based on the source or owner-  
11 ship of content, application, or service;

12           “(2) offering directly to each user broadband  
13 service that does not distinguish based on the source  
14 or ownership of content, application, or service, at  
15 different prices based on defined levels of bandwidth  
16 or the actual quantity of data flow over a user’s con-  
17 nection;

18           “(3) offering consumer protection services (in-  
19 cluding parental controls for indecency or unwanted  
20 content, software for the prevention of unsolicited  
21 commercial electronic messages, or other similar ca-  
22 pabilities), if each user is provided clear and accu-  
23 rate advance notice of the ability of such user to  
24 refuse or disable individually provided consumer pro-  
25 tection capabilities;



1           “(4) handling breaches of the terms of service  
2           offered by such broadband service provider by a sub-  
3           scriber, provided that such terms of service are not  
4           inconsistent with the requirements of subsection (a);  
5           or

6           “(5) where otherwise required by law, to pre-  
7           vent any violation of Federal or State law.

8           “(c) EXCEPTION.—Nothing in this section shall apply  
9           to any service regulated under title VI, regardless of the  
10          physical transmission facilities used to provide or transmit  
11          such service.

12          “(d) IMPLEMENTATION.—Not later than 180 days  
13          after the date of enactment of the Consumer Competition  
14          and Broadband Promotion Act, the Commission shall pre-  
15          scribe rules to implement this section that—

16               “(1) permit any aggrieved person to file a com-  
17               plaint with the Commission concerning any violation  
18               of this section; and

19               “(2) establish enforcement and expedited adju-  
20               dicatory review procedures consistent with the objec-  
21               tives of this section, including the resolution of any  
22               complaint described in paragraph (1) not later than  
23               90 days after such complaint was filed, except for  
24               good cause shown.

25          “(e) ENFORCEMENT.—

1           “(1) IN GENERAL.—The Commission shall en-  
2       force compliance with this section under title V, ex-  
3       cept that—

4           “(A) no forfeiture liability shall be deter-  
5       mined under section 503(b) against any person  
6       unless such person receives the notice required  
7       by section 503(b)(3) or section 503(b)(4); and

8           “(B) the provisions of section 503(b)(5)  
9       shall not apply.

10          “(2) SPECIAL ORDERS.—In addition to any  
11       other remedy provided under this Act, the Commis-  
12       sion may issue any appropriate order, including an  
13       order directing a broadband service provider—

14           “(A) to pay damages to a complaining  
15       party for a violation of this section or the regu-  
16       lations hereunder; or

17           “(B) to enforce the provisions of this sec-  
18       tion.

19          “(f) DEFINITIONS.—In this section, the following  
20       definitions shall apply:

21           “(1) AFFILIATED.—The term ‘affiliated’ in-  
22       cludes—

23           “(A) a person that (directly or indirectly)  
24       owns or controls, is owned or controlled by, or

1 is under common ownership or control with, an-  
2 other person; or

3 “(B) a person that has a contract or other  
4 arrangement with a content, applications, or  
5 service provider relating to access to or dis-  
6 tribution of such content, applications, or serv-  
7 ice.

8 “(2) BROADBAND SERVICE.—The term  
9 ‘broadband service’ has the meaning given it in sec-  
10 tion 715(b)(1).

11 “(3) BROADBAND SERVICE PROVIDER.—The  
12 term ‘broadband service provider’ has the meaning  
13 given that term in section 715(b)(2).

14 “(4) IP-ENABLED VOICE SERVICE.—The term  
15 ‘IP-enabled voice service’ has the meaning given that  
16 term in section 715(b)(3).

17 “(5) USER.—The term ‘user’ means any resi-  
18 dential or business subscriber who, by way of a  
19 broadband service, takes and utilizes Internet serv-  
20 ices, whether provided for a fee, in exchange for an  
21 explicit benefit, or for free.”.

22 (b) REPORT ON DELIVERY OF CONTENT, APPLICA-  
23 TIONS, AND SERVICES.—Not later than 270 days after the  
24 date of enactment of this Act, and annually thereafter,  
25 the Federal Communications Commission shall transmit

1 a report to the Committee on Commerce, Science, and  
2 Transportation of the Senate and the Committee on En-  
3 ergy and Commerce of the House of Representatives on  
4 the—

5 (1) ability of providers of content, applications,  
6 or services to transmit and send such information  
7 into and over broadband networks;

8 (2) ability of competing providers of trans-  
9 mission capability to transmit and send such infor-  
10 mation into and over broadband networks;

11 (3) price, terms, and conditions for transmit-  
12 ting and sending such information into and over  
13 broadband networks;

14 (4) number of entities that transmit and send  
15 information into and over broadband networks; and

16 (5) state of competition among those entities  
17 that transmit and send information into and over  
18 broadband networks.

19 **SEC. 202. OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE**  
20 **CARRIERS.**

21 (a) **IN GENERAL.**—For purposes of this section, an  
22 incumbent local exchange carrier shall be treated as a  
23 common carrier, telecommunications carrier, local ex-  
24 change carrier, and incumbent local exchange carrier with

1 respect to all wireline facilities owned or controlled by such  
2 carrier or any affiliate, regardless of the—

3 (1) classification of the services offered using  
4 such facilities;

5 (2) transmission and switching technology used;  
6 or

7 (3) physical composition of such wireline facili-  
8 ties.

9 (b) COMPLIANCE WITH 1934 ACT.—A carrier de-  
10 scribed in subsection (a), and any affiliate thereof, shall  
11 comply with the requirements of sections 201, 202, 224,  
12 251, 252, 259, and 271 of the Communications Act of  
13 1934 (47 U.S.C. 201, 202, 224, 251, 252, 259, and 271)  
14 with respect to any request by a telecommunications car-  
15 rier for access to such wireline facilities, or for trans-  
16 mission provided using such facilities, for the provision of  
17 any telecommunications, telecommunications service, or  
18 information service, regardless of the transmission or  
19 switching technology used by such requesting tele-  
20 communications carrier to provide such services.

21 (c) COMMON TERMINOLOGY.—The terms used in this  
22 section shall have the same meaning as such terms are  
23 given in sections 3 and 251(h) of the Communications Act  
24 of 1934 (47 U.S.C. 153 and 251(h)).

1 **SEC. 203. STAND ALONE BROADBAND REQUIREMENT.**

2 Title VII of the Communications Act of 1934 (47  
3 U.S.C. 601 et seq.) is amended by adding at the end there-  
4 of the following:

5 **"SEC. 715. STAND-ALONE BROADBAND SERVICE.**

6 "(a) PROHIBITION.—A broadband service provider  
7 shall not require a subscriber, as a condition on the pur-  
8 chase of any broadband service the provider offers, to pur-  
9 chase any cable service, telecommunications service, or IP-  
10 enabled voice service offered by the provider.

11 "(b) DEFINITIONS.—In this section:

12 "(1) The term 'broadband service' means a 2-  
13 way transmission service (whether offered separately  
14 or as part of a bundle of services) offered directly  
15 to the public, or to such classes of users as to be ef-  
16 fectively available directly to the public, regardless of  
17 the facilities used that connects to the Internet and  
18 transmits information of a user's choosing at a  
19 speed, as shall be periodically updated by the Com-  
20 mission, of at least 200 kilobits per second in at  
21 least one direction.

22 "(2) The term 'broadband service provider'  
23 means a person or entity that controls, operates, or  
24 resells and controls any facility used to provide  
25 broadband service.

1           “(3) IP-ENABLED VOICE SERVICE.—The term  
2     ‘IP-enabled voice service’ means the provision of  
3     real-time 2-way voice communications offered to the  
4     public, or such classes of users as to be effectively  
5     available to the public, transmitted through cus-  
6     tomer premises equipment using IP protocol, or a  
7     successor protocol, (whether part of a bundle of  
8     services or separately) with interconnection capa-  
9     bility such that the service can originate traffic to,  
10    and terminate traffic from, the public switched tele-  
11    phone network.”.

12   **SEC. 204. BETTER DATA ON LOCAL COMPETITION IN DIF-**  
13           **FERENT PRODUCT MARKETS.**

14    (a) INQUIRY.—Not later than 180 days after the date  
15    of enactment of this Act, and every year thereafter, the  
16    Commission shall conduct an inquiry regarding the extent  
17    to which providers of telecommunications service,  
18    broadband service, and IP-enabled voice service have de-  
19    ployed their own local transmission facilities.

20    (b) DATA COLLECTION.—In connection with its in-  
21    quiry, the Commission shall require that all providers of  
22    telecommunications service, broadband service, and IP-en-  
23    abled voice service submit annual reports to the Commis-  
24    sion describing the extent to which they have deployed  
25    their own local transmission facilities. At a minimum, pro-

1 viders shall report separately on their deployment of loop  
2 facilities in each wire center used to provide service in dif-  
3 ferent product markets served by providers of tele-  
4 communications service, broadband service, and IP-en-  
5 abled voice service. In defining product markets for these  
6 purposes, the Commission shall utilize the methodology set  
7 forth in the United States Department of Justice and  
8 Federal Trade Commission Horizontal Merger Guidelines  
9 and shall, at a minimum, distinguish among the products  
10 demanded by—

- 11 (1) residential customers;
- 12 (2) small and medium-sized business customers;
- 13 and
- 14 (3) large business customers.

15 (c) REPORT TO CONGRESS.—Not later than one year  
16 after the date of enactment of this Act, and each year  
17 thereafter, the Commission shall submit a report to Con-  
18 gress describing the extent to which providers of tele-  
19 communications service, broadband service, and IP-en-  
20 abled voice service have deployed their own local trans-  
21 mission facilities. Such report shall analyze separately the  
22 extent of actual facilities-based competition in each wire  
23 center in the product markets described in subsection (b).

24 (d) DEFINITIONS.—In this section:



1           (1)    BROADBAND    SERVICE.—The    term  
2    “broadband service” has the meaning given that  
3    term in section 715(b)(1) of the Communications  
4    Act of 1934.

5           (2)    IP-ENABLED VOICE SERVICE.—The term  
6    “IP-enabled voice service” has the meaning given  
7    that term in section 715(b)(3) of the Communica-  
8    tions Act of 1934.

9           (3)    LOCAL TRANSMISSION FACILITIES.—The  
10   term “local transmission facilities” means wireless  
11   and wireline transmission facilities used to transmit  
12   information or signals to, from or among locations  
13   within a wire center.

14   **SEC. 205. IMPROVED ENFORCEMENT OPTIONS.**

15       (a)    INCREASED PENALTIES.—Section 503(b)(2)(B)  
16   of the Communications Act of 1934 (47 U.S.C.  
17   503(b)(2)(B)) is amended—

18           (1)   by striking “\$100,000” and inserting  
19       “\$1,000,000”; and

20           (2)   by striking “\$1,000,000” and inserting  
21       “\$10,000,000”.

22       (b)    STATUTE OF LIMITATIONS.—Section 503(b)(6)  
23   of the Communications Act of 1934 (47 U.S.C. 503(b)(6))  
24   is amended—

1 (1) by striking “or” after the semicolon in sub-  
2 paragraph (A)(ii);

3 (2) redesignating subparagraph (B) as subpara-  
4 graph (C); and

5 (3) inserting after subparagraph (A) the fol-  
6 lowing:

7 “(B) such person is a common carrier subject  
8 to the provisions of this Act or an applicant for any  
9 common carrier license, permit, certificate, or other  
10 instrument of authorization issued by the Commis-  
11 sion and if the violation charged occurred more than  
12 3 years prior to the date of issuance of the required  
13 notice or notice of apparent liability; or”.

14 **SEC. 206. COMPETITION IN SPECIAL ACCESS MARKETS.**

15 (a) **REPLACEMENT OF CURRENT RULES.**—Within  
16 180 days after the date of enactment of this Act, the Com-  
17 mission shall issue a final order, which shall take effect  
18 not later than 30 days after the date on which it is issued,  
19 requiring integrated incumbent local exchange carriers to  
20 offer special access services pursuant to interstate tariffs  
21 that—

22 (1) except as provided in section 207, are sub-  
23 ject to the special access service price index estab-  
24 lished under subsection (b)(1); and

1           (2) include service quality measurements and,  
2           where applicable, service quality benchmarks for pre-  
3           ordering, ordering, provisioning, maintenance, and  
4           repair that apply uniformly to all integrated incum-  
5           bent local exchange carriers and for which each inte-  
6           grated incumbent local exchange carrier shall file  
7           service quality reports.

8           (b) SPECIAL ACCESS SERVICE PRICE INDEX.—

9           (1) IN GENERAL.—In the proceeding conducted  
10          under subsection (a), the Commission shall—

11           (A) develop a methodology for establishing  
12           and revising an index that defines the max-  
13           imum prices that may be charged for services  
14           subject to the index while preserving incentives  
15           to offer subject services more efficiently;

16           (B) establish a special access service price  
17           index utilizing that methodology that—

18           (i) is based on the rates in effect on  
19           June 30, 2004, for special access service  
20           offered by an integrated incumbent local  
21           exchange carrier; and

22           (ii) reduces those rates to the level  
23           that would have been in effect if the Com-  
24           mission had applied an annual productivity  
25           adjustment for special access service, less

1 inflation, beginning on July 1, 2004, and  
2 on each subsequent July 1 prior to the  
3 date of enactment of this Act; and

4 (C) establish procedures under which, be-  
5 ginning with the first annual access filing after  
6 the order required by subsection (a) is issued  
7 and annually thereafter, the Commission  
8 shall—

9 (i) adjust the index by an annual pro-  
10 ductivity adjustment to reflect productivity  
11 gains achievable by integrated incumbent  
12 local exchange companies in excess of the  
13 economy as a whole; and

14 (ii) ensure that any reductions re-  
15 quired by this section are provided propor-  
16 tionately to all special access customers  
17 and across all special access services.

18 (2) MULTIPLE INDICES.—The Commission may  
19 establish more than 1 special access service price  
20 index under this section.

21 **SEC. 207. CUSTOMER CONTRACTS.**

22 (a) IN GENERAL.—In the rulemaking proceeding  
23 under section 206(a), the Commission shall adopt rules  
24 that—

1           (1) allow integrated incumbent local exchange  
2 carriers to continue to offer special access pursuant  
3 to volume and term discounts; but

4           (2) prohibit integrated incumbent local ex-  
5 change carriers from conditioning the availability of  
6 volume and term discounts on customers' compliance  
7 with requirements that do not relate to the reduction  
8 of costs yielded by volume and term commitments.

9           (b) EXAMPLES OF CONDITIONS UNRELATED TO VOL-  
10 UME AND TERM EFFICIENCIES.—For purposes of sub-  
11 section (a)(2), among the conditions that may be prohib-  
12 ited is any requirement that a customer—

13           (1) discontinue purchasing, and not purchase  
14 during the term of the contract, services from the  
15 integrated incumbent local exchange carriers' com-  
16 petitors;

17           (2) increase the volume of special access pur-  
18 chased from the integrated incumbent local exchange  
19 carrier without a corresponding and proportionate  
20 increase in the discount offered under the contract;  
21 and

22           (3) separate the special access purchases of its  
23 business units for purposes of achieving required vol-  
24 umes.

1 (c) EXISTING CONTRACTS.—If a customer receiving  
2 special access service from an integrated incumbent local  
3 exchange carrier under a contract that is in effect on the  
4 date of enactment of this Act that includes a condition  
5 prohibited by the Commission's rules adopted under sub-  
6 section (a), the customer may terminate the contract, not-  
7 withstanding any provision of the contract or any other  
8 provision of Federal, State, or local law, without liability  
9 to the carrier for premature termination or any penalty  
10 provided by the contract or law in order to facilitate the  
11 ability of customers to purchase special access service  
12 under interstate tariffs that are subject to the special ac-  
13 cess service requirements of section 206.

14 **SEC. 208. COMPETITIVE ALTERNATIVE PRICING.**

15 (a) LOW REVENUE SHARE EXCEPTION.—If an inte-  
16 grated incumbent local exchange carrier demonstrates to  
17 the satisfaction of the Commission that its share of total  
18 annual special access revenues obtained by incumbent  
19 local exchange carriers in a year is less than 15 percent,  
20 the Commission may determine that the carrier is not sub-  
21 ject to the requirement established under section 206(a)  
22 for that year.

23 (b) REQUIRED ACCESS EXCEPTION.—Beginning with  
24 the 6th year for which the requirement established under  
25 section 206(a) is in effect, if an integrated incumbent local

1 exchange carrier demonstrates to the satisfaction of the  
2 Commission that it is not required to provide access to  
3 loops or transport as unbundled network elements in ac-  
4 cordance with the standards adopted by the Commission  
5 under section 251 of the Communications Act of 1934 (47  
6 U.S.C. 251), the Commission may determine that the car-  
7 rier is no longer subject to the requirements for special  
8 access loops or transport that correspond in capacity to  
9 the types of loop or transport for which unbundling is no  
10 longer required, but only in locations for which such  
11 unbundling is no longer required.

12 (c) ALTERNATIVE PRICING REGIME.—If an inte-  
13 grated incumbent local exchange carrier is determined by  
14 the Commission under subsection (a) or (b) not to be sub-  
15 ject to the requirement established under section 206(a),  
16 its provision of loop or transport special access service in  
17 the deregulated area shall be subject to a separate price  
18 index that contains an annual adjustment equal to the rate  
19 of inflation used by the Commission for purposes of sec-  
20 tion 206(b)(1)(A).

21 **SEC. 209. FORBEARANCE.**

22 Notwithstanding section 10 of the Communications  
23 Act of 1934 (47 U.S.C. 160)—

24 (1) the Commission may not forbear from ap-  
25 plying the requirements of this title or any regula-

1       tion promulgated under this title until 5 years after  
2       the effective date of the Commission's rules issued  
3       pursuant to section 206(a) of this Act; and

4           (2) no forbearance granted by the Commission  
5       under that section before the date of enactment of  
6       this Act shall apply to any requirement of this title  
7       or any regulation promulgated under this title.

8   **SEC. 210. DEFINITIONS.**

9       In this title:

10           (1) ANNUAL PRODUCTIVITY ADJUSTMENT.—

11       The term “annual productivity adjustment” means a  
12       percentage determined by the Commission to rep-  
13       resent the productivity gained by integrated incum-  
14       bent local exchange companies in excess of the econ-  
15       omy as a whole.

16           (2) COMMISSION.—The term “Commission”  
17       means the Federal Communications Commission.

18           (3) INTEGRATED INCUMBENT LOCAL EX-  
19       CHANGE CARRIER.—The term “integrated incum-  
20       bent local exchange carrier” means any local ex-  
21       change carrier, including its affiliates and subsidi-  
22       aries (without regard to the date on which an entity  
23       became or becomes an affiliate or subsidiary), that  
24       itself, or with its affiliates and subsidiaries—



1 (A) provides wireline local and local ex-  
2 change and commercial mobile radio services  
3 over its own facilities, or the facilities of its af-  
4 filiates or subsidiaries; and

5 (B) has 15 percent or more of total annual  
6 special access revenues obtained by incumbent  
7 local exchange carriers in the year immediately  
8 preceding the date of enactment of this Act, as  
9 reported to the Commission.

10 (4) SERVICE QUALITY BENCHMARK.—The term  
11 “service quality benchmark” means a reasonable  
12 level of service quality for an integrated incumbent  
13 local exchange carrier’s performance for a particular  
14 special access pre-ordering, ordering, provisioning,  
15 maintenance, or repair function for which there is no  
16 retail analog when providing such a function to its  
17 wholesale customers and its affiliates.

18 (4) SERVICE QUALITY MEASUREMENT.—The  
19 term “service quality measurement” means a uni-  
20 form definition of a particular wholesale special ac-  
21 cess pre-ordering, ordering, provisioning, mainte-  
22 nance, or repair function that allows for consistent  
23 measurement and comparison of service quality pro-  
24 vided by an incumbent local exchange carrier to

1       itself, its affiliates, its retail customers, and its  
2       wholesale customers.

3           (5) SERVICE QUALITY REPORT.—The term  
4       “service quality report” means a quarterly report by  
5       an integrated incumbent local exchange carrier set-  
6       ting forth its performance in providing the functions  
7       defined by the service quality measurements where  
8       each integrated incumbent local exchange carrier re-  
9       ports separately its performance in providing the  
10      functions to itself, its affiliates, its retail customers,  
11      and its wholesale customers (including any wholesale  
12      customer that requests company-specific reporting).

13          (6) SPECIAL ACCESS.—The term “special ac-  
14      cess” means an interstate service offered by an in-  
15      cumbent local exchange carrier that—

16           (A) provides a dedicated (unswitched)  
17           transmission link between 2 locations regardless  
18           of the technology used; and

19           (B) may consist of a dedicated connection  
20           between or among—

21                   (i) a local exchange carrier’s offices;

22                   (ii) an interexchange carrier’s points  
23                   of presence;

24                   (iii) a wireless carrier’s cell sites or  
25                   switching centers; or

1 (iv) connections between any location  
2 in clause (i), (ii), or (iii) and a customer's  
3 premises, including Internet content server  
4 locations.

5 (7) YEAR.—The term “year” means a calendar  
6 year or any other consecutive 12-month period.

7 **TITLE III—ENCOURAGING**  
8 **BROADBAND DEPLOYMENT**  
9 **AND BASIC COMMUNICA-**  
10 **TIONS RESEARCH**

11 **SEC. 301. ELIGIBLE BROADCAST TELEVISION SPECTRUM**

12 **MADE AVAILABLE FOR WIRELESS USE.**

13 Part I of title III of the Communications Act of 1934  
14 (47 U.S.C. 301 et seq.), as amended by section 152, is  
15 amended by adding at the end the following:

16 **“SEC. 343. ELIGIBLE BROADCAST TELEVISION SPECTRUM**

17 **MADE AVAILABLE FOR WIRELESS USE.**

18 “(a) IN GENERAL.—Effective 270 days after the date  
19 of enactment of the Consumer Competition and  
20 Broadband Promotion Act, a certified unlicensed device  
21 may use eligible broadcast television frequencies.

22 “(b) COMMISSION TO FACILITATE USE.—Within 270  
23 days after the date of enactment of that Act, the Commis-  
24 sion shall adopt minimal technical and device rules in ET  
25 Docket No. 04–186 to facilitate the efficient use of eligible

1 broadcast television frequencies by certified unlicensed de-  
2 vices, which shall include rules and procedures—

3 “(1) to protect licensees from harmful inter-  
4 ference from certified unlicensed devices;

5 “(2) to require certification of unlicensed de-  
6 vices designed to be operated in the eligible broad-  
7 cast television frequencies which shall include testing  
8 in a laboratory certified by the Commission to en-  
9 sure that such devices meet the technical criteria es-  
10 tablished under this paragraph;

11 “(3) to address complaints from licensees with-  
12 in the eligible broadcast television frequencies that a  
13 certified unlicensed device causes harmful inter-  
14 ference, which shall include verification in the field  
15 of actual harmful interference; and

16 “(4) to limit the operation or use of certified  
17 unlicensed devices within any geographic area in  
18 which a public safety entity is authorized to operate  
19 as a licensee within the eligible broadcast television  
20 frequencies.

21 “(c) DEFINITIONS.—In this section:

22 “(1) CERTIFIED UNLICENSED DEVICE.—The  
23 term ‘certified unlicensed device’ means a device cer-  
24 tified under subsection (b)(2).

1           “(2) ELIGIBLE BROADCAST TELEVISION FRE-  
2           QUENCIES.—The term ‘eligible broadcast television  
3           frequencies’ means the following frequencies:

4                   “(A) All frequencies between 54 and 72  
5                   megaHertz, inclusive.

6                   “(B) All frequencies between 76 and 88  
7                   megaHertz, inclusive.

8                   “(C) All frequencies between 174 and 216  
9                   megaHertz, inclusive.

10                  “(D) All frequencies between 470 and 608  
11                  megaHertz, inclusive.

12                  “(E) All frequencies between 616 and 698  
13                  megaHertz, inclusive.”.

14   **SEC. 302. MUNICIPAL BROADBAND.**

15           Section 706 of the Telecommunications Act of 1996  
16 (47 U.S.C. 157 note) is amended—

17                   (1) by redesignating subsection (c) as sub-  
18                   section (d) and inserting after subsection (b) the fol-  
19                   lowing:

20           “(c) LOCAL GOVERNMENT PROVISION OF ADVANCED  
21 TELECOMMUNICATIONS CAPABILITY AND SERVICES.—

22                   “(1) IN GENERAL.—No State statute, regula-  
23                   tion, or other State legal requirement may prohibit  
24                   or have the effect of prohibiting any public provider  
25                   from providing, to any person or any public or pri-

1       vate entity, advanced telecommunications capability  
2       or any service that utilizes the advanced tele-  
3       communications capability provided by such pro-  
4       vider.

5           “(2) ANTIDISCRIMINATION SAFEGUARDS.—To  
6       the extent any public provider regulates competing  
7       private providers of advanced telecommunications  
8       capability or services, it shall apply its ordinances  
9       and rules without discrimination in favor of itself or  
10      any advanced telecommunications services provider  
11      that it owns.

12           “(3) SAVINGS CLAUSE.—Nothing in this sub-  
13      section shall exempt a public provider from any Fed-  
14      eral or State telecommunications law or regulation  
15      that applies to all providers of advanced tele-  
16      communications capability or services using such ad-  
17      vanced telecommunications capability.”; and

18           (2) by adding at the end of subsection (d), as  
19      redesignated, the following:

20           “(3) PUBLIC PROVIDER.—The term ‘public pro-  
21      vider’ means a State or political subdivision thereof,  
22      any agency, authority, or instrumentality of a State  
23      or political subdivision thereof, or an Indian tribe  
24      (as defined in section 4(e) of the Indian Self-Deter-  
25      mination and Education Assistance Act (25 U.S.C.

1 450b(e)), that provides advanced telecommunications  
2 capability, or any service that utilizes such advanced  
3 telecommunications capability, to any person or pub-  
4 lic or private entity.”.

5 **SEC. 303. FEDERAL INFORMATION AND COMMUNICATIONS**  
6 **TECHNOLOGY RESEARCH.**

7 (a) ADVANCED INFORMATION AND COMMUNICATIONS  
8 TECHNOLOGY RESEARCH.—

9 (1) NATIONAL SCIENCE FOUNDATION INFORMA-  
10 TION AND COMMUNICATIONS TECHNOLOGY RE-  
11 SEARCH.—The Director of the National Science  
12 Foundation shall establish a program of basic re-  
13 search in advanced information and communications  
14 technologies focused on enhancing or facilitating the  
15 availability and affordability of advanced commu-  
16 nications services to all Americans. In developing  
17 and carrying out the program, the Director shall  
18 consult with the Board established under paragraph  
19 (2).

20 (2) FEDERAL ADVANCED INFORMATION AND  
21 COMMUNICATIONS TECHNOLOGY RESEARCH  
22 BOARD.—There is established within the National  
23 Science Foundation a Federal Advanced Information  
24 and Communications Technology Board which shall  
25 advise the Director of the National Science Founda-

1       tion in carrying out the program authorized by para-  
2       graph (1). The Board Shall be composed of individ-  
3       uals with expertise in information and communica-  
4       tions technologies, including representatives from the  
5       National Telecommunications and Information Ad-  
6       ministration, the Federal Communications Commis-  
7       sion, the National Institute of Standards and Tech-  
8       nology, and the Department of Defense.

9           (3) GRANT PROGRAM.—The Director, in con-  
10       sultation with the Board, shall award grants for  
11       basic research into advanced information and com-  
12       munications technologies that will contribute to en-  
13       hancing or facilitating the availability and afford-  
14       ability of advanced communications services to all  
15       Americans. Areas of research to be supported  
16       through these grants include—

- 17           (A) affordable broadband access, including
- 18           wireless technologies;
- 19           (B) network security and reliability;
- 20           (C) communications interoperability;
- 21           (D) networking protocols and architec-
- 22           tures, including resilience to outages or attacks;
- 23           (E) trusted software;
- 24           (F) privacy;



1 (G) nanoelectronics for communications  
2 applications;

3 (H) low-power communications electronics;  
4 and

5 (I) such other related areas as the Direc-  
6 tor, in consultation with the Board, finds ap-  
7 propriate.

8 (4) CENTERS.—The Director shall award  
9 multiyear grants, subject to the availability of appro-  
10 priations, to institutions of higher education (as de-  
11 fined in section 101(a) of the Higher Education Act  
12 of 1965 (20 U.S.C. 1001(a)), nonprofit research in-  
13 stitutions, or consortia thereof to establish multi-  
14 disciplinary Centers for Communications Research.  
15 The purpose of the Centers shall be to generate in-  
16 novative approaches to problems in communications  
17 and information technology research, including the  
18 research areas described in paragraph (3). Institu-  
19 tions of higher education nonprofit research, institu-  
20 tions, or consortia receiving such grants may partner  
21 with 1 or more government laboratories or for-profit  
22 institutions, or other institutions of higher education  
23 or nonprofit research institutions.

24 (5) APPLICATIONS.—The Director, in consulta-  
25 tion with the Board, shall establish criteria for the

1       award of grants under paragraphs (3) and (4).  
2       Grants shall be awarded under the program on a  
3       merit-reviewed competitive basis. The Director shall  
4       give priority to grants that offer the potential for  
5       revolutionary rather than evolutionary break-  
6       throughs.

7           (6) AUTHORIZATION OF APPROPRIATIONS.—  
8       There are authorized to be appropriated to the Na-  
9       tional Science Foundation to carry out this sub-  
10      section—

- 11                   (A) \$40,000,000 for fiscal year 2007;  
12                   (B) \$45,000,000 for fiscal year 2008;  
13                   (C) \$50,000,000 for fiscal year 2009;  
14                   (D) \$55,000,000 for fiscal year 2010; and  
15                   (E) \$60,000,000 for fiscal year 2011.

16      (b) SPECTRUM-SHARING INNOVATION TESTBED.—

17           (1) SPECTRUM-SHARING PLAN.—Within 1 year  
18       after the date of enactment of this Act, the Federal  
19       Communications Commission and the Assistant Sec-  
20       retary of Commerce for Communications and Infor-  
21       mation, in coordination with other Federal agencies,  
22       shall—

- 23                   (A) develop a plan to increase sharing of  
24       spectrum between Federal and non-Federal gov-  
25       ernment users; and

1 (B) establish a pilot program for imple-  
2 mentation of the plan.

3 (2) TECHNICAL SPECIFICATIONS.—The Com-  
4 mission and the Assistant Secretary—

5 (A) shall each identify a segment of spec-  
6 trum of equal bandwidth within their respective  
7 jurisdiction for the pilot program that is ap-  
8 proximately 10 megaHertz in width for assign-  
9 ment on a shared basis to Federal and non-  
10 Federal government use; and

11 (B) may take the spectrum for the pilot  
12 program from bands currently allocated on ei-  
13 ther an exclusive or shared basis.

14 (3) REPORT.—The Commission and the Assist-  
15 ant Secretary shall transmit a report to the Senate  
16 Committee on Commerce, Science, and Transpor-  
17 tation and the House of Representatives Committee  
18 on Energy and Commerce 2 years after the incep-  
19 tion of the pilot program describing the results of  
20 the program and suggesting appropriate procedures  
21 for expanding the program as appropriate.

22 (c) NATIONAL INSTITUTE OF STANDARDS AND  
23 TECHNOLOGY RESPONSIBILITIES.—The Director of the  
24 National Institute of Standards and Technology shall con-  
25 tinue to support research and support standards develop-

1 ment in advanced information and communications tech-  
2 nologies focused on enhancing or facilitating the avail-  
3 ability and affordability of advanced communications serv-  
4 ices to all Americans, in order to implement the Institute's  
5 responsibilities under section 2(c)(12) of the National In-  
6 stitute of Standards and Technology Act (15 U.S.C.  
7 272(c)(12)). The Director shall support intramural re-  
8 search and cooperative research with institutions of higher  
9 education (as defined in section 101(a) of the Higher Edu-  
10 cation Act of 1965 (20 U.S.C. 1001(a)) and industry.

11 **SEC. 304. COMMUNITY BROADBAND GRANTS FOR**  
12 **UNSERVED AREAS AND UNDERSERVED COM-**  
13 **MUNITIES.**

14 (a) IN GENERAL.—The Secretary of Commerce shall  
15 establish a grant program to extend and expand the avail-  
16 ability, affordability, and use of broadband service in  
17 unserved areas and underserved communities.

18 (b) IMPLEMENTATION.—

19 (1) IN GENERAL.—The Secretary shall by rule  
20 establish—

21 (A) guidelines for determining which areas  
22 may be considered to be unserved areas and  
23 which communities or groups may be considered  
24 to be underserved communities for purposes of  
25 this section;

1 (B) criteria for determining which facili-  
2 ties-based providers of broadband communica-  
3 tions service, and which projects, are eligible for  
4 support from the account;

5 (C) procedural guidelines for awarding as-  
6 sistance from the account on a merit-based and  
7 competitive basis;

8 (D) guidelines for application procedures,  
9 accounting and reporting requirements, and  
10 other appropriate fiscal controls for assistance  
11 made available from the account; and

12 (E) a procedure for making funds in the  
13 account available among the several States on  
14 a matching basis.

15 (2) STUDY AND ANNUAL REPORTS ON  
16 UNSERVED AREAS AND UNDERSERVED COMMU-  
17 NITIES.—

18 (A) UNSERVED AREAS.—Within 6 months  
19 after the date of enactment of this Act, the Sec-  
20 retary shall conduct a study to determine which  
21 areas of the United States may be considered to  
22 be unserved areas for purposes of this section.  
23 For purposes of the study and for purposes of  
24 the guidelines to be established under sub-  
25 section (a)(1), the availability of broadband

1           communications services by satellite in an area  
2           shall not preclude designation of that area as  
3           unserved if the Secretary determines that  
4           subscribership to the service in that area is de  
5           minimis.

6           (B) UNDERSERVED COMMUNITIES.—With-  
7           in 6 months after the date of enactment of this  
8           Act, the Secretary shall conduct a study to de-  
9           termine which communities or groups of the  
10          United States may be considered to be under-  
11          served communities for purposes of this section.  
12          In establishing guidelines for determining which  
13          communities or groups may be considered to be  
14          underserved communities or groups for pur-  
15          poses of this section, the Secretary shall, at a  
16          minimum, include communities or groups in  
17          which broadband penetration is at least 50 per-  
18          cent below the national average.

19          (C) ANNUAL UPDATES.—The Secretary  
20          shall update the study annually.

21          (D) REPORT.—The Secretary shall trans-  
22          mit a report to the Senate Committee on Com-  
23          merce, Science, and Transportation and the  
24          House of Representatives Committee on Energy  
25          and Commerce setting forth the findings and

1 conclusions of the Secretary for the study and  
2 each update under this paragraph and making  
3 recommendations for an increase or decrease, if  
4 necessary, in the amounts credited to the ac-  
5 count under this section.

6 (c) ADMINISTRATIVE PROVISIONS.—

7 (1) IN GENERAL.—Upon approving an applica-  
8 tion under this section with respect to any project,  
9 the Secretary shall make a grant to or enter into a  
10 contract with the applicant in an amount determined  
11 by the Secretary not to exceed the reasonable and  
12 necessary cost of such project or grant. The Sec-  
13 retary shall pay such amount from the sums avail-  
14 able therefor, in advance or by way of reimburse-  
15 ment, and in such installments consistent with es-  
16 tablished practice, as he may determine.

17 (2) MAXIMUM FUNDING PERIOD.—The funding  
18 of any project or grant under this section shall con-  
19 tinue for not more than 3 years from the date of the  
20 original grant or contract.

21 (3) ANNUAL SUMMARY AND EVALUATION RE-  
22 QUIRED.—The Secretary shall require that the re-  
23 cipient of a grant or contract under this section sub-  
24 mit a summary and evaluation of the results of the

1 project at least annually for each year in which  
2 funds are received under this section.

3 (4) BOOKS AND RECORDS.—Each recipient of  
4 assistance under this section shall keep such records  
5 as may be reasonably necessary to enable the Sec-  
6 retary to carry out the Secretary's functions under  
7 this section, including records which fully disclose  
8 the amount and the disposition by such recipient of  
9 the proceeds of such assistance, the total cost of the  
10 project or undertaking in connection with which  
11 such assistance is given or used, the amount and na-  
12 ture of that portion of the cost of the project or un-  
13 dertaking supplied by other sources, and such other --  
14 records as will facilitate an effective audit.

15 (5) AUDIT AND EXAMINATION.—The Secretary  
16 and the Comptroller General of the United States,  
17 or any of their duly authorized representatives, shall  
18 have access for the purposes of audit and examina-  
19 tion to any books, documents, papers, and records of  
20 the recipient that are pertinent to assistance re-  
21 ceived under this section.

22 (d) REGULATIONS.—The Secretary is authorized to  
23 make such rules and regulations as may be necessary to  
24 carry out this section, including regulations relating to the  
25 order of priority in approving applications for projects



1 under this section or to determining the amounts of grants  
2 for such projects.

3 (g) AUTHORIZATION OF APPROPRIATIONS.—There  
4 are authorized to be appropriated \$500,000,000 for each  
5 of the fiscal years 2008, 2009, and 2010, to be used by  
6 the Secretary to carry out the provisions of this section.  
7 Sums appropriated under this subsection for any fiscal  
8 year shall remain available for payment of grants or con-  
9 tracts for projects for which applications approved under  
10 this section have been submitted within one year after the  
11 last day of such fiscal year.

12 **SEC. 305. DIRECT FCC TO REVISIT BROADBAND SPEEDS.**

13 Within 90 days after the date of enactment of this  
14 Act and biennially thereafter, the Federal Communica-  
15 tions Commission shall revise its definition of broadband  
16 to reflect a data rate—

17 (1) greater than the 200 kilobits per second  
18 standard established in its Section 706 Report (14  
19 FCC Rec. 2406); and

20 (2) consistent with data rates for broadband  
21 communications services generally available to the  
22 public on the date of enactment of this Act and  
23 thereafter, upon the date of the Commission's re-  
24 view.

1 **SEC. 306. DIRECT CENSUS TO INCLUDE QUESTION AS PART**  
2 **OF ITS AMERICAM COMMUNITY SURVEY.**

3 The Secretary of Commerce, in consultation with the  
4 Federal Communications Commission, shall expand the  
5 American Community Survey conducted by the Bureau of  
6 the Census to elicit information for residential households,  
7 including those located on native lands, as to what tech-  
8 nology such households use to access the Internet from  
9 home.

10 **TITLE IV—REFORM AND**  
11 **STRENGTHEN USF**

12 **SEC. 401. UNIVERSAL SERVICE FUND CONTRIBUTION RE-**  
13 **QUIREMENTS.**

14 (a) INCLUSION OF INTRASTATE REVENUES.—Section  
15 254(d) of the Communications Act of 1934 (47 U.S.C.  
16 254(d)) is amended—

17 (1) by striking “Every” and inserting “Not-  
18 withstanding section 2(b) of this Act, a”;

19 (2) by striking “interstate” each place it ap-  
20 pears; and

21 (b) STATE USF CONTRIBUTIONS.—Section 254(f) of  
22 the Communications Act of 1934 (47 U.S.F. 254(f) is  
23 amended—

24 (1) by striking “telecommunications carrier that  
25 provides intrastate telecommunications” and insert-

1 ing "provider of telecommunications or telecommuni-  
2 cations services";

3 (2) by striking "that do not rely on or burden  
4 Federal universal support mechanisms"; and

5 (3) by adding at the end "Nothing in this sub-  
6 section precludes a State from requiring contribu-  
7 tions with respect to telecommunications or tele-  
8 communications services for which contributions are  
9 required under subsection (d) if the primary place of  
10 use of such services are within the State, regardless  
11 of where the services originate or terminate or  
12 through which the services transit."

13 (c) UNIVERSAL SERVICE PROCEEDING.—

14 (1) PROCEEDING.—The Federal Communica-  
15 tions Commission shall initiate a proceeding, or take  
16 action pursuant to any proceeding on universal serv-  
17 ice existing on the date of enactment of this Act, to  
18 establish a permanent mechanism to support uni-  
19 versal service, that will preserve and enhance the  
20 long term financial stability of universal service, and  
21 will promote the public interest.

22 (2) CRITERIA.—In establishing such a perma-  
23 nent mechanism, the Commission—

24 (A) shall exercise its authority under the  
25 last sentence of section 254(d) of the Commu-

1           nications Act of 1934 as necessary to ensure  
2           contributions by providers of broadband services  
3           as defined in section 715(b)(1) of the Commu-  
4           nications Act of 1934 and of IP-enabled voice  
5           services as defined in section 715(b)(3) of the  
6           Communications Act of 1934; and

7           (B) may include collection methodologies  
8           such as total telecommunications revenues, the  
9           assignment of telephone numbers and any suc-  
10          cessor identifier, connections (which could in-  
11          clude carriers with a retail connection to a cus-  
12          tomer), and any combination thereof if the  
13          methodology—

14                 (i) promotes competitive neutrality  
15                 among providers and technologies;

16                 (ii) ensures that such methodology re-  
17                 sults in a proportionately reduced burden  
18                 for low-volume residential customers and  
19                 customers of in-vehicle emergency commu-  
20                 nications services; and

21                 (iii) ensures that a carrier is not re-  
22                 quired to contribute more than once for  
23                 the same transaction, activity, or service.

24           (3) DEADLINE.—The Commission shall com-  
25          plete the proceeding and issue a final rule not more

1       than 6 months after the date of enactment of this  
2       Act.

3       (d) COMPETITIVE NEUTRALITY PRINCIPLE.—Section  
4       254(b) of the Communications Act of 1934 (47 U.S.C.  
5       254(b)) is amended by redesignating paragraph (7) as  
6       paragraph (8), and inserting the following:

7           “(7) COMPETITIVE NEUTRALITY.—Universal  
8       service support mechanisms and rules should be  
9       competitively neutral. In this context, competitive  
10      neutrality means that universal service support  
11      mechanisms and rules neither unfairly advantage  
12      nor disadvantage one provider over another, and nei-  
13      ther unfairly favor nor disfavor one technology over  
14      another.”.

15   **SEC. 402. TREATMENT OF SUBSTITUTE SERVICES UNDER**  
16           **SECTION 254(g).**

17      (a) IN GENERAL.—Section 254(g) of the Commu-  
18      nications Act of 1934 (47 U.S.C. 254(g)) is amended by  
19      inserting “This section shall also apply to any services  
20      within the jurisdiction of the Commission that can be used  
21      as effective substitutes for interexchange telecommuni-  
22      cations services, including any such substitute classified  
23      as an information service that uses telecommunications.”  
24      after “State.”.

1 **SEC. 403. PHANTOM TRAFFIC.**

2 Section 254 of the Communications Act of 1934 (47  
3 U.S.C. 254) is amended by adding at the end the fol-  
4 lowing:

5 “(m) NETWORK TRAFFIC IDENTIFICATION AC-  
6 COUNTABILITY STANDARDS.—

7 “(1) NETWORK TRAFFIC IDENTIFICATION  
8 STANDARDS.—An provider of voice communications  
9 services (including an IP-enabled voice service pro-  
10 vider) shall ensure that all traffic that originates on  
11 its network contains sufficient information to allow  
12 for traffic identification by other communications  
13 service providers that transport, transit, or termi-  
14 nate such traffic, including information on the iden-  
15 tity of the originating provider, the calling and called  
16 parties, and such other information as the Commis-  
17 sion deems appropriate.

18 “(2) NETWORK TRAFFIC IDENTIFICATION  
19 RULEMAKING.—The Commission, in consultation  
20 with the States, shall initiate a single rulemaking no  
21 later than 180 days after the date of enactment of  
22 the Consumer Competition and Broadband Pro-  
23 motion Act to establish rules and enforcement provi-  
24 sions for traffic identification.

25 “(3) NETWORK TRAFFIC IDENTIFICATION EN-  
26 FORCEMENT.—The Commission shall adopt clear

1 penalties, fines, and sanctions for insufficiently la-  
2 beled traffic.”.

3 **SEC. 404. PERMANENT EXTENSION OF ADA EXEMPTION.**

4 Section 254 of the Communications Act of 1934 (47  
5 U.S.C. 254), as amended by section 403, is further  
6 amended by adding at the end the following:

7 “(n) APPLICATION OF ANTIDEFICIENCY ACT.—Sec-  
8 tion 1341 and subchapter II of chapter 15 of title 31,  
9 United States Code, do not apply—

10 “(1) to any amount collected or received as  
11 Federal universal service contributions required by  
12 this section, including any interest earned on such  
13 contributions; nor

14 “(2) to the expenditure or obligation of  
15 amounts attributable to such contributions for uni-  
16 versal service support programs established pursuant  
17 to this section.”.

18 **SEC. 405. INTERCARRIER COMPENSATION.**

19 (a) JURISDICTION.—Notwithstanding section 2(b) of  
20 the Communications Act of 1934 (47 U.S.C. 152(b)), the  
21 Federal Communications Commission shall have exclusive  
22 jurisdiction to establish rates for inter-carrier compensa-  
23 tion payments and shall establish rules providing a com-  
24 prehensive, unified system of inter-carrier compensation,

1 including compensation for the origination and termi-  
2 nation of intrastate telecommunications traffic.

3 (b) CRITERIA.—In establishing these rules, and in  
4 conjunction with its action in its universal service pro-  
5 ceeding under section 401(c), the Commission, in con-  
6 sultation with the Federal-State Joint Board on Universal  
7 Service, shall—

8 (1) ensure that the costs associated with the  
9 provision of interstate and intrastate telecommuni-  
10 cations services are fully recoverable;

11 (2) examine whether sufficient requirements  
12 exist to ensure traffic contains necessary identifiers  
13 for the purposes of inter-carrier compensation;

14 (3) to the greatest extent possible, minimize op-  
15 portunities for arbitrage; and

16 (4) to the greatest extent possible, minimize  
17 any resulting increase in subscriber line charges.

18 (c) SUFFICIENT SUPPORT.—The Commission should,  
19 to the greatest extent possible, ensure that as a result of  
20 its universal service and inter-carrier compensation pro-  
21 ceedings, the aggregate amount of universal service sup-  
22 port and inter-carrier compensation provided to local ex-  
23 change carriers with fewer than 2 percent of the Nation's  
24 subscriber lines will be sufficient to meet the just and rea-  
25 sonable costs of such local exchange carriers.



1 (d) NEGOTIATED AGREEMENTS.—Nothing in this  
2 section precludes carriers from negotiating their own  
3 inter-carrier compensation agreements.

4 (e) DEADLINE.—The Commission shall complete the  
5 pending Intercarrier Compensation proceeding in Docket  
6 No. 01–92 and issue a final rule not more than 6 months  
7 after the date of enactment of this Act.

8 **SEC. 406. PRIMARY LINE; CONDITIONS FOR DESIGNATION**  
9 **AS AN ELIGIBLE TELECOMMUNICATIONS**  
10 **CARRIER; BROADBAND REQUIREMENT.**

11 (a) PRIMARY LINE.—Section 214(e) of the Commu-  
12 nications Act of 1934 (47 U.S.C. 214(e)) is amended by  
13 adding at the end the following:

14 “(7) PRIMARY LINE.—In implementing the re-  
15 quirements of this Act with respect to the distribu-  
16 tion and use of Federal universal service support the  
17 Commission shall not limit such distribution and use  
18 to a single connection or primary line, and all resi-  
19 dential and business lines served by an eligible tele-  
20 communications carrier shall be eligible for Federal  
21 universal service support.”.

22 (b) DESIGNATION.—Section 214(e) of the Commu-  
23 nications Act of 1934 (47 U.S.C. 214(e)), as amended by  
24 subsection (a), is further amended by adding at the end  
25 the following:

1           “(8) CONDITIONS FOR DESIGNATION.—

2           “(A) IN GENERAL.—A common carrier  
3           may not be designated as an eligible tele-  
4           communications carrier under this subsection  
5           unless the State commission or the Commission,  
6           as applicable, determines that the carrier—

7                   “(i) is committed to providing service  
8                   throughout its proposed designated service  
9                   area, using its own facilities or a combina-  
10                  tion of facilities and resale of another car-  
11                  rier’s facilities, to all customers making a  
12                  reasonable request for service;

13                  “(ii) has certified to the State com-  
14                  mission or the Commission that it will pro-  
15                  vide service on a timely basis to requesting  
16                  customers within its service area, if service  
17                  can be provided at reasonable cost;

18                  “(iii) has submitted a plan to the  
19                  State commission or the Commission that  
20                  describes with specificity proposed im-  
21                  provements or upgrades to its network that  
22                  will be accomplished with high-cost support  
23                  over the first 2 years following its designa-  
24                  tion as an eligible telecommunications car-  
25                  rier;

1                   “(iv) has demonstrated to the State  
2                   commission or the Commission its ability  
3                   to remain functional in emergency situa-  
4                   tions, including a demonstration that it  
5                   has a reasonable amount of back-up power  
6                   to ensure functionality without an external  
7                   power source, is able to reroute traffic  
8                   around damaged facilities, and is capable  
9                   of managing traffic spikes resulting from  
10                  emergency situations;

11                  “(v) is committed to following applica-  
12                  ble consumer protection and service quality  
13                  standards; and

14                  “(vi) has complied with annual report-  
15                  ing requirements established by the Com-  
16                  mission or by State Commissions for all  
17                  carriers receiving universal service support  
18                  to ensure that such support is used for the  
19                  provision, maintenance, and upgrading of  
20                  the facilities for which support is intended.

21                  “(9) BROADBAND SERVICE REQUIREMENT.—

22                  “(A) IN GENERAL.—Notwithstanding para-  
23                  graph (1), an eligible telecommunications car-  
24                  rier may not receive universal service support  
25                  under section 254 more than 60 months after

1 the date of enactment of the Consumer Com-  
2 petition and Broadband Promotion Act if it has  
3 not deployed broadband service (as defined in  
4 section 715(b)(1)) within its service area before  
5 the end of that 60-month period unless it re-  
6 ceives a waiver under subparagraph (B).

7 “(B) WAIVERS.—

8 “(i) APPLICATION.—In order to re-  
9 ceive a waiver under this subparagraph, an  
10 eligible telecommunications carrier shall  
11 submit an application to the Commission.

12 “(ii) COST OF DEPLOYMENT.—If an  
13 eligible telecommunications carrier dem-  
14 onstrates to the satisfaction of the Com-  
15 mission that the cost per line of deploying  
16 such broadband service is at least 3 times  
17 the average cost per line of deploying such  
18 broadband service for all eligible tele-  
19 communications carriers receiving uni-  
20 versal service support, the Commission  
21 shall waive the application of subparagraph  
22 (A) to that eligible telecommunications car-  
23 rier.

24 “(iii) OTHER FACTORS.—If an eligible  
25 telecommunications carrier demonstrates

1 to the satisfaction of the Commission that  
2 the deployment and provision of such  
3 broadband service is not technically fea-  
4 sible or would materially impair the car-  
5 rier's ability to continue to provide services  
6 supported under section 254(c) or  
7 broadband service throughout its service  
8 area, the Commission may waive the appli-  
9 cation of subparagraph (A) to that eligible  
10 telecommunications carrier.

11 “(iv) DEEMED APPROVAL.—If the  
12 Commission fails to act on a waiver re-  
13 quest within 60 calendar days after it re-  
14 ceives a completed application for the waiv-  
15 er, the waiver shall be deemed to be grant-  
16 ed. If the Commission requests additional  
17 information from the eligible telecommuni-  
18 cations carrier, the 60-day period shall be  
19 tolled beginning on the date on which re-  
20 quest is received by the carrier and ending  
21 on the date on which the Commission re-  
22 ceives the information requested.

23 “(v) TERM; RENEWAL.—A waiver  
24 under this subparagraph—

1                   “(I) shall be for a period of not  
2                   more than 2 years; and

3                   “(II) may be renewed, upon ap-  
4                   plication, by the Commission if the  
5                   applicant demonstrates that it is eligi-  
6                   ble for a waiver under clause (ii) or  
7                   (iii).

8                   “(C) NOTIFICATION OF STATE COMMIS-  
9                   SION.—Whenever the Commission grants a  
10                  waiver to an eligible telecommunications carrier  
11                  under subparagraph (B) that has been des-  
12                  ignated under paragraph (2) by a State com-  
13                  mission, the Commission shall notify the State  
14                  commission of the waiver.”.

15 **SEC. 407. RURAL HEALTH CARE SUPPORT MECHANISMS.**

16                  (a) RURAL HEALTH CARE SUPPORT MECHANISMS.—

17                   (1) AMENDMENT.—Subparagraph (A) of sec-  
18                  tion 254(h)(1) of the Communications Act of 1934  
19                  (47 U.S.C. 254(h)(1)) is amended to read as follows:

20                   “(A) HEALTH CARE SERVICES FOR RURAL  
21                  AREAS.—Within 180 days after the date of en-  
22                  actment of the Consumer Competition and  
23                  Broadband Promotion Act, the Commission  
24                  shall prescribe regulations that provide that a  
25                  communications service provider shall, upon, re-

1           ceiving a bona fide request, provide covered  
2           services which are necessary for the provision of  
3           health care services in a State, including in-  
4           struction relating to such services, to any public  
5           or nonprofit health care provider that serves  
6           persons who reside in rural areas in that State  
7           at rates that are reasonably comparable to rates  
8           charged for similar services in urban areas in  
9           that State. A communications service provider  
10          providing service under this subparagraph shall  
11          be entitled to have an amount equal to the dif-  
12          ference, if any, between the rates for services  
13          provided to health care providers for rural areas  
14          in a State and the rates for similar services in  
15          urban areas in that State treated as a service  
16          obligation as a part of its obligation to partici-  
17          pate in the mechanisms to preserve and ad-  
18          vance universal service.”.

19           (2) DEFINITION OF HEALTH CARE PRO-  
20          VIDER.—Subparagraph (B) of section 254(h)(7) of  
21          such Act (47 U.S.C. 254(h)(7)(B)) is amended to  
22          read as follows:

23                   “(B) HEALTH CARE PROVIDER.—The term  
24          ‘health care provider’ means—

- 1                   “(i) post-secondary educational insti-
- 2                   tutions offering health care instruction,
- 3                   teaching hospitals, and medical schools;
- 4                   “(ii) community health centers or
- 5                   health centers providing health care to mi-
- 6                   grants;
- 7                   “(iii) local health departments or
- 8                   agencies;
- 9                   “(iv) community mental health cen-
- 10                  ters;
- 11                  “(v) not-for-profit hospitals;
- 12                  “(vi) critical access hospitals;
- 13                  “(vii) rural hospitals with emergency
- 14                  rooms;
- 15                  “(viii) rural health clinics;
- 16                  “(ix) not-for-profit nursing homes or
- 17                  skilled nursing homes;
- 18                  “(x) hospice providers;
- 19                  “(xi) emergency medical services fa-
- 20                  cilities;
- 21                  “(xii) rural dialysis facilities;
- 22                  “(xiii) elementary, secondary, and
- 23                  post-secondary school health clinics; and



1                   “(xiv) consortia of health care pro-  
2                   viders consisting of one or more entities  
3                   described in clauses (i) through (xiii).”.

4                   (3) DEFINITION OF RURAL FOR HEALTH CARE  
5                   SUPPORT.—Section 254(h)(7) of such Act is further  
6                   amended by adding at the end the following new  
7                   subparagraph:

8                   “(J) RURAL AREA.—Within 180 days after  
9                   the date of enactment of the Consumer Protec-  
10                  tion and Broadband Promotion Act, the Com-  
11                  mission shall prescribe regulations that provide  
12                  that, for purposes of the rural health care uni-  
13                  versal service support mechanisms established  
14                  pursuant to this subsection, a ‘rural area’ is—

15                  “(i) any incorporated or unincor-  
16                  porated place in the United States, its ter-  
17                  ritories and insular possessions (including  
18                  any area within the Federated States of  
19                  Micronesia, the Republic of the Marshall  
20                  Islands and the Republic of Palau) that  
21                  has no more than 20,000 inhabitants  
22                  based on the most recent available popu-  
23                  lation statistics from the Census Bureau;

24                  “(ii) any area located outside of the  
25                  boundaries of any incorporated or unincor-

1                   porated city, village, or borough having a  
2                   population exceeding 20,000;

3                   “(iii) any area with a population den-  
4                   sity of fewer than 250 persons per square  
5                   mile; or

6                   “(iv) any place that qualified as a  
7                   ‘rural area’ and received support from the  
8                   rural health care support mechanism pur-  
9                   suant to the Commission’s rules in effect  
10                  prior to December 1, 2004, and that con-  
11                  tinues to qualify as a ‘rural area’ pursuant  
12                  to such rules.”.

13       (b) SCHOOLS, LIBRARIES, RURAL HEALTH CARE,  
14 LIFE-LINE, LINK-UP, AND TOLL LIMITATION HOLD  
15 HARMLESS.—Except as provided in subsections (h)(1)(A),  
16 (h)(7)(B), and (h)(7)(J) of section 254 of the Communica-  
17 tions Act of 1934 (47 U.S.C. 254), as amended by sub-  
18 section (a)—

19               (1) nothing in this Act (or the amendments  
20               made by this Act) shall be construed as limiting,  
21               changing, modifying, or altering the amount of sup-  
22               port or means of distribution for the schools, librar-  
23               ies, rural health care, life-line, link-up, and toll limi-  
24               tation programs; and

1           (2) the Federal Communications Commission  
2           shall ensure that such amendments do not result in  
3           a decrease of such support to a level below the level  
4           for the fiscal year preceding the fiscal year in which  
5           this Act is enacted.

6 **SEC. 408. TELECOMMUNICATIONS SERVICES FOR LIBRAR-**  
7 **IES.**

8           Section 254(h)(4) of the Communications Act of  
9 1934 (47 U.S.C. 254(h)(4)) is amended to read as follows:

10           “(4) CERTAIN USERS NOT ELIGIBLE.—Notwith-  
11           standing any other provision of this subsection, the  
12           following entities are not entitled to preferential  
13           rates or treatment as required by this subsection:

14           “(A) An entity operated as a for-profit  
15           business.

16           “(B) A school described in paragraph  
17           (7)(A) with an endowment of more than  
18           \$50,000,000.

19           “(C) A library or library consortium not el-  
20           igible for assistance under the Library Services  
21           and Technology Act (20 U.S.C. 9101 et seq.)  
22           from a State library administrative agency.

23           “(D) A library or library consortium not  
24           eligible for assistance funded by a grant under  
25           section 261 of the Library Services and Tech-

1 nology Act (20 U.S.C. 9161) from an Indian  
2 tribe or other organization.”.

3 **SEC. 409. AUDITS.**

4 (a) STATE AUDITS.—Section 214(e) of the Commu-  
5 nications Act of 1934 (47 U.S.C. 214(e)), as amended by  
6 section 406, is amended by adding at the end the fol-  
7 lowing:

8 “(10) AUDITS.—Each State commission that  
9 designates an eligible telecommunications carrier,  
10 and the Commission, with respect to eligible tele-  
11 communications carriers designated by it, shall pro-  
12 vide for random periodic audits of each such carrier  
13 with respect to its receipt and use of universal serv-  
14 ice support.”.

15 (b) FEDERAL AUDITS.—The Federal Communica-  
16 tions Commission, in consultation with the Administrator  
17 of the Universal Service Administrative Company, shall—

18 (1) ensure the integrity and accountability of all  
19 programs established under section 254 of the Com-  
20 munications Act of 1934 (47 U.S.C. 254(h)); and

21 (2) not later than 180 days after the date of  
22 enactment of this Act, establish rules identifying ap-  
23 propriate fiscal controls and accountability standards

- 1 that shall be applied to all Federal universal support
- 2 programs.

○

# **ATTACHMENT 12**

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## Internet Freedom Preservation Act (Introduced in Senate)

S 2917 IS

109th CONGRESS

2d Session

### **S. 2917**

To amend the Communications Act of 1934 to ensure net neutrality.

## **IN THE SENATE OF THE UNITED STATES**

**May 19, 2006**

Ms. SNOWE (for herself, Mr. DORGAN, Mr. INOUE, Mr. WYDEN, Mr. LEAHY, Mrs. BOXER, Mr. OBAMA, and Mrs. CLINTON) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

### **A BILL**

To amend the Communications Act of 1934 to ensure net neutrality.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## **SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Internet Freedom Preservation Act'.

## **SEC. 2. INTERNET NEUTRALITY.**

Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by

adding at the end the following:

**SEC. 12. INTERNET NEUTRALITY.**

(a) Duty of Broadband Service Providers- With respect to any broadband service offered to the public, each broadband service provider shall--

(1) not block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content, application, or service made available via the Internet;

(2) not prevent or obstruct a user from attaching or using any device to the network of such broadband service provider, only if such device does not physically damage or substantially degrade the use of such network by other subscribers;

(3) provide and make available to each user information about such user's access to the Internet, and the speed, nature, and limitations of such user's broadband service;

(4) enable any content, application, or service made available via the Internet to be offered, provided, or posted on a basis that--

(A) is reasonable and nondiscriminatory, including with respect to quality of service, access, speed, and bandwidth;

(B) is at least equivalent to the access, speed, quality of service, and bandwidth that such broadband service provider offers to affiliated content, applications, or services made available via the public Internet into the network of such broadband service provider; and

(C) does not impose a charge on the basis of the type of content, applications, or services made available via the Internet into the network of such broadband service provider;

(5) only prioritize content, applications, or services accessed by a user that is made available via the Internet within the network of such broadband service provider based on the type of content, applications, or services and the level of service purchased by the user, without charge for such prioritization; and

(6) not install or utilize network features, functions, or capabilities that impede or hinder compliance with this section.

(b) Certain Management and Business-Related Practices- Nothing in this section shall be construed to prohibit a broadband service provider from engaging in any activity, provided that such activity is not inconsistent with the requirements of subsection (a), including--



` (1) protecting the security of a user's computer on the network of such broadband service provider, or managing such network in a manner that does not distinguish based on the source or ownership of content, application, or service;

` (2) offering directly to each user broadband service that does not distinguish based on the source or ownership of content, application, or service, at different prices based on defined levels of bandwidth or the actual quantity of data flow over a user's connection;

` (3) offering consumer protection services (including parental controls for indecency or unwanted content, software for the prevention of unsolicited commercial electronic messages, or other similar capabilities), if each user is provided clear and accurate advance notice of the ability of such user to refuse or disable individually provided consumer protection capabilities;

` (4) handling breaches of the terms of service offered by such broadband service provider by a subscriber, provided that such terms of service are not inconsistent with the requirements of subsection (a); or

` (5) where otherwise required by law, to prevent any violation of Federal or State law.

` (c) Exception- Nothing in this section shall apply to any service regulated under title VI, regardless of the physical transmission facilities used to provide or transmit such service.

` (d) Stand-Alone Broadband Service- A broadband service provider shall not require a subscriber, as a condition on the purchase of any broadband service offered by such broadband service provider, to purchase any cable service, telecommunications service, or IP-enabled voice service.

` (e) Implementation- Not later than 180 days after the date of enactment of the Internet Freedom Preservation Act, the Commission shall prescribe rules to implement this section that--

` (1) permit any aggrieved person to file a complaint with the Commission concerning any violation of this section; and

` (2) establish enforcement and expedited adjudicatory review procedures consistent with the objectives of this section, including the resolution of any complaint described in paragraph (1) not later than 90 days after such complaint was filed, except for good cause shown.

` (f) Enforcement-

` (1) IN GENERAL- The Commission shall enforce compliance with this section under title V, except that--

` (A) no forfeiture liability shall be determined under section 503(b) against any person unless such person receives the notice required by

section 503(b)(3) or section 503(b)(4); and

`(B) the provisions of section 503(b)(5) shall not apply.

`(2) SPECIAL ORDERS- In addition to any other remedy provided under this Act, the Commission may issue any appropriate order, including an order directing a broadband service provider--

`(A) to pay damages to a complaining party for a violation of this section or the regulations hereunder; or

`(B) to enforce the provisions of this section.

`(g) Definitions- In this section, the following definitions shall apply:

`(1) AFFILIATED- The term `affiliated' includes--

`(A) a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person; or

`(B) a person that has a contract or other arrangement with a content, applications, or service provider relating to access to or distribution of such content, applications, or service.

`(2) BROADBAND SERVICE- The term `broadband service' means a 2-way transmission that--

`(A) connects to the Internet regardless of the physical transmission facilities used; and

`(B) transmits information at an average rate of at least 200 kilobits per second in at least 1 direction.

`(3) BROADBAND SERVICE PROVIDER- The term `broadband service provider' means a person or entity that controls, operates, or resells and controls any facility used to provide broadband service to the public, whether provided for a fee or for free.

`(4) IP-ENABLED VOICE SERVICE- The term `IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol, for a fee (whether part of a bundle of services or separately) with interconnection capability such that service can originate traffic to, and terminate traffic from, the public switched telephone network

`(5) USER- The term `user' means any residential or business subscriber who, by way of a broadband service, takes and utilizes Internet services, whether provided for a fee, in exchange for an explicit benefit, or for free.'.

### SEC. 3. REPORT ON DELIVERY OF CONTENT, APPLICATIONS, AND SERVICES.

Not later than 270 days after the date of enactment of this Act, and annually thereafter, the Federal Communications Commission shall transmit a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives on the--

- (1) ability of providers of content, applications, or services to transmit and send such information into and over broadband networks;
- (2) ability of competing providers of transmission capability to transmit and send such information into and over broadband networks;
- (3) price, terms, and conditions for transmitting and sending such information into and over broadband networks;
- (4) number of entities that transmit and send information into and over broadband networks; and
- (5) state of competition among those entities that transmit and send information into and over broadband networks.

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**Item 1 of 1**

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**S.2917**

**Title:** A bill to amend the Communications Act of 1934 to ensure net neutrality.

**Sponsor:** Sen Snowe, Olympia J. [ME] (introduced 5/19/2006) Cosponsors (13)

**Latest Major Action:** 5/19/2006 Referred to Senate committee. Status: Read twice and referred to the Committee on Commerce, Science, and Transportation.

---

Jump to: Summary, Major Actions, All Actions, Titles, Cosponsors, Committees, Related Bill Details, Amendments

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**SUMMARY AS OF:**

5/19/2006--Introduced.

Internet Freedom Preservation **Act** - Amends **the Communications Act of 1934** to establish certain Internet neutrality duties for broadband service providers (providers), including not interfering with, or discriminating against, **the ability of** any person **to** use broadband service in **a** lawful manner. Allows providers **to** engage in activities in furtherance **of** certain management and business-related practices, such as protecting network security and offering consumer protection services such as parental controls.

Prohibits **a** provider from requiring **a** subscriber, as **a** condition on **the** purchase **of** broadband service, **to** purchase any cable service, telecommunications service, or IP-enabled voice service.

Requires **a** report from **the** Federal **Communications** Commission (FCC) **to** specified congressional committees on provider delivery **of** broadband content, applications, and services.

---

**MAJOR ACTIONS:**

\*\*\*NONE\*\*\*

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**ALL ACTIONS:****5/19/2006:**

Sponsor introductory remarks on measure. (CR S4840-4841)

**5/19/2006:**

Read twice and referred to the Committee on Commerce, Science, and Transportation.

**TITLE(S):** *(italics indicate a title for a portion of a bill)*

\*\*\*NONE\*\*\*

**COSPONSORS(13), ALPHABETICAL** [followed by Cosponsors withdrawn]: (Sort: by date)

Sen Bayh, Evan [IN] - 6/27/2006      Sen Boxer, Barbara [CA] - 5/19/2006  
Sen Cantwell, Maria [WA] - 6/21/2006      Sen Clinton, Hillary Rodham [NY] - 5/19/2006  
Sen Dayton, Mark [MN] - 9/5/2006      Sen Dodd, Christopher J. [CT] - 6/13/2006  
Sen Dorgan, Byron L. [ND] - 5/19/2006      Sen Harkin, Tom [IA] - 9/5/2006  
Sen Inouye, Daniel K. [HI] - 5/19/2006      Sen Kerry, John F. [MA] - 7/13/2006  
Sen Leahy, Patrick J. [VT] - 5/19/2006      Sen Obama, Barack [IL] - 5/19/2006  
Sen Wyden, Ron [OR] - 5/19/2006

**COMMITTEE(S):****Committee/Subcommittee: Activity:**

Senate Commerce, Science,  
and Transportation      Referral, In Committee

**RELATED BILL DETAILS:**

\*\*\*NONE\*\*\*

**AMENDMENT(S):**

\*\*\*NONE\*\*\*

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# **ATTACHMENT 13**

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## There are 2 versions of Bill Number H.R.5417 for the 109th Congress

- 1 . Internet Freedom and Nondiscrimination Act of 2006 (Introduced in House)  
[\[H.R.5417.IH\]](#)
- 2 . Internet Freedom and Nondiscrimination Act of 2006 (Reported in House)  
[\[H.R.5417.RH\]](#)

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**Bill 1 of 2**

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**Internet Freedom and Nondiscrimination Act of 2006 (Introduced in House)**

HR 5417 IH

109th CONGRESS

2d Session

**H. R. 5417**

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

**IN THE HOUSE OF REPRESENTATIVES**

**May 18, 2006**

Mr. SENSENBRENNER (for himself, Mr. CONYERS, Mr. BOUCHER, and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

**A BILL**

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the `Internet Freedom and Nondiscrimination Act of



2006'.

## **SEC. 2. PURPOSES.**

The purposes of this Act are to promote competition, to facilitate trade, and to ensure competitive and nondiscriminatory access to the Internet.

## **SEC. 3. AMENDMENTS TO THE CLAYTON ACT.**

The Clayton Act (15 U.S.C. 12 et seq.) is amended--

- (1) by redesignating section 28 as section 29,
- (2) by inserting after section 27 the following:

## **' DISCRIMINATION BY BROADBAND NETWORK PROVIDERS**

' Sec. 28. (a) It shall be unlawful for any broadband network provider--

' (1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;

' (2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;

' (3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or

' (B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;

' (4) to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or

' (5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.

' (b) If a broadband network provider prioritizes or offers enhanced quality of

service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.

`(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures--

`(1) to manage the functioning of its network to protect the security of such network and broadband network services if such management does not result in discrimination among the content, applications, or services on the network;

`(2) to give priority to emergency communications; or

`(3) to prevent a violation of a Federal or State law, or to comply with an order of a court to enforce such law.

`(d) For purposes of this section--

`(1) the term `affiliate' means--

`(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under the common ownership or control with another person; or

`(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or such service;

`(2) the term `broadband network provider' means a person engaged in commerce that owns, controls, operates, or resells any facility used to provide broadband network service to the public, by whatever technology and without regard to whether provided for a fee, in exchange for an explicit benefit, or for free;

`(3) the term `broadband network service' means a 2-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction, irrespective of whether such transmission is provided separately or as a component of another service; and

`(4) the term `user' means a person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.', and

(3) by amending subsection (a) and the 1st sentence of subsection (b) of section 11 by striking `and 8' and inserting `8, and 29'.

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HR 5417 IH

109th CONGRESS

2d Session

**H. R. 5417**

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

**IN THE HOUSE OF REPRESENTATIVES**

**May 18, 2006**

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**SECTION 1. SHORT TITLE.**

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**SEC. 3. AMENDMENTS TO THE CLAYTON ACT.**

The Clayton Act (15 U.S.C. 12 et seq.) is amended--

- (1) by redesignating section 28 as section 29,
- (2) by inserting after section 27 the following:

## **DISCRIMINATION BY BROADBAND NETWORK PROVIDERS**

Sec. 28. (a) It shall be unlawful for any broadband network provider--

(1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;

(2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;

(3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or

(B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;

(4) to prohibit a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or

(5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.

(b) If a broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.

(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures--

(1) to manage the functioning of its network to protect the security of such network and broadband network services if such management does not result in discrimination among the content, applications, or services on the network;

`(2) to give priority to emergency communications; or

`(3) to prevent a violation of a Federal or State law, or to comply with an order of a court to enforce such law.

`(d) For purposes of this section--

`(1) the term `affiliate' means--

`(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under the common ownership or control with another person; or

`(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or such service;

`(2) the term `broadband network provider' means a person engaged in commerce that owns, controls, operates, or resells any facility used to provide broadband network service to the public, by whatever technology and without regard to whether provided for a fee, in exchange for an explicit benefit, or for free;

`(3) the term `broadband network service' means a 2-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction, irrespective of whether such transmission is provided separately or as a component of another service; and

`(4) the term `user' means a person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.', and

(3) by amending subsection (a) and the 1st sentence of subsection (b) of section 11 by striking `and 8' and inserting `8, and 29'.

END

HR 5417 RH

**Union Calendar No. 303**

109th CONGRESS

2d Session

**H. R. 5417**

[Report No. 109-541]

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

**IN THE HOUSE OF REPRESENTATIVES**

**May 18, 2006**

Mr. SENSENBRENNER (for himself, Mr. CONYERS, Mr. BOUCHER, and Ms. ZOE LOFGREN of California) introduced the following bill; which was referred to the Committee on the Judiciary

**June 29, 2006**

Additional sponsors: Mr. ANDREWS and Mr. VISCLOSKY

**June 29, 2006**

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

**[Strike out all after the enacting clause and insert the part printed in italic]**

**[For text of introduced bill, see copy of bill as introduced on May 18, 2006]**

**A BILL**

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

*Be it enacted by the Senate and House of Representatives of the United*

*States of America in Congress assembled,*

## **SECTION 1. SHORT TITLE.**

*This Act may be cited as the 'Internet Freedom and Nondiscrimination Act of 2006'.*

## **SEC. 2. PURPOSES.**

*The purposes of this Act are to promote competition, to facilitate trade, and to ensure competitive and nondiscriminatory access to the Internet.*

## **SEC. 3. AMENDMENTS TO THE CLAYTON ACT.**

*The Clayton Act (15 U.S.C. 12 et seq.) is amended--*

*(1) by redesignating section 28 as section 29,*

*(2) by inserting after section 27 the following:*

## **' DISCRIMINATION BY BROADBAND NETWORK PROVIDERS**

*' SEC. 28. (a) It shall be unlawful for any broadband network provider--*

*' (1) to fail to provide its broadband network services on reasonable and nondiscriminatory terms and conditions such that any person can offer or provide content, applications, or services to or over the network in a manner that is at least equal to the manner in which the provider or its affiliates offer content, applications, and services, free of any surcharge on the basis of the content, application, or service;*

*' (2) to refuse to interconnect its facilities with the facilities of another provider of broadband network services on reasonable and nondiscriminatory terms or conditions;*

*' (3)(A) to block, to impair, to discriminate against, or to interfere with the ability of any person to use a broadband network service to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet; or*

*' (B) to impose an additional charge to avoid any conduct that is prohibited by this subsection;*

*' (4) to prohibit a user from attaching or using a device on the provider's*



*network that does not physically damage or materially degrade other users' utilization of the network; or*

*`(5) to fail to clearly and conspicuously disclose to users, in plain language, accurate information concerning any terms, conditions, or limitations on the broadband network service.*

*`(b) If a broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, it must prioritize or offer enhanced quality of service to all data of that type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or enhanced quality of service.*

*`(c) Nothing in this section shall be construed to prevent a broadband network provider from taking reasonable and nondiscriminatory measures--*

*`(1) to manage the functioning of its network, on a systemwide basis, provided that any such management function does not result in discrimination between content, applications, or services offered by the provider and unaffiliated provider;*

*`(2) to give priority to emergency communications;*

*`(3) to prevent a violation of a Federal or State law, or to comply with an order of a court to enforce such law;*

*`(4) to offer consumer protection services (such as parental controls), provided that a user may refuse or disable such services;*

*`(5) to offer special promotional pricing or other marketing initiatives; or*

*`(6) to prioritize or offer enhanced quality of service to all data of a particular type (regardless of the origin or ownership of such data) without imposing a surcharge or other consideration for such prioritization or quality of service.*

*`(d) For purposes of this section--*

*`(1) the term 'affiliate' means--*

*`(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under the common ownership or control with another person; or*

*`(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or such service;*

*'(2) the term 'broadband network provider' means a person engaged in commerce that owns, controls, operates, or resells any facility used to provide broadband network service to the public, by whatever technology and without regard to whether provided for a fee, in exchange for an explicit benefit, or for free;*

*'(3) the term 'broadband network service' means a 2-way transmission service that connects to the Internet and transmits information at an average rate of at least 200 kilobits per second in at least one direction, irrespective of whether such transmission is provided separately or as a component of another service; and*

*'(4) the term 'user' means a person who takes and uses broadband network service, whether provided for a fee, in exchange for an explicit benefit, or for free.', and*

*(3) by amending subsection (a) and the 1st sentence of subsection (b) of section 11 by striking 'and 8' and inserting '8, and 28'.*

Union Calendar No. 303

109th CONGRESS

2d Session

**H. R. 5417**

**[Report No. 109-541]**

**A BILL**

To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet.

**June 29, 2006**

**Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed**

END

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**Item 6 of 12**

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**H.R.5417**

**Title:** To amend the **Clayton Act** with respect to competitive and nondiscriminatory access to the Internet.

**Sponsor:** [Rep Sensenbrenner, F. James, Jr.](#) [WI-5] (introduced 5/18/2006)

[Cosponsors](#) (5)

**Latest Major Action:** 6/29/2006 Placed on the Union Calendar, Calendar No. 303.

**House Reports:** [109-541](#)

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Jump to: [Summary](#), [Major Actions](#), [All Actions](#), [Titles](#), [Cosponsors](#), [Committees](#), [Related Bill Details](#), [Amendments](#)

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**SUMMARY AS OF:**

6/29/2006--Reported to House amended. (There is 1 [other summary](#))

Internet Freedom and Nondiscrimination **Act** of 2006 - Amends the **Clayton Act** to prohibit any broadband network provider from: (1) failing to provide its services on reasonable and nondiscriminatory terms; (2) refusing to interconnect its facilities with those of another service provider on reasonable and nondiscriminatory terms; (3) blocking, impairing, discriminating against, or interfering with any person's ability to use a broadband network service to access or offer lawful content, applications, or services over the Internet (or imposing an additional charge to avoid such prohibited conduct); (4) prohibiting a user from attaching or using a device on the provider's network that does not physically damage or materially degrade other users' utilization of the network; or (5) failing to clearly and conspicuously disclose to users accurate information concerning service terms.

Requires a provider that prioritizes or offers enhanced quality of service to data of a particular type to prioritize or offer enhanced quality of service to all data of that type without imposing a surcharge or other consideration.

Permits a provider to take reasonable and nondiscriminatory measures to: (1) manage the functioning of its network and services; (2) give priority to emergency communications; (3) prevent a violation of federal or state law; (4) offer consumer protection services; (5) offer special promotional pricing or other marketing initiatives; or (6) prioritize or offer enhanced quality of service to all data of a particular type without imposing a surcharge or other consideration.

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**MAJOR ACTIONS:** *lvD*

5/18/2006 Introduced in House

6/29/2006 Reported (Amended) by the Committee on Judiciary. H. Rept. 109-541.

6/29/2006 Placed on the Union Calendar, Calendar No. 303.

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**ALL ACTIONS:****5/18/2006:**

Referred to the House Committee on the Judiciary.

**5/25/2006:**

Committee Consideration and Mark-up Session Held.

**5/25/2006:**

Ordered to be Reported (Amended) by the Yeas and Nays: 20 - 13.

**6/29/2006 5:39pm:**

Reported (Amended) by the Committee on Judiciary. H. Rept. 109-541.

**6/29/2006 5:40pm:**

Placed on the Union Calendar, Calendar No. 303.

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**TITLE(S):** (*italics indicate a title for a portion of a bill*)

- **POPULAR TITLE(S):**  
Network Neutrality bill (identified by CRS)
- **SHORT TITLE(S) AS INTRODUCED:**  
Internet Freedom and Nondiscrimination **Act** of 2006
- **SHORT TITLE(S) AS REPORTED TO HOUSE:**  
Internet Freedom and Nondiscrimination **Act** of 2006
- **OFFICIAL TITLE AS INTRODUCED:**  
To amend the **Clayton Act** with respect to competitive and nondiscriminatory access to the Internet.

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**COSPONSORS(5), ALPHABETICAL** [followed by Cosponsors withdrawn]: (Sort: by date)

Rep Andrews, Robert E. [NJ-1] - 6/14/2006 Rep Boucher, Rick [VA-9] - 5/18/2006

Rep Conyers, John, Jr. [MI-14] - 5/18/2006 Rep Lofgren, Zoe [CA-16] - 5/18/2006

Rep Visclosky, Peter J. [IN-1] - 6/20/2006

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**COMMITTEE(S):****Committee/Subcommittee: Activity:**

House Judiciary

Referral, Markup, Reporting

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**RELATED BILL DETAILS:**

\*\*\*NONE\*\*\*

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**AMENDMENT(S):**

\*\*\*NONE\*\*\*

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# **ATTACHMENT 14**

HR 5273 IH

109th CONGRESS

2d Session

**H. R. 5273**

To promote open broadband networks and innovation, foster electronic commerce, and safeguard consumer access to online content and services.

**IN THE HOUSE OF REPRESENTATIVES**

**May 2, 2006**

Mr. MARKEY (for himself, Ms. ESHOO, Mr. BOUCHER, and Mr. INSLEE) introduced the following bill; which was referred to the Committee on Energy and Commerce

**A BILL**

To promote open broadband networks and innovation, foster electronic commerce, and safeguard consumer access to online content and services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Network Neutrality Act of 2006'.

**SEC. 2. FINDINGS.**

The Congress finds the following:

- (1) Our Nation's economy, education, and society are increasingly dependent upon broadband telecommunications networks.
- (2) These networks also hold the promise of advancing economic growth, job creation, and technological innovation.
- (3) As America becomes ever more reliant upon such broadband networks, unfettered access to broadband networks to offer content and services and run software applications over the Internet is vital.
- (4) The global leadership in high technology the United States provides

today stems directly from historic policies that have ensured that telecommunications networks are open to all lawful uses and to all users.

(5) The Internet was enabled by those historic policies and provides an open architecture medium for world-wide communications, providing low barriers to entry for web-based content, applications, and services.

(6) Due to recent Federal Communications Commission interpretations and court decisions, these features of the Internet are no longer certain, and erosion of these historic policies permits broadband network owners to claim they can control who can and who cannot offer content and services over the Internet utilizing their broadband networks.

(7) The high technology economy would be severely harmed if Internet content providers cannot reach consumers without interference from broadband network operators.

(8) The overwhelming majority of residential consumers take broadband service from one of only two wireline providers, namely, from the cable operator or the local telephone company.

(9) Broadband network operators have an economic interest to discriminate in favor of their own services and against other online providers.

(10) A network neutrality policy based upon the principle of nondiscrimination is essential to ensure that broadband telecommunications networks, including the Internet, remain open to independent service and content providers.

(11) A network neutrality policy is also essential to give certainty to entrepreneurs, innovators, investors, and others who rely upon the Internet for commercial reasons.

(12) A network neutrality policy can also permit broadband network operators to take action to protect network reliability, prevent spam, and thwart illegal uses in the same way that network operators have historically done so.

(13) Because of the vital role that broadband networks and the Internet play for America's economic growth and our First Amendment rights to speak, the United States should adopt a clear policy endorsing the open nature of Internet communications and freely accessible broadband networks.

### **SEC. 3. POLICY.**



It is the policy of the United States--

- (1) to maintain the freedom to use broadband telecommunications networks, including the Internet, without interference from network operators, as has been the policy for Internet commerce and the basis for user expectations since its inception;
- (2) to ensure that the Internet, and its successors, remain a vital force in the United States economy, thereby enabling the country to preserve its global leadership in online commerce and technological innovation;
- (3) to preserve and promote the open and interconnected nature of broadband networks that enable consumers to reach, and service providers to offer, lawful content, applications, and services of their choosing, using their selection of devices that do not harm the network;
- (4) to encourage escalating broadband transmission speeds and capabilities that reflect the evolving nature of the broadband networks, including the Internet, and improvements in access technology, which enables consumers to use and enjoy, and service providers to offer, a growing array of content, applications, and services;
- (5) to provide for disclosure by broadband network operators of prices, terms, and conditions, and other relevant information, including information about the technical capabilities of broadband access provided to users, to inform their choices about services they rely on to communicate and to detect problems; and
- (6) to ensure vigorous and prompt enforcement of this Act's requirements to safeguard and promote competition, innovation, market certainty, and consumer empowerment.

#### **SEC. 4. NET NEUTRALITY SAFEGUARDS.**

(a) In General- Each broadband network provider has the duty to--

- (1) enable users to utilize their broadband service to access all lawful content, applications, and services available over broadband networks, including the Internet;
- (2) not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service to--
  - (A) access, use, send, receive, or offer lawful content, applications, or services over broadband networks, including the Internet; or
  - (B) attach any device to the provider's network and utilize such

device in connection with broadband service, provided that any such device does not physically damage, or materially degrade other subscribers' use of, the network;

(3) clearly and conspicuously disclose to users, in plain language, accurate information about the speed, nature, and limitations of their broadband service;

(4) offer, upon reasonable request to any person, a broadband service for use by such person to offer or access unaffiliated content, applications, and services;

(5) not discriminate in favor of itself in the allocation, use, or quality of broadband services or interconnection with other broadband networks;

(6) offer a service such that content, applications, or service providers can offer unaffiliated content, applications, or services in a manner that is at least equal to the speed and quality of service that the operator's content, applications, or service is accessed and offered, and without interference or surcharges on the basis of such content, applications, or services;

(7) if the broadband network provider prioritizes or offers enhanced quality of service to data of a particular type, prioritize or offer enhanced quality of service to all data of that type (regardless of the origin of such data) without imposing a surcharge or other consideration for such prioritization or quality of service; and

(8) not install network features, functions, or capabilities that thwart or frustrate compliance with the requirements or objectives of this section.

(b) Exceptions- Nothing in this section shall prohibit a broadband network provider from implementing reasonable and nondiscriminatory measures to--

(1) manage the functioning of its network, on a systemwide basis, provided that any such management function does not result in discrimination between content, applications, or services offered by the provider and unaffiliated providers;

(2) offer varying levels of transmission speed or bandwidth;

(3) protect network security or the security of a user's computer on the network;

(4) offer consumer protection services (such as parental controls), provided that a user may refuse or disable such services;

(5) carry or offer a cable service that requires management of the network to provide enhanced quality of service, provided that--

(A) a broadband service subscriber may refuse to subscribe to, and avoid charges for, such cable service while obtaining broadband services from such operator; and

(B) such carrying or offering does not violate any of the duties set forth in subsection (a); or

(6) where otherwise required by law, prevent any violation of Federal or State law.

(c) Implementation- Within 180 days after the date of enactment of this Act, the Commission shall adopt rules that--

(1) permit any person to complain to the Commission of anything done or omitted to be done in violation of any duty, obligation, or requirement under this section;

(2) provide that any complaint filed at the Commission that alleges a violation of this section shall be deemed granted unless acted upon by the Commission within 90 days after its filing;

(3) require the Commission, upon prima facie showing by a complainant of a violation of this section, to issue within 48 hours of the filing of any such complaint, a cease-and-desist or other appropriate order against the violator until the complaint is fully resolved, and, if in the public interest, such order may affect classes of persons similarly situated to the complainant or the violator, and any such order shall be in effect until the Commission resolves the complaint with an order dismissing the complaint or imposing appropriate remedies to resolve such complaint; and

(4) enable the Commission to use mediation or arbitration or other means to resolve the dispute.

(d) Enforcement- This section shall be enforced under titles IV and V of the Communications Act of 1934 (47 U.S.C. 401, 501 et seq.). A violation of any provision of this section shall be treated as a violation of the Communications Act of 1934, except that the warning requirements of section 503(b) shall not apply. In addition to imposing fines under its title V authority, the Commission also is authorized to issue any order, including an order directing a broadband network operator to pay damages to a complaining party.

(e) Definitions- For purposes of this section:

(1) BROADBAND NETWORK PROVIDER- The term `broadband network provider' means a person or entity that owns, controls, or resells, facilities used in the transmission of a broadband service and includes any affiliate, joint venture partner, or agent of such provider.

(2) BROADBAND SERVICE- The term `broadband service' means a two-way transmission capability that--

(A) enables the user to access content, applications, and services;

(B) is delivered with or without a fee to the physical location of the user, regardless of the facilities used;

(C) includes a transport speed of at least 200 kilobits per second on average in at least one direction; and

(D) permits a user to transmit or receive information of their own design or choosing.

(3) AFFILIATE- The term `affiliate' includes--

(A) a person that directly or indirectly owns, controls, is owned or controlled by, or is under common ownership or control with, another person; or

(B) a person that has a contract or other arrangement with a content or service provider concerning access to, or distribution of, such content or services.

END

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**H.R.5273**

**Title:** To promote open broadband networks and innovation, foster electronic commerce, and safeguard consumer access to online content and services.

**Sponsor:** [Rep Markey, Edward J. \[MA-7\]](#) (introduced 5/2/2006)      [Cosponsors](#) (23)

**Latest Major Action:** 5/15/2006 Referred to House subcommittee. Status: Referred to the Subcommittee on Telecommunications and the Internet.

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**SUMMARY AS OF:**

5/2/2006--Introduced.

Network Neutrality Act of 2006 - States that it is the policy of the United States to, among other things, maintain the freedom to use broadband telecommunications networks, including the Internet, without interference from network operators.

Outlines specified duties of broadband network providers to ensure broadband network neutrality, including the duty to: (1) enable users to utilize their broadband service to access all lawful content, applications, and services available over broadband networks, including the Internet; and (2) not block, impair, degrade, discriminate against, or interfere with the ability of any person to utilize their broadband service for lawful purposes. Provides exceptions for providers, including implementing reasonable measures to manage its networks and protect network security.

Provides for implementation and enforcement of this Act through the Federal Communications Commission (FCC).

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**MAJOR ACTIONS:**

\*\*\*NONE\*\*\*

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**ALL ACTIONS:**

**5/2/2006:**

Sponsor introductory remarks on measure. (CR [E680-681](#))

**5/2/2006:**

Referred to the House Committee on Energy and Commerce.

**5/15/2006:**

Referred to the Subcommittee on Telecommunications and the Internet.

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**TITLE(S):** (*italics indicate a title for a portion of a bill*)

\*\*\*NONE\*\*\*

**COSPONSORS(23), ALPHABETICAL** [followed by Cosponsors withdrawn]: (Sort: by date)

<u>Rep Baldwin, Tammy</u> [WI-2] - 5/3/2006	<u>Rep Boucher, Rick</u> [VA-9] - 5/2/2006
<u>Rep Brown, Sherrod</u> [OH-13] - 5/11/2006	<u>Rep Capps, Lois</u> [CA-23] - 5/18/2006
<u>Rep Carson, Julia</u> [IN-7] - 7/10/2006	<u>Rep Doyle, Michael F.</u> [PA-14] - 5/11/2006
<u>Rep Eshoo, Anna G.</u> [CA-14] - 5/2/2006	<u>Rep Frank, Barney</u> [MA-4] - 5/11/2006
<u>Rep Hinchey, Maurice D.</u> [NY-22] - 6/6/2006	<u>Rep Honda, Michael M.</u> [CA-15] - 6/6/2006
<u>Rep Inslee, Jay</u> [WA-1] - 5/2/2006	<u>Rep Lee, Barbara</u> [CA-9] - 5/11/2006
<u>Rep McDermott, Jim</u> [WA-7] - 5/3/2006	<u>Rep Miller, George</u> [CA-7] - 5/11/2006
<u>Rep Pelosi, Nancy</u> [CA-8] - 5/3/2006	<u>Rep Roybal-Allard, Lucille</u> [CA-34] - 6/6/2006
<u>Rep Sanders, Bernard</u> [VT] - 5/11/2006	<u>Rep Schakowsky, Janice D.</u> [IL-9] - 5/11/2006
<u>Rep Stark, Fortney Pete</u> [CA-13] - 5/18/2006	<u>Rep Udall, Tom</u> [NM-3] - 9/26/2006
<u>Rep Watson, Diane E.</u> [CA-33] - 5/3/2006	<u>Rep Waxman, Henry A.</u> [CA-30] - 5/3/2006
<u>Rep Woolsey, Lynn C.</u> [CA-6] - 6/6/2006	

**COMMITTEE(S):****Committee/Subcommittee: Activity:**House Energy and Commerce Referral, In CommitteeSubcommittee onTelecommunications and Referral  
the Internet**RELATED BILL DETAILS:**

\*\*\*NONE\*\*\*

**AMENDMENT(S):**

\*\*\*NONE\*\*\*

# **ATTACHMENT 15**

S 2686 IS

109th CONGRESS

2d Session

**S. 2686**

To amend the Communications Act of 1934 and for other purposes.

**IN THE SENATE OF THE UNITED STATES**

**May 1, 2006**

Mr. STEVENS (for himself and Mr. INOUE) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

**A BILL**

To amend the Communications Act of 1934 and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Communications, Consumer's Choice, and Broadband Deployment Act of 2006'.

**SEC. 2. AMENDMENT OF COMMUNICATIONS ACT OF 1934.**

Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

**SEC. 3. TABLE OF CONTENTS.**

The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Amendment of Communications Act of 1934.



Sec. 3. Table of contents.

## **TITLE I--WAR ON TERRORISM**

### **Subtitle A--Call Home**

Sec. 103. Telephone rates for members of armed forces deployed abroad.

Sec. 102. Repeal of existing authorization.

### **Subtitle B--Interoperability**

Sec. 151. Interoperable emergency communications.

## **TITLE II--UNIVERSAL SERVICE REFORM; INTERCONNECTION**

Sec. 201. Short title.

### **Subtitle A--Contributions to Universal Service**

Sec. 211. Stabilization of universal service funding.

Sec. 212. Telecommunications services for libraries.

Sec. 213. Modification of rural video service exemption.

Sec. 214. Interconnection.

### **Subtitle B--Distributions From Universal Service**

Sec. 251. Broadband requirement.

Sec. 252. Establishment of broadband account within universal service fund.

Sec. 253. Eligible telecommunications carrier guidelines.

Sec. 254. Primary line.

Sec. 255. Phantom traffic.

Sec. 256. Random audits.

Sec. 257. Waste, fraud, and abuse.

## **TITLE III--STREAMLINING FRANCHISING PROCESS**

Sec. 301. Short title.

### **Subtitle A--Updating the 1934 Act and Leveling the Regulatory Playing Field**

Sec. 311. Application of title VI to video services and video service providers.

Sec. 312. Purpose; franchise applications; scope.

Sec. 313. Standard franchise application form.

Sec. 314. Definitions.

### **Subtitle B--Streamlining the Provision of Video Services**

Sec. 331. Franchise requirements and related provisions.

Sec. 332. Renewal; revocation.

Sec. 333. PEG and institutional network obligations.

Sec. 334. Services, facilities, and equipment.

Sec. 337. Shared facilities.

Sec. 338. Consumer protection and customer service.

Sec. 339. Redlining.

### **Subtitle C--Miscellaneous and Conforming Amendments**

Sec. 351. Miscellaneous amendments.

### **Subtitle D--Effective Dates and Transition Rules.**

Sec. 381. Effective dates; phase-in.

## **TITLE IV--VIDEO CONTENT**

Sec. 401. Short title.

### **Subtitle A--Sports Freedom**

Sec. 401. Short title.

Sec. 402. Development of competition and diversity in video programming distribution.

Sec. 403. Regulations.

### **Subtitle B--National Satellite**

Sec. 431. Availability of certain licensed services in noncontiguous States.

### **Subtitle C--Video and Audio Flag**

Sec. 451. Short title.

Sec. 452. Digital video broadcasting.

Sec. 453. Digital audio broadcasting.

Sec. 454. Digital Audio Review Board.

### **TITLE V--MUNICIPAL BROADBAND**

Sec. 501. Short title.

Sec. 502. State regulation of municipal broadband networks.

### **TITLE VI--WIRELESS INNOVATION NETWORKS**

Sec. 601. Short title.

Sec. 602. Eligible television spectrum made available for wireless use.

### **TITLE VII--DIGITAL TELEVISION**

Sec. 701. Analog and digital television sets and converter boxes; consumer education and requirements to reduce the government cost of the converter box program.

Sec. 702. Digital stream requirement for the blind.

Sec. 703. Status of international coordination.

### **TITLE VIII--PROTECTING CHILDREN**

Sec. 801. Video transmission of child pornography.

## **TITLE IX--INTERNET NEUTRALITY**

Sec. 901. Neutral networks for consumers.

## **TITLE X--MISCELLANEOUS**

Sec. 1001. Commissioner participation in forums and meetings.

Sec. 1002. Severability.

## **TITLE I--WAR ON TERRORISM**

### **Subtitle A--Call Home**

#### **SEC. 103. TELEPHONE RATES FOR MEMBERS OF ARMED FORCES DEPLOYED ABROAD.**

(a) IN GENERAL- The Federal Communications Commission shall take such action as may be necessary to reduce the cost of calling home for Armed Forces personnel who are stationed outside the United States under official military orders or deployed outside the United States in support of military operations, training exercises, or other purposes as approved by the Secretary of Defense, including the reduction of such costs through the waiver of government fees, assessments, or other charges for such calls. The Commission may not regulate rates in order to carry out this section.

(b) FACTORS TO CONSIDER- In taking the action described in subsection (a), the Commission, in coordination with the Department of Defense and the Department of State, shall--

(1) evaluate and analyze the costs to Armed Forces personnel of such telephone calls to and from American military bases abroad;

(2) evaluate methods of reducing the rates imposed on such calls, including deployment of new technology such as voice over Internet protocol or other Internet protocol technology;

(3) encourage telecommunications carriers (as defined in section 3(44) of the Communications Act of 1934 (47 U.S.C. 153(44))) to adopt flexible billing procedures and policies for Armed Forces personnel and their dependents for telephone calls to and from such Armed Forces personnel; and

(4) seek agreements with foreign governments to reduce international

surcharges on such telephone calls.

(c) DEFINITIONS- In this section:

(1) ARMED FORCES- The term 'Armed Forces' has the meaning given that term by section 2101(2) of title 5, United States Code.

(2) MILITARY BASE- The term 'military base' includes official duty stations to include vessels, whether such vessels are in port or underway outside of the United States.

## **SEC. 102. REPEAL OF EXISTING AUTHORIZATION.**

Section 213 of the Telecommunications Authorization Act of 1992 (47 U.S.C. 201 note) is repealed.

### **Subtitle B--Interoperability**

## **SEC. 151. INTEROPERABLE EMERGENCY COMMUNICATIONS.**

(a) IN GENERAL- Section 3006 of Public Law 109-171 (47 U.S.C. 309 note) is amended by redesignating subsection (d) as subsection (g) and by inserting after subsection (c) the following:

'(d) Interoperable Communications System Equipment Deployment-

'(1) IN GENERAL- The Assistant Secretary shall allocate a portion of the funds made available to carry out this section to make interoperable communications system equipment grants for equipment that can utilize reallocated public safety spectrum.

'(2) ALLOCATION OF FUNDS- The Secretary shall allocate the funds as follows:

'(A) A portion to be equally distributed to each State.

'(B) A majority to be distributed to the States based on the threat and risk factors used by the Secretary of Homeland Security for the purposes of allocating discretionary grants under the heading 'OFFICE FOR DOMESTIC PREPAREDNESS, STATE AND LOCAL PROGRAMS' in the Department of Homeland Security Appropriations Act, 2006.

'(3) ELIGIBILITY- A State may not receive funds allocated to it under paragraph (2) unless it has established a statewide interoperable communications plan approved by the Secretary of Homeland Security.

` (4) USE OF FUNDS- A State shall use any funds received under this subsection for the purchase of equipment and infrastructure that complies with SAFECOM guidance, including any standards that may be referenced by SAFECOM guidance.

` (e) Coordination and Planning Grant Initiative-

` (1) IN GENERAL- The Assistant Secretary, in consultation with the Secretary of Homeland Security, shall allocate a portion of the funds made available to carry out this section for emergency communication and coordination planning grants. The grants shall supplement, and be in addition to, any Federal funds otherwise made available by grant or otherwise to the States for emergency planning.

` (2) ALLOCATION- The Secretary shall allocate funds under this subsection as follows:

` (A) A portion shall be equally distributed to each State for use by State and local governments; and

` (B) A majority shall be distributed to the States based on the threat and risk factors used by the Secretary of Homeland Security for the purposes of allocating discretionary grants under the heading `OFFICE FOR DOMESTIC PREPAREDNESS, STATE AND LOCAL PROGRAMS' in the Department of Homeland Security Appropriations Act, 2006.

` (3) COORDINATION AND PLANNING GUIDELINES- Except as provided in paragraph (4), a State shall use its emergency communication coordination and planning grant to establish a statewide plan consistent with the State communications interoperability planning methodology developed by the SAFECOM program within the Department of Homeland Security or a regional plan established pursuant to a regional planning agency consistent with this section. In establishing the plan, the Governor or the Governor's designee shall consult with the Secretary of Homeland Security or the Secretary's designee. A State shall submit its statewide plan to the Public Safety and Homeland Security Bureau of the Federal Communications Commission for approval and the Secretary of Homeland Security for approval.

` (f) Strategic Technology Reserves Initiative-

` (1) IN GENERAL- The Assistant Secretary, in consultation with the Secretary of Homeland Security, shall allocate a portion the funds made available to carry out this section to establish and implement a strategic technology reserve to pre-position or secure communications equipment in advance for immediate deployment in an emergency or major disaster

(as defined in section 102(2) of Public Law 93-288 (42 U.S.C. 5122)).

`(2) REQUIREMENTS AND CHARACTERISTICS- A reserve established under paragraph (1) shall--

`(A) be capable of re-establishing communications when existing infrastructure is damaged or destroyed in a major disaster or other event; and

`(B) include appropriate current, widely-used equipment, such as Land Mobile Radio Systems, cellular and satellite telephones, Cells On Wheels, Cells On Light Trucks, backup batteries, generators, fuel, and computers.

`(3) ADDITIONAL CHARACTERISTICS- Portions of the reserve may be virtual and may include items donated on an in-kind contribution basis.

`(4) CONSULTATION- In developing the reserve, the Secretary shall seek advice from the Secretary of Defense and the Secretary of Homeland Security, as well as from communications providers, first responders, emergency managers, and State, local, and tribal governments.

`(5) ALLOCATION AND USE OF FUNDS- The Secretary shall allocate--

`(A) a portion of the reserve's funds for block grants to States to enable each State to establish a strategic technology reserve within its borders in a secure location to allow immediate deployment; and

`(B) a portion of the reserve's funds for regional Federal strategic technology reserves to facilitate any Federal response when necessary, to be held in secure locations around the country for immediate deployment to every region of the country including remote areas and noncontiguous States.

`(g) Common Standards; Applications-

`(1) COMMON STANDARDS- In carrying out this section, the Assistant Secretary, in cooperation with the Secretary of Homeland Security shall develop and implement common standards to the greatest extent practicable.

`(2) APPLICATIONS- To be eligible for assistance under the programs established in this section, each State shall submit an application, at such time, in such form, and containing such information as the Assistant Secretary may require, including--

`(A) a detailed explanation of how assistance received under the program would be used to improve local communications interoperability and ensure interoperability with other appropriate Federal, State, local, tribal, and regional agencies in a regional or national emergency; and

`(B) assurance that the equipment and system would--

`(i) not be incompatible with the communications architecture developed under section 7303(a)(1)(E) of the Intelligence Reform Act of 2004;

`(ii) meet any voluntary consensus standards developed under section 7303(a)(1)(D) of that Act; and

`(iii) be consistent with the common grant guidance established under section 7303(a)(1)(H) of that Act.'.

(b) SEAMLESS MOBILITY- Within 180 days of the enactment of this Act, the Federal Communications Commission shall establish a streamlined process to review and approve deployment of multi-mode devices that permit communication across multiple platforms, facilities, or networks notwithstanding any other provision of law.

## **TITLE II--UNIVERSAL SERVICE REFORM; INTERCONNECTION**

### **SEC. 201. SHORT TITLE.**

This title may be cited as the 'Internet and Universal Service Act of 2006'.

#### **Subtitle A--Contributions to Universal Service**

### **SEC. 211. STABILIZATION OF UNIVERSAL SERVICE FUNDING.**

(a) ENSURING AN EQUITABLE CONTRIBUTION BASE FOR UNIVERSAL SERVICE-

(1) IN GENERAL- Section 254(d) (47 U.S.C. 254(d)) is amended to read as follows:

`(d) Universal Service Support Contributions-

`(1) Contribution mechanism-

`(A) IN GENERAL- Each communications service provider shall contribute as provided in this subsection to support universal



service.

`(B) REQUIREMENTS- The Commission shall ensure that the contributions required by this subsection are--

`(i) applied in a manner that is as competitively and technologically neutral as possible; and

`(ii) specific, predictable, and sufficient to sustain the funding of networks used to preserve and advance universal service.

`(C) ADJUSTMENTS- The Commission may adjust the contribution for providers for their low volume residential customers.

`(2) EXEMPTIONS- The Commission may exempt a communications service provider or any class of communications service providers from the requirements of this subsection--

`(A) if the services of such a provider are limited to such an extent that the level of its contributions would be de minimis; or

`(B) with respect to communications service provided pursuant to the Commission's Lifeline Assistance Program.

`(3) Contribution assessment flexibility-

`(A) METHODOLOGY- To achieve the principles in this section, the Commission may base universal service contributions upon--

`(i) revenue from communications service;

`(ii) working phone numbers or any other identifier protocol or connection to the networks; or

`(iii) network capacity.

`(B) USE OF MORE THAN 1 METHODOLOGY- If no single methodology employed under subparagraph (A) achieves the principles described in this subsection, the Commission may employ a combination of any such methodologies.

`(C) REMOVAL OF INTERSTATE/INTRASTATE DISTINCTION- For the purpose of universal service contributions, the Commission may assess the interstate, intrastate, or international portions of communications service.

`(D) GROUP PLAN DISCOUNT- If the Commission utilizes a

methodology under subparagraph (A) based in whole or in part on working phone numbers, it may provide a discount for up to 3 additional phones provided under a group or family pricing plan.

`(E) PRESERVATION OF UNIVERSAL SERVICE FUNDS- Nothing in this subsection precludes a State from establishing or maintaining State universal service pursuant to subsection (f).

`(4) NON-DISCRIMINATORY ELIGIBILITY REQUIREMENT- A communications service provider is not exempted from the requirements of this subsection solely on the basis that such provider is not eligible to receive support under this section.

`(6) Billing-

`(A) IN GENERAL- A communications service provider that contributes to universal service under this section may place on any customer bill a separate line item charge that does not exceed the amount for the customer that the provider is required to contribute under this subsection that shall be identified as the `Federal Universal Service Fee'.

`(B) LIMITATION- If such a provider bills customers for administrative costs associated with its collection and remission of universal service fees under this subsection--

`(i) the administrative costs shall be a separate line item charge on the bill and shall be identified as `Optional Company Administrative Fee'; and

`(ii) the amount billed for such costs may not exceed the estimated direct costs attributable to such administrative costs.

`(7) DEFINITIONS- In this subsection:

`(A) BROADBAND SERVICE- The term `broadband service' means any service used for transmission of information of a user's choosing with a transmission speed of at least 200 kilobits per second in at least 1 direction, regardless of the transmission medium or technology employed, that connects to the public Internet for a fee directly--

`(i) to the public; or

`(ii) to such classes of users as to be effectively available directly to the public.

`(B) COMMUNICATIONS SERVICE- The term `communications service' means telecommunications service, broadband service, or IP-enabled voice service (whether offered separately or as part of a bundle of services).

`(C) IP-ENABLED VOICE SERVICE- The term `IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol, for a fee (whether part of a bundle of services or separately) with 2-way interconnection capability such that the service can originate traffic to, and terminate traffic from, the public switched telephone network.'.

(2) CONFORMING AMENDMENT- Section 254(b)(4) (47 U.S.C. 254(b)(4)) is amended by striking `telecommunications services' and inserting `communications services (as defined in subsection (d)(7)(B))'.

(b) Proper Accounting of Universal Service Contributions-

(1) FROM ALL BUDGETS- Notwithstanding any other provision of law, the receipts and disbursements of universal service under section 254 of the Communications Act of 1934 (47 U.S.C. 254) shall not be counted as new budget authority, outlays, receipts, or deficit or surplus for purposes of--

(A) the budget of the United States Government as submitted by the President;

(B) the Congressional budget;

(C) the Balanced Budget and Emergency Deficit Control Act of 1985; or

(D) any other statute requiring budget sequesters.

(2) ADDITIONAL EXEMPTIONS- Section 1341, subchapter II of chapter 15, and sections 3302, 3321, 3322, and 3325 of title 31, United States Code, shall not apply to--

(A) the collection and receipt of universal service contributions, including the interest earned on such contributions; or

(B) disbursements or other obligations authorized by the Commission under section 254 of the Communications Act of 1934 (47 U.S.C. 254).

(c) FINANCIAL MANAGEMENT- The Federal Communications Commission and the Administrator of the Universal Service Fund--

(1) shall account for the financial transactions of the Fund in accordance with generally accepted accounting principles for Federal agencies;

(2) shall maintain the accounts of the Fund in accordance with the United States Government Standard General Ledger; and

(3) may invest unexpended balances only in Federal securities (as defined in section 113(b)(5) of Office of Management and Budget circular OMB A-11).

(d) RULEMAKING- Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a rule to implement section 254(d) of the Communications Act of 1934 (47 U.S.C. 254(d)) as amended by subsection (a).

## **SEC. 212. TELECOMMUNICATIONS SERVICES FOR LIBRARIES.**

(a) IN GENERAL- Section 254(h)(4) (47 U.S.C. 254(h)(4)) is amended to read as follows:

`(4) CERTAIN USERS NOT ELIGIBLE- Notwithstanding any other provision of this subsection, the following entities are not entitled to preferential rates or treatment as required by this subsection:

`(A) An entity operated as a for-profit business.

`(B) A school described in paragraph (7)(A) with an endowment of more than \$50,000,000.

`(C) A library or library consortium not eligible for assistance under the Library Services and Technology Act (20 U.S.C. 9101 et seq.)--

`(i) from a State library administrative agency; or

`(ii) funded by a grant under section 261 of the Library Services and Technology Act (20 U.S.C. 9161) from an Indian tribe or other organization.'.

(b) FUNDING- Section 254(h)(1) (47 U.S.C. 254(h)(1)) is amended by adding at the end the following:

`(C) FUNDING- The obligations under, and administrative costs of, this subsection for any funding year may not exceed the sum of--

`(i) the annual program funding cap established by the Commission; and

`(ii) any unobligated balances from prior funding years.'.

(c) AMERICAN COMMUNITY SURVEY RESIDENTIAL INTERNET ACCESS QUESTION- The Secretary of Commerce, in consultation with the Federal Communications Commission, shall expand the American Community Survey conducted by the Bureau of the Census to elicit information for residential households, including those located on native lands, as to what technology such households use to access the Internet from home.

## **SEC. 213. MODIFICATION OF RURAL VIDEO SERVICE EXEMPTION.**

(a) RURAL TELEPHONE COMPANIES- Section 251(f)(1) (47 U.S.C. 251(f)(1)) is amended--

(1) by striking `Subsection' in subparagraph (A) and inserting `Except as provided in subparagraph (B), subsection';

(2) by striking `interconnection, services, or network elements,' in subparagraph (A) and inserting `services or network elements,';

(3) by striking `(under subparagraph (B))' in subparagraph (A) and inserting `(under subparagraph (C))'

(4) by redesignating subparagraphs (B) and (C) as subparagraphs (C) and (D);

(5) by inserting after subparagraph (A) the following:

`(B) INTERCONNECTION- Notwithstanding subparagraph (A), subsection (c)(2) of this section shall not apply to a rural telephone company until such company has received a bona fide request for interconnection.';

(6) by striking `exemption under subparagraph (A).' in subparagraph (C), as redesignated, and inserting `exemption.'; and

(7) by striking subparagraph (D) as redesignated.

(b) OTHER RURAL CARRIERS- Section 251(f)(2) (47 U.S.C. 251(f)(2)) is amended by inserting `(other than subsection (c)(2))' after `subsection (b) or (c)'.

## **SEC. 214. INTERCONNECTION.**

Title VII (47 U.S.C. 601 et seq.) is amended by adding after section 714 the following new section:

**SEC. 715. RIGHTS AND OBLIGATIONS OF IP-ENABLED VOICE SERVICE PROVIDERS.**

(a) In General- An IP-enabled voice service provider shall have the same rights, duties, and obligations as a requesting telecommunications carrier under sections 251 and 252, if the provider elects to assert such rights.

(b) Disabled Services- An IP-enabled voice service provider shall have the same rights, duties, and obligations as a telecommunications carrier under sections 225, 255, and 710. In revising the Commission's regulations under such sections to carry out this subsection, the Commission shall consider whether a service or equipment is marketed as a substitute for telecommunications service, telecommunications equipment, customer premises equipment, or telecommunications relay services.

(c) IP-ENABLED VOICE SERVICE DEFINED- In this section, the term 'IP-enabled voice service' means the provision of real-time 2-way voice communications offered to the public, or such classes of users as to be effectively available to the public, transmitted through customer premises equipment using TCP/IP protocol, or a successor protocol, for a fee (whether part of a bundle of services or separately) with interconnection capability such that the service can originate traffic to, or terminate traffic from, the public switched telephone network.'

**Subtitle B--Distributions From Universal Service**

**SEC. 251. BROADBAND REQUIREMENT.**

Section 214(e) (47 U.S.C. 214(e)) is amended by adding at the end the following:

(7) Broadband Service Requirement-

(A) IN GENERAL- Notwithstanding paragraph (1), an eligible communications carrier may not receive universal service support under section 254 more than 60 months after the date of enactment of the Internet and Universal Service Act of 2006 if it has not deployed broadband service within its service area before the end of that 60-month period unless it receives a waiver under subparagraph (B).

(B) WAIVERS-

` (i) APPLICATION- In order to receive a waiver under this subparagraph, an eligible communications carrier shall submit an application to the Commission.

` (ii) COST OF DEPLOYMENT- If an eligible communications carrier demonstrates to the satisfaction of the Commission that the cost per line of deploying such broadband service is at least 3 times the average cost per line of deploying such broadband service for all eligible communications carriers receiving universal service support, the Commission shall waive the application of subparagraph (A) to that eligible communications carrier.

` (iii) OTHER FACTORS- If an eligible communications carrier demonstrates to the satisfaction of the Commission that the deployment and provision of such broadband service is not technically feasible or would materially impair the carrier's ability to continue to provide local exchange service or broadband service throughout its service area, the Commission may waive the application of subparagraph (A) to that eligible communications carrier.

` (iv) DEEMED APPROVAL- If the Commission fails to act on a waiver request within 60 calendar days after it receives a completed application for the waiver, the waiver shall be deemed to be granted. If the Commission requests additional information from the eligible communications carrier, the 60-day period shall be tolled beginning on the date on which request is received by the carrier and ending on the date on which the Commission receives the information requested.

` (v) TERM; RENEWAL- A waiver under this subparagraph--

` (I) shall be for a period of not more than 2 years; and

` (II) may be renewed, upon application, by the Commission if the applicant demonstrates that it is eligible for a waiver under clause (ii) or (iii).

` (C) NOTIFICATION OF STATE COMMISSION- Whenever the Commission grants a waiver to an eligible communications carrier under subparagraph (B) that has been designated under paragraph (2) by a State commission, the Commission shall notify the State commission of the waiver.

` (D) DEFINITIONS- In this paragraph:

`(i) BROADBAND SERVICE- The term `broadband service' means any service used for transmission of information of a user's choosing with a transmission speed of at least 3 megabits per second in at least 1 direction, regardless of the transmission medium or technology employed, that connects to the public Internet for a fee directly--

`(I) to the public; or

`(II) to such classes of users as to be effectively available directly to the public.

`(ii) ELIGIBLE COMMUNICATIONS CARRIER- The term `eligible communications carrier' means an entity designated under paragraph (2), (3), or (6). Any reference to `eligible telecommunications carrier' in this section is deemed also to refer to `eligible communications carrier'.'.

## **SEC. 252. ESTABLISHMENT OF BROADBAND ACCOUNT WITHIN UNIVERSAL SERVICE FUND.**

Part I of title II (47 U.S.C. 201 et seq.) is amended by inserting after section 254 the following:

### **` SEC. 254A. BROADBAND FOR UNSERVED AREAS ACCOUNT.**

`(a) Account Established-

`(1) IN GENERAL- There shall be, within the universal service fund established pursuant to section 254, a separate account to be known as the `Broadband for Unserved Areas Account'.

`(2) PURPOSE- The purpose of the Account is to provide financial assistance for the deployment of broadband service to unserved areas throughout the United States.

`(b) Implementation-

`(1) IN GENERAL- Within 180 days after the date of enactment of the Internet and Universal Service Act of 2006, the Commission shall issue rules establishing--

`(A) guidelines for determining which areas may be considered to be unserved areas for purposes of this section;

`(B) criteria for determining which facilities-based providers of



broadband service, and which projects, are eligible for support from the Account;

`(C) procedural guidelines for awarding assistance from the Account on a merit-based and competitive basis;

`(D) guidelines for application procedures, accounting and reporting requirements, and other appropriate fiscal controls for assistance made available from the Account; and

`(E) a procedure for making funds in the Account available among the several States on an equitable basis.

`(2) SATELLITE SERVICE-

`(A) ELIGIBILITY OF PROVIDER- A satellite service provider shall be considered to be a facility-based provider eligible for support from the Account.

`(B) ELIGIBILITY OF CPE PROJECTS- The deployment of satellite customer premises equipment may be considered to be a project eligible for support from the Account.

`(C) DESIGNATION OF LIGHTLY SERVED AREAS- The availability of broadband service by satellite in an area shall not preclude the designation of that area as an unserved area if the Commission determines that subscribership to satellite service in the area is de minimis.

`(D) MULTIPLE AREAS WITHIN STATE- For purposes of this section, there may be more than 1 unserved area within a State.

`(3) REPORT- The Commission shall transmit an annual report to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce making recommendations for an increase or decrease, if necessary, in the amounts credited to the account under this section.

`(c) LIMITATIONS-

`(1) ANNUAL AMOUNT- Amounts obligated or expended under subsection (b) for any fiscal year may not exceed \$500,000,000.

`(2) USE OF FUNDS- To the extent that the full amount in the account is not obligated for financial assistance under this section within a fiscal year, any unobligated funds shall be used to support universal service under section 254.

`(3) SUPPORT LIMITED TO FACILITIES-BASED SINGLE PROVIDER PER UNSERVED AREA- Assistance under this section may be provided only to--

`(A) facilities-based providers of broadband service; and

`(B) 1 facility-based provider of broadband service in any unserved area.

`(d) Application With Sections 214, 254, and 410-

`(1) Section 214(e)- Section 214(e) shall not apply to the Broadband for Unserved Areas Account.

`(2) SECTION 254- Section 254 shall be applied to the Broadband for Unserved Areas Account--

`(A) by disregarding--

`(i) subsections (a) and (e) thereof; and

`(ii) any other provision thereof determined by the Commission to be inappropriate or inapplicable to implementation of this section; and

`(B) by reconciling, to the maximum extent feasible and in accordance with guidelines prescribed by the Commission, the implementation of this section with the provisions of subsections (h) and (l) thereof.

`(3) SECTION 410- Section 410 shall not apply to the Broadband for Unserved Areas Account.

`(e) Broadband Service Defined-

`(1) IN GENERAL- In this section, except to the extent revised by the Commission under paragraph (2), the term 'broadband service' means any service used for transmission of information of a user's choosing with a transmission speed of at least 500 kilobits per second in at least 1 direction, regardless of the transmission medium or technology employed, that connects to the public Internet for a fee directly--

`(A) to the public; or

`(B) to such classes of users as to be effectively available directly to the public.

` (2) ANNUAL REVIEW OF TRANSMISSION SPEED- The Commission shall review the transmission speed component of the definition in subparagraph (A) no less frequently than once each year and revise that component as appropriate.'

## **SEC. 253. ELIGIBILITY GUIDELINES.**

Section 214(e) (47 U.S.C. 214(e)), as amended by section 251, is amended by adding at the end the following:

` (8) ELIGIBILITY GUIDELINES- A common carrier may not be designated as an eligible communications carrier (as defined in paragraph (7)(D)(ii)) subsection unless it--

` (A) provides a 5-year plan demonstrating how high-cost universal service support will be used to improve its coverage, service quality, or capacity in every wire center for which it seeks designation and expects to receive universal service;

` (B) demonstrates its ability to remain functional in emergency situations;

` (C) demonstrates that it will satisfy consumer protection and service quality standards;

` (D) offers local usage plans comparable to those offered by the incumbent local exchange carrier in the areas for which it seeks designation; and

` (E) acknowledges that it may be required to provide equal access if all other eligible telecommunications carriers in the designated service area relinquish their designations pursuant to paragraph (4) of this subsection.'

## **SEC. 254. PRIMARY LINE.**

Section 214(e) (47 U.S.C. 214(e)), as amended by section 253, is amended by adding at the end the following:

` (9) PRIMARY LINE- In implementing the requirements of this Act with respect to the distribution and use of Federal universal service support the Commission shall not limit such distribution and use to a single connection or primary line, and all residential and business lines served by an eligible telecommunications carrier shall be eligible for Federal universal service support.'

**SEC. 255. PHANTOM TRAFFIC.**

Section 254 (47 U.S.C. 254) is amended by adding at the end the following:

`(i) NETWORK TRAFFIC IDENTIFICATION ACCOUNTABILITY STANDARDS-

`(1) NETWORK TRAFFIC IDENTIFICATION STANDARDS- A provider of voice communications services (including an IP-enabled voice service provider) shall ensure that all traffic that originates on its network contains sufficient information to allow for traffic identification by other communications service providers that transport, transit, or terminate such traffic, including information on the identity of the originating provider, the calling and called parties, and such other information as the Commission deems appropriate.

`(2) NETWORK TRAFFIC IDENTIFICATION RULEMAKING- The Commission, in consultation with the States, shall initiate a single rulemaking no later than 180 days after the date of enactment of the Internet and Universal Service Act of 2006 to establish rules and enforcement provisions for traffic identification.

`(3) NETWORK TRAFFIC IDENTIFICATION ENFORCEMENT- The Commission shall adopt clear penalties, fines, and sanctions for insufficiently labeled traffic.'

**SEC. 256. RANDOM AUDITS.**

Section 214(e) (47 U.S.C. 214(e)), as amended by section 254, is amended by adding at the end the following:

`(10) AUDITS- Each State commission that designates an eligible communications provider (as defined in paragraph (7)(D)(ii) and the Commission, with respect to eligible communications carriers designated by it, shall provide for random periodic audits of each such carrier with respect to its receipt and use of universal service support and its relative cost to provide service compared to other, similarly situated, universal service recipients based on their respective study areas or service areas.'

**SEC. 257. WASTE, FRAUD, AND ABUSE.**

The Federal Communications Commission, in consultation with the Administrator of the Universal Service Administrative Company, shall--

(1) ensure the integrity and accountability of all programs established under section 254(h) of the Communications Act of 1934 (47 U.S.C. 254

(h)); and

(2) not later than 180 days after the date of enactment of this Act, establish rules--

(A) identifying appropriate fiscal controls and accountability standards that shall be applied to the Schools and Libraries Program under section 254(h);

(B) including a memorandum of understanding, or including contractual relationships, as the Commission determines appropriate, defining the administrative structure and processes by which the Universal Service Administrative Company administers the Schools and Libraries Program under section 254(h);

(C) creating performance goals and measures for the Schools and Libraries Program under section 254(h), such goals and measures shall be used by the Commission to determine--

(i) how efficiently and cost-effectively funds are spent in supporting the telecommunications needs of schools and libraries; and

(ii) areas for improved operations; and

(D) establishing appropriate enforcement actions, including imposition of sanctions on applicants and vendors who repeatedly and knowingly violate program rules set forth in section 254(h), such as debarment from the program for individuals convicted of crimes or held civilly liable for actions taken in connection with the Schools and Libraries Program.

### **TITLE III--STREAMLINING FRANCHISING PROCESS**

#### **SEC. 301. SHORT TITLE.**

This title may be cited as the 'Video Competition and Savings for Consumers Act of 2006'.

#### **Subtitle A--Updating the 1934 Act and Leveling the Regulatory Playing Field**

#### **SEC. 311. APPLICATION OF TITLE VI TO VIDEO SERVICES AND VIDEO SERVICE PROVIDERS.**

(a) TERMINOLOGY- Title VI (47 U.S.C. 521 et seq.), except for section 602

(47 U.S.C. 522), is amended--

- (1) by striking 'cable operator' and 'cable operators' each place they appear and inserting 'video service provider' or 'video service providers', as appropriate;
- (2) by striking 'cable service' and 'cable services' each place they appear and inserting 'video service' or 'video services', respectively;
- (3) by striking 'cable' each place it appears, except the second place it appears in section 624(i), and inserting 'video service';
- (4) by striking 'operator' each place it appears and inserting 'provider';
- (5) by striking 'cassette' each place it appears; and
- (6) by striking 'tape' each place it appears and inserting 'copy'.

(b) HEADINGS- Title VI (47 U.S.C. 521 et seq.) is amended--

- (1) by striking the heading for title VI and inserting '**TITLE VI--VIDEO SERVICES**';
- (2) by striking the heading for part II and inserting '**PART II--USE OF VIDEO SERVICES; RESTRICTIONS**';
- (3) by striking the heading for part III and inserting '**PART III--FRANCHISING**'; and
- (4) striking '**CABLE**' in the heading for sections 633 and 640 and inserting '**VIDEO SERVICE**'.

(c) Regulations-

- (1) NEW REGULATIONS- Within 120 days after the date of enactment of this Act, the Commission shall issue regulations to implement sections 603, 612, 621, and 622 of the Communications Act of 1934, as amended by this Act.
- (2) UPDATING EXISTING REGULATIONS- Within 120 days after the date of enactment of this Act, the Commission shall issue, as necessary, updated regulations needed under title VI or other provisions of the Communications Act of 1934 to reflect the amendments made by this Act.

## **SEC. 312. PURPOSE; FRANCHISE APPLICATIONS; SCOPE.**

(a) PURPOSE- Section 601 (47 U.S.C. 521) is amended to read as follows:

**SEC. 601. PURPOSE.**

It is the purpose of this title to establish a comprehensive Federal legal framework for the franchising of video services that use public rights-of-way.'

(b) FRANCHISE APPLICATION; SCOPE- Part I of title VI (47 U.S.C. 521 et seq.) is amended by adding at the end the following:

**SEC. 603. FRANCHISE APPLICATIONS.**

(a) In General-

(1) 30-day process- Except as otherwise provided in this subsection, a franchising authority shall grant a franchise to provide video service within its franchise area to a video service provider within 30 calendar days after receiving a franchise application from the video service provider that is complete except for--

(A) the franchise fee, as provided by section 622;

(B) the number of public, educational, or governmental use channels required by section 611;

(C) any fee that may be assessed under section 622(b)(5); and

(D) the point of contact for the franchising authority.

(2) STANDARDIZED APPLICATION FORM- A video service provider shall use the standard franchise application form promulgated by the Commission under section 612.

(3) RESPONSIBILITIES OF FRANCHISE AUTHORITY- Within 15 calendar days after receiving a franchise application under paragraph (1), a franchising authority may--

(A) complete the application form by providing the information described in subparagraphs (A), (B), (C) and (D) of paragraph (1) in a manner that is consistent with the requirements of this title; and

(B) return the completed application to the video service provider.

(4) ACCEPTANCE OF TERMS- A franchising agreement shall take effect

on the date on which the completed franchise application is received by the applicant under paragraph (3)(B) unless the applicant notifies the franchising authority within 15 calendar days after receipt of the completed franchise application form that the terms provided are not accepted.

` (5) EXCEPTION- This subsection does not require a franchise authority to approve or complete an application from a video service provider if a franchise held by that provider has been revoked under section 625(b) or 640 by the franchise authority.

` (b) DEEMED APPROVAL- Except as provided in subsection (a)(5), if a franchising authority fails to act on a franchise application that meets the requirements of paragraphs (1) and (2) of subsection (a) within the 30-day period, the franchise application shall be deemed to be granted--

` (1) effective on the 31st day after the franchising authority received the application;

` (2) for a term of 15 years;

` (3) with a franchise fee equal to the lesser of--

` (A) the fee paid by the cable operator with the most subscribers offering cable service in the franchise area; or

` (B) 5 percent of gross revenue (determined under section 622); and

` (4) with an obligation to provide the number of public, educational, or governmental use channels required by section 611.

` (c) PROCEDURE- If an application is not granted within 30 days after its receipt by a franchising authority because of subsection (a)(5), the applicant may avail itself of the procedures in section 635 of this Act.

#### **` SEC. 604. NO EFFECT ON STATE LAWS OF GENERAL APPLICABILITY.**

` Nothing in this title is intended to affect State or local laws of general applicability for all businesses, except to the extent that such laws are inconsistent with this title.

#### **` SEC. 605. DIRECT BROADCAST SATELLITE SERVICE.**

` No State or local government may regulate direct broadcast satellite



services (as that term is used in section 335 of this Act).'

### **SEC. 313. STANDARD FRANCHISE APPLICATION FORM.**

Section 612 (47 U.S.C. 532) is amended to read as follows:

### **SEC. 612. STANDARD FRANCHISE AGREEMENT FORM.**

' Within 30 days after the date of enactment of the Video Competition and Savings for Consumers Act of 2006, the Commission shall promulgate a standard franchise agreement form, the use of which by franchising authorities shall be mandatory. The franchise application form shall include blank spaces to be filled in by the video service provider and the franchising authority, as appropriate, for--

- ' (1) the name of the video service provider;
- ' (2) the name and business address of each director and principal executive officers;
- ' (3) a point of contact for the video service provider;
- ' (4) a point of contact for the franchising authority;
- ' (5) the fees;
- ' (6) the period during which the franchising agreement shall be in effect;
- ' (7) the public, educational, or governmental programming to be provided;
- ' (8) the physical location of the headend; and
- ' (9) a description of the video service to be provided.'

### **SEC. 314. DEFINITIONS.**

(a) IN GENERAL- Section 602 (47 U.S.C. 522) is amended--

- (1) by striking 'cable system' in paragraphs (1) and (9) and inserting 'video service system';
- (2) by striking 'regulation);' in paragraph (4) and inserting 'regulation) or its equivalent (as determined by the Commission).';

(3) by inserting after paragraph (11) the following:

`(11A) `headend' means the headend of a cable system or video service system.';

(4) by inserting after paragraph (12) the following:

`(12A) `institutional network' means a communication network that is constructed or operated by a video service provider cable operator and that is generally available only to subscribers who are not residential subscribers.';

(5) by striking `cable operator' in paragraph (14) and inserting `video service provider';

(6) by inserting after paragraph (16) the following:

`(16A) `satellite carrier' means an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission and operates in the Fixed-Satellite Service under part 25 of title 47 of the Code of Federal Regulations or the Direct Broadcast Satellite Service under part 100 of title 47 of the Code of Federal Regulations, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.';

(7) by striking `cable service' in paragraph (17) and inserting `video service';

(8) by striking `cable operator' each place it appears in paragraph (17) and inserting `video service provider'; and

(9) by inserting after paragraph (20) the following:

`(24) VIDEO SERVICE- The term `video service' means--

`(A) video programming;

`(B) interactive on demand services; or

`(C) other programming services.

`(25) VIDEO SERVICE PROVIDER- The term `video service provider'--

`(A) means a provider of video service that utilizes a public right-of-way in the provision of such service, including a cable operator; but

`(B) does not include--

`(i) a satellite carrier;

`(ii) any person providing video programming using radio communication directly to the recipient's premises; or

`(iii) any provider of commercial mobile service (as defined in section 332(d)).'.

(b) STYLISTIC CONSISTENCY- Section 602 (47 U.S.C. 622), as amended by subsection (a), is amended--

(1) by striking `title--' and inserting `title:';

(2) by redesignating paragraphs (1) through (20) as paragraphs (1) through (23);

(3) by striking the semicolon at the end of each such paragraph and inserting a period; and

(4) by inserting after the designation of each such paragraph--

(A) a heading, in a form consistent with the form of the heading of paragraphs (24) and (25), as added by subsection (a) of this section consisting of the term defined by such paragraph, or the first term so defined in the paragraph defines more than 1 term; and

(B) the words `The term'.

### **Subtitle B--Streamlining the Provision of Video Services**

## **SEC. 331. FRANCHISE REQUIREMENTS AND RELATED PROVISIONS.**

(a) GENERAL FRANCHISE REQUIREMENTS- Section 621 (47 U.S.C. 541) is amended--

(1) by striking subsection (a) and inserting the following:

`(a) In General-

` (1) AWARD OF FRANCHISE- A franchising authority may not--

` (A) grant an exclusive franchise; or

` (B) grant a franchise for a term shorter than 5 years or longer than 15 years.

` (2) Preservation of local government power to manage public rights-of-way; easements-

` (A) IN GENERAL- Nothing in this title affects the authority of a State or local government to apply its laws or regulations governing the use of the public rights of way in a manner that is reasonable, competitively neutral, nondiscriminatory, and consistent with State statutory police powers, including permitting, payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages to ensure compliance with such laws and regulations.

` (B) Limitations on permitting fees-

` (i) IN GENERAL- A State or local government may not--

` (I) impose a permitting fee on a video service provider that exceeds the estimated direct costs incurred by the State or local government in issuing the permit;

` (II) impose any conditions for market entry or use this section as a barrier to entry by a video service provider; or

` (III) take any action that would delay the provision of video services by a video service provider in a local franchise area.

` (ii) RECONCILIATION OF OVERCHARGES- Within 30 days after any re-estimate of estimated direct costs for purposes of clause (i)(I) that--

` (I) requires a reduction in the permitting fee, the State or local government shall refund the excess, if any, to the video service provider; or

` (II) results in an increase in the permitting fee, the video service provider shall pay the difference between the amount paid and the increased fee to the State or local government.

`(C) TIMELY ACTION REQUIRED- In managing the public rights-of-way a State or local government that issues permits or licenses for use of the public rights-of-way shall act upon any such request for use in a timely manner.

`(D) NEW ROADS- Nothing in this section shall affect the ability of a State or local government to impose reasonable limits on access to public rights-of-way associated with newly constructed roads.

`(E) PREVENTION OF ABUSE OF POWER- If the Commission determines in a proceeding brought by a video service provider to enforce this subsection that a franchising authority abused the authority provided by this section in violation of subparagraph (B), the Commission may award reasonable attorneys' fees and Commission costs to the video service provider.'; and

(2) by striking paragraph (1) of subsection (b) and inserting `(1) Except to the extent provided in subsection (f), a video service provider may not provide video service without a franchise.'

(b) FRANCHISE FEE- Section 622 (47 U.S.C. 542) is amended--

(1) by striking subsections (a) and (b) and inserting the following:

`(a) IN GENERAL- A franchising authority may impose and collect a franchise fee from a video service provider that provides video services within the local franchise area of that authority.

`(b) Amount-

`(1) IN GENERAL- The franchise fee imposed by a franchising authority under subsection (a) for any 12-month period may not exceed 5 percent of the video service provider's gross revenue derived in such period. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes.

`(2) PREPAID OR DEFERRED PAYMENT ARRANGEMENTS- Nothing in this subsection prohibits a franchising authority and a video service provider from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis, except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

`(3) FRANCHISING AUTHORITY AND VIDEO SERVICE PROVIDER AGREEMENTS- Nothing in this section precludes a State or local

government and a video service provider from entering into a voluntary commercial agreement, whereby in consideration for a mutually agreed upon reduction in the franchise fee under paragraph (1), the video service provider makes available to the local unit of government services, equipment, capabilities, or other valuable consideration.

`(4) PEG and institutional network financial support-

`(A) IN GENERAL- A video service provider with a franchise under this section for a franchise area may be required to pay an amount equal to not more than 1 percent of the video service provider's gross revenue in the franchise area to the franchising authority for the support of public, educational, and governmental use and institutional networks. The payment shall be assessed and collected in a manner consistent with this section.

`(B) EXISTING FRANCHISE INSTITUTIONAL NETWORKS- A franchising authority may require a cable operator to continue to provide any institutional network provided by that cable operator before executing a franchise agreement under this title.

`(C) INCREMENTAL COSTS- If the incremental cost of operating an institutional network under subparagraph (B) is less than 1 percent of the video service provider's gross revenue, the video service provider may deduct the incremental cost of operating the institutional network from the contribution required under subparagraph (A). The franchising authority shall reimburse the video service provider for the amount by which the incremental cost of operating such institutional network exceeds any fee required under subparagraph (A).

`(D) ADJUSTMENT- Every 15 years after the commencement of a franchise granted after April 30, 2006, a franchising authority may require a video service provider to increase the channel capacity designated for public, educational, or governmental use, and the channel capacity designated for such use on any institutional networks required under subparagraph (A). The increase may not exceed the greater of--

`(i) 1 channel; or

`(ii) 10 percent of the public, educational, or governmental channel capacity required of the video service provider before the required increase.'; and

(2) by striking subsections (d) through (h) and inserting the following:

`(d) Other Taxes, Fees, and Assessments Not Affected-

`(1) IN GENERAL- Nothing in this section shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation.

`(2) GENERALLY APPLICABLE TAXES, FEES, AND ASSESSMENTS- Nothing in this section shall be construed to modify, impair, or supersede any Federal, State, or local tax, fee, or assessment, or other charges that are--

`(A) applicable to services other than video service; or

`(B) generally applicable (including any such tax, fee, assessment, or charge imposed on both utilities and video service providers or their services other than a tax, fee, assessment, or charge that is unduly discriminatory against video service providers or video service subscribers).

`(3) TELECOMMUNICATIONS SERVICES- Nothing in this section is intended to modify, impair, or supersede the ability of any State to impose a tax, fee, or assessment (including any such tax, fee, or assessment that is imposed by the State and remitted to its political subdivisions) that is--

`(A) measured by the sales price of a telecommunications service and required to be paid by all telecommunications service providers or their customers (including video service providers) on a nondiscriminatory basis; and

`(B) in lieu of any compensation or other charge for using or occupying the public rights-of-way to provide telecommunications service, including the franchise fee authorized by this section.

`(e) ANNUAL REVIEW-

`(1) AUDIT PROCEDURE- A franchising authority that believes that it is not receiving the full amount of the video service fee imposed under this section may petition its State commission to commence an audit to ensure compliance with the definition of gross revenue and the calculation of fees under this section. The State commission shall coordinate audits to the maximum extent possible to avoid unnecessary duplication and cost on carriers.

`(2) REIMBURSEMENT OF FRANCHISING AUTHORITY FOR SUBSTANTIAL DEFICIENCIES- If there is a final determination, after the dispute resolution procedures under subsection (f) have been completed, that

the video service provider has underpaid the franchise fee imposed under this section by 5 percent or more for the 12-month period that was the subject of the review, the video service provider shall reimburse the franchising authority for the reasonable costs associated with the review. Those costs include any reasonable amount paid by the franchising authority to an independent third party for conducting the review other than any amount paid to an independent third party under a contingency fee arrangement.

` (3) STATUTE OF LIMITATIONS- A franchising authority may not request a review under paragraph (1) for any 12-month period ending more than 36 months before the date on which the request is submitted.

` (f) Dispute Resolution Procedure-

` (1) NOTICE; 30-DAY PERIOD- If there is a dispute between a franchising authority and a video service provider over the amount or payment of the fee authorized by this section that has not been resolved between the parties in a reasonable period of time under normal business procedures, the aggrieved party may give the other party written notice of intent to initiate the dispute resolution procedure provided by this subsection. Within 30 calendar days after the notice has been received by the second party, representatives of each party with authority to settle the dispute shall meet at a mutually agreed upon time and place to attempt to negotiate a resolution of the dispute.

` (2) 60-day period; commission complaint procedure-

` (A) IN GENERAL- If the dispute has not been resolved within 60 calendar days after the notice has been received by the second party, either party may file a complaint with the Commission.

` (B) INFORMATION PROVIDED IN THE COURSE OF NEGOTIATIONS- For the purpose of any adjudication by the Commission under this subsection, information provided by either party to the other in negotiations under subparagraph (A) shall be treated as compromise and settlement negotiations for purposes of the Federal Rules of Evidence.

` (C) STATUTE OF LIMITATIONS- Notwithstanding subparagraph (A), no complaint may be filed with the Commission under this paragraph more than 3 years after the end of the quarter to which the disputed amount relates, unless the 3-year period is extended by written agreement between the video service provider and the local government franchising authority.

` (D) PROCEDURAL REQUIREMENTS- The Commission shall adopt



rules establishing procedures for handling complaints under this paragraph, which shall require that--

` (i) the complaint be heard by an administrative law judge;

` (ii) any decision of the administrative law judge be directly reviewable by the Commission upon the request of either party;

` (iii) any review by the Commission be limited to the record before the administrative law judge;

` (iv) the complaint be treated as a restricted proceeding under subpart H of part 1 of the Commission's regulations (47 C.F.R. part 1, subpart H); and

` (v) any review of the Commission's decision shall be brought as provided in section 402(a) of this Act.

` (g) GAAP STANDARDS- For purposes of this section, all financial determinations and computations shall be made in accordance with generally accepted accounting principles except as otherwise provided.

` (h) DEFINITIONS- In this section:

` (1) FRANCHISE FEE- The term `franchise fee'--

` (A) includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a video service provider or subscriber, or both, solely because of their status as such; but

` (B) does not include--

` (i) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and video service providers or their services but not including a tax, fee, or assessment which is unduly discriminatory against video service providers or subscribers);

` (ii) any fee that is required by the franchise under section 622(b);

` (iii) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

`(iv) any fee imposed under title 17, United States Code.

`(2) GROSS REVENUE-

`(A) IN GENERAL- The term 'gross revenue' means all consideration of any kind or nature including cash, credits, property, and in-kind contributions (services or goods) received by a video service provider from the provision of broadband video service within a local franchise area including--

`(i) all charges and fees paid by subscribers for the provision of video service, including fees attributable to video service when that service is sold individually or as part of package, bundle, or functionally integrated with services other than video service; and

`(ii) revenue received by a video service provider as compensation for carriage of video programming on the provider's system.

`(B) AFFILIATES- The gross revenue of a video service provider includes gross revenue of an affiliate to the extent the exclusion of the affiliate's gross revenue would have the effect of permitting the video service provider to evade the payment of franchise fees which would otherwise be paid by that video service provider for video services provided within the local franchise area of the franchising authority imposing the fee.

`(C) REVENUE FROM BUNDLED OR FUNCTIONALLY INTEGRATED SERVICE- In the case of a video service that is bundled or functionally integrated with other services, capabilities, or applications, the portion of the video service provider's revenue attributable to such other services, capabilities, or applications shall be included in gross revenue unless the video service provider can reasonably identify the division or exclusion of such revenue from its books and records kept in the regular course of business.

`(D) EXCLUSIONS- Gross revenue of a video service provider (or an affiliate to the extent otherwise included in the gross revenue of the video service provider under subparagraph (B)) does not include--

`(i) any revenue not actually received, even if billed, such as bad debts net of any recoveries of bad debts;

`(ii) refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not excluded under clause (i);

` (iii) subject to subparagraph (C), any revenues received by a video service provider or its affiliates from the provision of services or capabilities other than video service, including--

` (I) voice, Internet access, or other broadband-enabled applications; and

` (II) services, capabilities, and applications that are sold or provided as part of a package or bundle of services or capabilities, or that are functionally integrated with video service;

` (iv) any revenues received by a video service provider or its affiliates for the provision of directory or Internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing;

` (v) any amounts attributable to the provision of video services to subscribers at no charge, including the provision of such services to public institutions without charge;

` (vi) any revenue derived from home shopping channels;

` (vii) any revenue forgone from the provision of video service at no charge to any person other than forgone revenue exchanged for trades, barters, services, or other items of value;

` (viii) any tax, fee, or assessment of general applicability imposed on a subscriber, subscription, or subscription-related transaction by Federal, State, or local government that is required to be collected by the video service provider and remitted to the taxing authority, including sales taxes, use taxes, and utility user taxes;

` (ix) any revenue from the sale of capital assets or surplus equipment;

` (x) the reimbursement by programmers for marketing costs actually incurred by a video service provider for the introduction of new programming; or

` (xi) any revenue from the sale of video services for resale to the extent that the purchaser certifies in writing that it will--

` (I) resell the service; and

`(II) pay any applicable franchise fee with respect thereto.'.

## **SEC. 332. RENEWAL; REVOCATION.**

Part II of title VI (47 U.S.C. 541 et seq.) is amended--

(1) by striking section 623 and redesignating sections 624 and 624A as sections 623 and 624, respectively; and

(2) by striking sections 625 and 626 and inserting the following:

### **` SEC. 625. RENEWAL; REVOCATION.**

`(a) RENEWAL- A video service provider may submit a written application for renewal of its franchise to a franchising authority not more than 180 days before the franchise expires. Any such application shall be made on the standard application form promulgated by the Commission under section 612 and shall be treated under section 603 in the same manner as any other franchise application.

`(b) REVOCATION- A franchising authority may revoke a video service provider's franchise to provide video services if it determines, after notice and an opportunity for a hearing, that the video service provider has willfully and repeatedly--

`(1) violated any Federal or State law, or any Commission regulation, relating to the provision of video services in the franchise area;

`(2) made false statements, or material omissions, in any filing with the Commission relating to the provision of video service in the franchise area; or

`(3) violated the rights-of-way management laws or regulations of any franchising authority in the franchise area relating to the provision of video service in the franchise area.

`(c) NOTICE; OPPORTUNITY TO CURE- A franchising authority may not revoke a franchise unless it first provides--

`(1) written notice to the video service provider of the alleged violation in which the revocation would be based; and

`(2) a reasonable opportunity to cure the violation.

`(d) FINALITY OF DECISION- Any decision of a franchising authority to

revoke a franchise under this section is final for purposes of appeal. A video service provider whose franchise is revoked by a franchising authority may avail itself of the procedures in section 635 of this Act.

`(e) PREVENTION OF ABUSE OF POWER- A franchising authority may not use this section as a barrier to entry by a video service provider. If the Commission determines, in a proceeding brought by a video service provider to enforce this subsection, that a franchising authority abused the authority provided by this section in violation of the preceding sentence, the Commission may award reasonable attorneys' fees and Commission costs to the video service provider.'

### **SEC. 333. PEG AND INSTITUTIONAL NETWORK OBLIGATIONS.**

Section 611 (47 U.S.C. 531) is amended to read as follows:

#### **` SEC. 611. CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE.**

`(a) IN GENERAL- A video service provider that obtains a franchise shall provide channel capacity for public, educational, or governmental use that is not less than the channel capacity required of the video service provider with the greatest number of public, educational, or governmental use channels in the franchise area on the effective date of that franchise. If there is no other video service provider in the franchise area on the effective date of the franchise, the video service provider shall provide the amount of channel capacity for such use as determined by Commission rule.

`(b) EDITORIAL CONTROL- Subject to section 623(b)(1), a video service provider shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section, but a video service provider may refuse to transmit any public access program or portion of a public access program which contains obscenity.

`(c) TRANSMISSION AND PRODUCTION OF PROGRAMMING-

`(1) PEG PROGRAMMING- A video service provider shall ensure that all subscribers receive any public, educational, or governmental programming carried by the video service provider within the subscriber's franchise area.

`(2) PRODUCTION RESPONSIBILITY- The production of any programming provided under this subsection shall be the responsibility of the franchising authority.

`(3) TRANSMISSION RESPONSIBILITY- The video service provider shall

be responsible for the transmission from the signal origination point (or points) of the programming, or from the point of interconnection with another video service provider already offering the public, educational, or governmental programming under paragraph (4), to the video service provider's subscribers, or any public, educational, or governmental programming produced by or for the franchising authority and carried by the video service provider pursuant to this section.

`(4) INTERCONNECTION; COST-SHARING- Unless 2 video service providers otherwise agree to the terms for interconnection and cost sharing, such video service providers shall comply with regulations prescribed by the Commission providing for--

`(A) the interconnection between 2 video service providers in a franchise area for transmission of public, educational, or governmental programming, without material degradation in signal quality or functionality; and

`(B) the reasonable allocation of the costs of such interconnection between such video service providers.

`(5) DISPLAY OF PROGRAM INFORMATION- The video service provider shall display the program information for public, educational, or governmental programming in any print or electronic program guide in the same manner in which it displays program information for other video programming in the franchise area. The video service provider shall not omit public, educational, or governmental programming from any navigational device, guide, or menu containing other video programming that is available to subscribers in the franchise area.'.

## **SEC. 334. SERVICES, FACILITIES, AND EQUIPMENT.**

Section 623 of title VI, as redesignated by section 332, is amended--

(1) by striking subsections (a), (b), (c), (e), and (h) and redesignating subsections (d), (f), (g), and (i) as subsections (a) through (d), respectively; and

(2) by inserting 'or wire' after 'cable' in subsection (d), as redesignated.

## **SEC. 337. SHARED FACILITIES.**

Part III of title VI (47 U.S.C. 541 et seq.) is amended--

(1) by striking section 627 and redesignating sections 628 (after its

amendment by section 402) and 629 as sections 626 and 627, respectively; and

(2) by adding at the end the following:

**SEC. 628. ACCESS TO PROGRAMMING FOR SHARED FACILITIES.**

(a) IN GENERAL- A video service programming vendor in which a video service provider has an attributable interest may not deny a video service provider with a franchise under this title access to video programming solely because that video service provider uses a headend for its video service system that is also used, under a shared ownership or leasing agreement, as the headend for another video service system.

(b) VIDEO SERVICE PROGRAMMING VENDOR DEFINED- The term 'video service programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of video programming that is primarily intended for direct receipt by video service providers for retransmission to their video service subscribers.'

**SEC. 338. CONSUMER PROTECTION AND CUSTOMER SERVICE.**

Section 632 (47 U.S.C. 552) is amended to read as follows:

**SEC. 632. CONSUMER PROTECTION AND CUSTOMER SERVICE.**

(a) Regulations-

(1) IN GENERAL- Not later than 120 days after the date of enactment of the Video Competition and Savings for Consumers Act of 2006, the Commission, after receiving comments from interested parties, including franchising authorities and consumer representatives, shall promulgate regulations, which may include penalties, with respect to customer service and consumer protection requirements for video service providers.

(2) EFFECTIVE DATE OF REGULATIONS- The regulations required by subsection (a) shall take effect 60 days after the date on which a final rule is promulgated by the Commission.

(b) STATE COMMISSION AUTHORITY- A State commission shall have the authority to enforce regulations promulgated under subsection (a).

(c) FRANCHISING AUTHORITY STANDING- A franchising authority shall have standing to file a complaint, otherwise initiate an enforcement proceeding, or intervene in a proceeding on behalf of consumers in its franchise area under

the regulations promulgated under subsection (a).'

### **SEC. 339. REDLINING.**

Part IV of title VI (47 U.S.C. 551 et seq.) is amended by adding at the end the following:

### **` SEC. 642. REDLINING.**

` (a) IN GENERAL- A video service provider may not deny access to its video service to any group of potential residential video service subscribers because of the income, race, or religion of that group.

` (b) ENFORCEMENT- This section shall be enforced by the Commission through a complaint-initiated adjudication process. A complaint may be filed by a resident of the franchising area who is aggrieved by a violation of subsection (a) or by a franchising authority on behalf of residents of its franchise area.

` (c) REMEDIES- If the Commission determines that a video service provider has violated subsection (a), it--

` (1) shall ensure that the video service provider extends access to any group denied access in violation of subsection (a);

` (2) may assess a civil penalty in such amount as may be authorized under State law for the franchising area in which the violation occurred for violation of its antidiscrimination laws; and

` (3) may revoke a video service provider's franchise to provide video services if it determines, after notice and an opportunity for a hearing, that the video service provider has willfully and repeatedly violated this section.'

### **Subtitle C--Miscellaneous and Conforming Amendments**

### **SEC. 351. MISCELLANEOUS AMENDMENTS.**

(a) MUNICIPAL OPERATORS- Section 621(f) (47 U.S.C. 541(f)) is amended to read as follows:

` (f) MUNICIPAL OPERATORS- No provision of this title shall be construed to prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by the franchising authority.'



(b) PROCEDURE- Section 622(b) (47 U.S.C. 542(b)), as amended by section 331(a) of this Act, is further amended--

(1) by redesignating paragraphs (3) and (4) as paragraphs (4) and (5), respectively; and

(2) by inserting after paragraph (2) the following:

`(3) REQUIRED SHOWING IN LITIGATION- In any lawsuit challenging the amount of the franchise fee imposed under this subsection, the franchising authority shall be required to demonstrate that the rate structure reflects all costs of the franchise fees.'.

(c) SUNSET- Section 626(c)(5) (47 U.S.C. 546), as redesignated by section 334, is amended--

(1) by striking `10 years after the date of enactment of this section,' and inserting `on October 5, 2012,'; and

(2) by striking `last year of such 10-year period,' and inserting `12-month period ending on that date,'.

(d) UPDATING- Section 613 is amended--

(1) by striking `July 1, 1984,' in subsection (g) and inserting `the date of enactment of the Communications, Consumer's Choice, and Broadband Deployment of 2006'; and

(2) by striking subsection (a) and redesignating subsections (c) through (h) as subsections (a) through (f), respectively.

(e) REPEAL- Section 617 (47 U.S.C. 537) is repealed.

(f) ENFORCEMENT- Section 634(i) (47 U.S.C. 554(i)) is amended--

(1) by striking paragraph (1); and

(2) by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

(g) RESTRUCTURING PART IV- Part IV of title VI (47 U.S.C. 551 et seq.) is amended--

(1) by striking sections 635A, 636, and 637; and

(2) by redesignating sections 638, 639, 640, 641, and 642 (as added by section 339 of this Act) as sections 636, 637, 638, 639, and 640

respectively.

(h) CONFORMING AMENDMENTS FOR RETRANSMISSION-

(1) Section 325(b) (47 U.S.C. 325(b)) is amended--

(A) by striking 'cable system' in paragraph (1) and inserting 'video service provider'; and

(B) by inserting 'The term 'video service provider' has the meaning given it in section 602(25) of this Act.' after 'title.' in the matter following subparagraph (E) of paragraph (2).

(2) Section 336(b) (47 U.S.C. 336(b)) is amended by striking 'section 614 or 615 or be deemed a multichannel video programming distributor for purposes of section 628;' and inserting 'section 614 or 615;'.

**Subtitle D--Effective Dates and Transition Rules.**

**SEC. 381. EFFECTIVE DATES; PHASE-IN.**

(a) In General-

(1) 6-month delay- Except as provided in paragraph (2), the amendments made by this Act (the Video Competition and Savings for Consumers Act of 2006) shall take effect 180 days after the date of enactment of this Act.

(2) INITIATION OF CERTAIN PROCEEDINGS- Notwithstanding paragraph (1), the Federal Communications Commission shall initiate any proceeding required by title VI of the Communications Act of 1934, as amended by this Act, or made necessary by such amendment as soon as practicable after the date of enactment of this Act.

(b) Application to Existing Franchise Agreements-

(1) IN GENERAL- Except as provided in paragraph (2), the provisions of title VI of the Communications Act of 1934, as amended by this Act, shall not apply to a franchise agreement in effect on the date of enactment of this Act between a franchising authority and a video service provider before the expiration date of the agreement, as determined without regard to any renewal or extension of the agreement. The provisions of title VI of that Act, as in effect on the day before the date of enactment of this Act shall continue to apply to any such franchise agreement as provided by subsection (c) until the earlier of--

(A) the expiration date of the agreement; or

(B) that date on which a new franchise agreement that replaces the existing franchise agreement takes effect.

(2) Competition trigger-

(A) NOTIFICATION OF EXISTING FRANCHISEE REQUIRED- If a franchising authority receives an application from a video service provider to provide video service in an area in which cable service is provided under an existing franchise agreement, it shall notify any cable operator providing cable service in that area.

(B) NEW FRANCHISE AGREEMENT SUPERSEDES EXISTING AGREEMENT- Upon receipt of notice under subparagraph (A), a cable operator may submit an application for a franchise under section 603 of the Communications Act of 1934, as amended by this Act. When the franchise is granted--

(i) the terms and conditions of the new franchise agreement supersede the existing franchise agreement; and

(ii) the provisions of title VI of the Communications Act of 1934, as amended by this Act, shall apply.

(c) Limited Application of Old Title VI -

(1) IN GENERAL- Except as provided in subsection (b) or otherwise explicitly provided in new title VI, the provisions of old title VI (and all regulations, rulings, waivers, orders, and franchise agreements under old title VI) shall continue in effect after the date of enactment of this Act with respect to any cable operator to which they applied before that date until the earlier of--

(A) the expiration date of the franchise agreement under which the cable operator was operating on the date of enactment of this Act; or

(B) that date on which a new franchise agreement takes effect that replaces a cable operator's franchise agreement described in subparagraph (A).

(2) DEFINITIONS- In this subsection:

(A) NEW TITLE VI- The term 'new title VI' means title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.) as amended by this Act.

(B) OLD TITLE VI- The term 'old title VI' means title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.) as in effect on the day before the date of enactment of this Act.

#### **TITLE IV--VIDEO CONTENT**

##### **SEC. 401. SHORT TITLE.**

This title may be cited as the 'Video Content Act'.

#### **Subtitle A--Sports Freedom**

##### **SEC. 401. SHORT TITLE.**

This subtitle may be cited as the 'Sports Freedom Act of 2006'.

##### **SEC. 402. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.**

(a) IN GENERAL- Section 628 (47 U.S.C. 548), before its redesignation by section 337 of this Act, is amended to read as follows:

##### **' SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.**

' (a) PURPOSE- The purpose of this section is--

' (1) to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market;

' (2) to increase the availability of MVPD programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming; and

' (3) to spur the development of communications technologies.

' (b) PROHIBITION- 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 or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing MVPD programming or satellite broadcast programming to subscribers or consumers.

' (c) REGULATIONS REQUIRED-

` (1) PROCEEDING REQUIRED- Not later than 180 days after the date of enactment of the Sports Freedom Act of 2006, the Commission shall prescribe regulations to specify particular conduct that is prohibited by subsection (b), in order to promote--

` (A) the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market; and

` (B) the continuing development of communications technologies.

` (2) MINIMUM CONTENTS OF REGULATION- The regulations required under paragraph (1) shall--

` (A) establish effective safeguards to prevent an MVPD which has an attributable interest in an MVPD programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, MVPD programming or satellite broadcast programming to any unaffiliated MVPD;

` (B) prohibit discrimination by an MVPD programming vendor in which an MVPD has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of MVPD programming or satellite broadcast programming among or between cable systems, cable operators, or other MVPDs, or their agents or buying groups, except that an MVPD programming vendor in which an MVPD has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

` (i) imposing reasonable requirements for--

` (I) creditworthiness;

` (II) offering of service; and

` (III) financial stability and standards regarding character and technical quality;

` (ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of MVPD programming or satellite broadcast programming;

` (iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other

direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

` (iv) entering into an exclusive contract that is permitted under subparagraph (D);

` (C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for MVPD programming or satellite broadcast programming between an MVPD and an MVPD programming vendor or satellite broadcast programming vendor, that prevent an MVPD from obtaining such programming from any MVPD programming vendor in which an MVPD has an attributable interest or any satellite broadcast programming vendor in which an MVPD has an attributable interest for distribution to persons in areas not served by an MVPD as of the date of enactment of the Sports Freedom Act of 2006; and

` (D) with respect to distribution to persons in areas served by an MVPD, prohibit exclusive contracts for MVPD programming or satellite broadcast programming between an MVPD and an MVPD programming vendor in which an MVPD has an attributable interest or a satellite broadcast programming vendor in which an MVPD has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

` (3) PREEMPTION AND RESCHEDULING OF CHILDREN'S PROGRAMS- Nothing in this section shall be construed in a manner that limits the discretion of a licensee of a local television broadcast station to preempt or to reschedule programming specifically designed to serve educational and informational needs of children in order to air timely coverage of news or sporting events.

` (4) LIMITATIONS-

` (A) GEOGRAPHIC LIMITATIONS- Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

` (B) APPLICABILITY TO SATELLITE RETRANSMISSIONS- Nothing in this section shall apply--

` (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast

programming; or

` (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

` (C) EXCLUSION OF INDIVIDUAL VIDEO PROGRAMS- Nothing in this section shall apply to a specific individual video program produced by an MVPD for local distribution by that MVPD and not made available directly or indirectly to unaffiliated MVPDs, if--

` (i) all other video programming carried on a programming channel or network on which the individual video program is carried, is made available to unaffiliated MVPDs pursuant to paragraph (2)(D); and

` (ii) such specific individual video program is not the transmission of a sporting event.

` (D) MVPD SPORTS PROGRAMMING- The prohibition set forth in paragraph (2)(D), and the rules adopted by the Commission pursuant to that paragraph, shall apply to any MVPD programming that includes the transmission of live sporting events, irrespective of whether an MVPD has an attributable interest in the MVPD programming vendor engaged in the production, creation, or wholesale distribution of such MVPD programming.

` (5) PUBLIC INTEREST DETERMINATIONS ON EXCLUSIVE CONTACTS- In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider with respect to the effect of such contract on the distribution of video programming in areas that are served by an MVPD--

` (A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

` (B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

` (C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new MVPD programming;

` (D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution

market; and

`(E) the duration of the exclusive contract.

`(6) SUNSET PROVISION- The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of the Sports Freedom Act of 2006, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

`(d) ADJUDICATORY PROCEEDING-

`(1) IN GENERAL- An MVPD aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.

`(2) REQUEST FOR PRODUCTION OF AGREEMENTS- In any proceeding commenced under paragraph (1), the Commission shall request from a party, and the party shall produce, such agreements between the party and a third party relating to the distribution of MVPD programming that the Commission believes to be relevant to its decision regarding the matters at issue in such adjudicatory proceeding.

`(3) CONFIDENTIALITY TO BE MAINTAINED- The production of any agreement under paragraph (2) and its use in a Commission decision in the adjudicatory proceeding under paragraph (1) shall be subject to such provisions ensuring confidentiality as the Commission may by regulation determine.

`(e) REMEDIES FOR VIOLATIONS-

`(1) REMEDIES AUTHORIZED- Upon completion of an adjudicatory proceeding under subsection (d), the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to an aggrieved MVPD.

`(2) ADDITIONAL REMEDIES- The remedies provided under paragraph (1) are in addition to any remedy available to an MVPD under title V or any other provision of this Act.

`(f) PROCEDURES-

`(1) IN GENERAL- The Commission shall prescribe regulations to implement this section.



` (2) CONTENT OF REGULATIONS- The regulations required under paragraph (1) shall--

` (A) provide for an expedited review of any complaints made pursuant to this section, including the issuance of a final order terminating such review not later than 120 days after the date on which the complaint was filed;

` (B) establish procedures for the Commission to collect such data as the Commission requires to carry out this section, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section; and

` (C) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

` (g) REPORTS- The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

` (h) EXEMPTIONS FOR PRIOR CONTRACTS-

` (1) IN GENERAL- Nothing in this section shall affect--

` (A) any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990; or

` (B) any contract that grants exclusive distribution rights to any person with respect to MVPD programming that is not satellite cable programming and that was entered into on or before July 1, 2003, except that the provisions of subsection (c)(2)(C) shall apply for distribution to persons in areas not served by an MVPD.

` (2) LIMITATION ON RENEWALS-

` (A) SATELLITE CABLE PROGRAMMING CONTRACTS- A contract pertaining to satellite cable programming or satellite broadcast programming that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of the Sports Freedom Act of 2006 shall not be exempt under paragraph (1).

` (B) MVPD PROGRAMMING CONTRACTS- A contract pertaining to MVPD programming that is not satellite cable programming that

was entered into on or before July 1, 2003, but that is renewed or extended after the date of enactment of the Sports Freedom Act of 2006 shall not be exempt under paragraph (1).

`(i) DEFINITIONS- In this section:

`(1) MVPD- The term `MVPD' means multichannel video programming distributor.

`(2) MVPD PROGRAMMING- The term `MVPD programming' includes the following:

`(A) DIRECT RECEIPT- Video programming primarily intended for the direct receipt by MVPDs for their retransmission to MVPD subscribers (including any ancillary data transmission).

`(B) ADDITIONAL PROGRAMMING-

`(i) IN GENERAL- Additional types of programming content that the Commission determines in a rulemaking proceeding to be completed not later than 120 days from the date of enactment of the Sports Freedom Act of 2006, as of the time of such rulemaking, of a type that is--

`(I) primarily intended for the direct receipt by MVPDs for their retransmission to MVPD subscribers, regardless of whether such programming content is--

`(aa) digital or analog;

`(bb) compressed or uncompressed;

`(cc) encrypted or unencrypted; or

`(dd) provided on a serial, pay-per-view, or on demand basis; and

`(II) without regard to the end user device used to access such programming or the mode of delivery of such programming content to MVPDs.

`(ii) CONSIDERATIONS- In making the determination under clause (i), the Commission shall consider the effect of technologies and services that combine different forms of content so that certain content or programming is not included within the meaning of MVPD programming solely because it is integrated with other content that is of a type that is primarily intended for the direct receipt by MVPDs for their

retransmission to MVPD subscribers.

`(iii) MODIFICATION OF PROGRAMMING DEFINED AS MVPD PROGRAMMING- At any time after 3 years following the conclusion of the rulemaking proceeding required under clause (ii), any interested MVPD or MVPD programming vendor may petition the Commission to modify the types of additional programming content included by the Commission within the definition of MVPD programming in light of--

`(I) the purpose of this section;

`(II) market conditions at the time of such petition; and

`(III) the factors to be considered by the Commission under clause (ii).

`(3) MVPD PROGRAMMING VENDOR- The term `MVPD programming vendor'--

`(A) means a person engaged in the production, creation, or wholesale distribution for sale of MVPD programming; and

`(B) does not include a satellite broadcast programming vendor.

`(4) SATELLITE BROADCAST PROGRAMMING- The term `satellite broadcast programming' means broadcast video programming when--

`(A) such programming is retransmitted by satellite; and

`(B) the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

`(5) SATELLITE BROADCAST PROGRAMMING VENDOR- The term `satellite broadcast programming vendor' means a fixed service satellite carrier that provides satellite broadcast programming.

`(6) SATELLITE CABLE PROGRAMMING- The term `satellite cable programming' has the same meaning as in section 705, except that such term does not include satellite broadcast programming.

`(7) SATELLITE CABLE PROGRAMMING VENDOR- The term `satellite cable programming vendor'--

`(A) means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming; but

`(B) does not include a satellite broadcast programming vendor.

`(j) COMMON CARRIERS-

`(1) IN GENERAL- Any provision that applies to an MVPD under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers.

`(2) ATTRIBUTABLE INTEREST- Any provision that applies to an MVPD programming vendor in which an MVPD has an attributable interest shall apply to any MVPD programming vendor in which such common carrier has an attributable interest.

`(3) LIMITATION- For the purposes of this subsection, 2 or fewer common officers or directors shall not by itself establish an attributable interest by a common carrier in an MVPD programming vendor (or its parent company).'

(b) EFFECTIVE DATE- Notwithstanding section 381 of this Act, the amendment made by subsection (a) shall take effect on the date of enactment of this Act.

## **SEC. 403. REGULATIONS.**

Not later than 120 days after the date of enactment of this Act, the Commission shall prescribe such regulations as may be necessary to implement section 628 of the Communications Act of 1934 (47 U.S.C. 548) as amended by section 402(a).

### **Subtitle B--National Satellite**

## **SEC. 431. AVAILABILITY OF CERTAIN LICENSED SERVICES IN NONCONTIGUOUS STATES.**

Notwithstanding any other provision of law, before the Federal Communications Commission grants a license under the Communications Act of 1934 (47 U.S.C. 151 et seq.) to a satellite carrier (as defined in section 338(k)(5) of that Act (47 U.S.C. 338(k)(5))), it shall ensure that, to the greatest extent technically feasible, if the license is granted the service provided by that carrier pursuant to the license will be available to subscribers in the noncontiguous States to the same extent as that service is available to subscribers in the contiguous States.

### **Subtitle C--Video and Audio Flag**

## **SEC. 451. SHORT TITLE.**

This subtitle may be cited as the 'Digital Content Protection Act of 2006'.

## **SEC. 452. DIGITAL VIDEO BROADCASTING.**

Part I of title III (47 U.S.C. 301 et seq.) is amended by adding at the end the following:

### **` SEC. 342. PROTECTION OF DIGITAL VIDEO BROADCASTING CONTENT.**

`(a) IN GENERAL- Within 30 days after the date of enactment of the Digital Content Protection Act of 2006, the Commission shall initiate, and within 6 months after that date conclude, a proceeding--

`(1) to implement its Report and Order in the matter of Digital Broadcast Content Protection, FCC 03-273 and its Report and Order in the matter of Digital Output Protection Technology and Recording Method Certifications, FCC 04-193; and

`(2) to modify, if necessary, such Reports and Orders to meet the requirements of subsection (b) of this section.

`(b) REQUIREMENTS- In the regulations promulgated under this section, the Commission shall permit transmission of--

`(1) short excerpts of broadcast digital television content over the Internet; and

`(2) broadcast digital television content over a home network or other localized network accessible to a limited number of devices connected to such network; or

`(C) broadcast digital television content over the Internet for distance learning purposes;

`(2) permit government bodies or accredited nonprofit educational institutions to use copyrighted work in distance education courses pursuant to the Technology, Education, and Copyright Harmonization Act of 2002 and the amendments made by that Act;

`(3) permit the redistribution of news and public affairs programming (not including sports) in which the primary commercial value depends on timeliness as determined by the broadcaster or broadcasting network; and

`(4) require that any authorized redistribution control technology and

any authorized recording method technology approved by the Commission under this Section that is publicly offered to licensees, be licensed on reasonable and nondiscriminatory terms and conditions.

`(c) REVIEW OF DETERMINATIONS- The Commission may review any such determination described in subsection (b)(3) by a broadcaster or broadcasting network if the Commission receives a bona fide complaint alleging, or otherwise has reason to believe, that the determination is inconsistent with the requirements of that subsection or the regulations promulgated thereunder.

`(d) EFFECTIVE DATE OF REGULATIONS- Regulations promulgated under this section shall take effect 12 months after the date on which the Commission issues a final rule under this section.'.

## **SEC. 453. DIGITAL AUDIO BROADCASTING.**

Part I of title III (47 U.S.C. 301 et seq.), as amended by section 452, is further amended by adding at the end the following:

## **` SEC. 343. PROTECTION OF DIGITAL AUDIO BROADCASTING CONTENT.**

`(a) IN GENERAL- Subject to section 454(d)(2) of the Digital Content Protection Act of 2006, the Commission may promulgate regulations governing the indiscriminate redistribution of audio content with respect to--

- `(1) digital radio broadcasts;
- `(2) satellite digital radio transmissions; and
- `(3) digital radios.

`(b) MONITORING ORGANIZATIONS- The Commission shall ensure that a performing rights society or a mechanical rights organization, or any entity acting on behalf of such a society or organization, is granted a license for free or for a de minimis fee to cover only the reasonable costs to the licensor of providing the license, and on reasonable, nondiscriminatory terms and conditions, to access and retransmit as necessary any content contained in such transmissions protected by content protection or similar technologies, if such licenses are for purposes of carrying out the activities of such society, organization, or entity in monitoring the public performance or other uses of copyrighted works, and such society, organization, or entity employs reasonable methods to protect any such content accessed from further distribution.'.

**SEC. 454. DIGITAL AUDIO REVIEW BOARD.**

(a) ESTABLISHMENT- The Federal Communications Commission shall establish an advisory committee, to be known as the Digital Audio Review Board.

(b) MEMBERSHIP- Members of the Board shall be appointed by the chairman of the Commission and shall include representatives nominated by--

- (1) the information technology industry;
- (2) the software industry;
- (3) the consumer electronics industry;
- (4) the radio broadcasting industry;
- (5) the satellite radio broadcasting industry;
- (6) the cable industry;
- (7) the audio recording industry;
- (8) the music publishing industry;
- (9) performing rights societies, including--

(A) the American Society of Composers, Authors and Publishers;

(B) Broadcast Music, Inc.; and

(C) SESAC, Inc.;

- (10) public interest organizations;
- (11) organizations representing recording artists, performers and musicians; and
- (12) any other group that the Commission determines will be directly affected by adoption of broadcast flag technology regulations.

(c) DUTY-

(1) IN GENERAL- Within 1 year after the date of enactment of this Act, the Board shall submit to the Commission a proposed regulation under section 343 of the Communications Act of 1934 (47 U.S.C. 343) that--

(A) represents a consensus of the members of the Board; and

(B) are consistent with fair use principles.

(2) EXTENSION OF 1-YEAR PERIOD- The Commission may extend, for good cause shown, the 1-year period described in paragraph (1) for a period of not more than 6 months, if the Commission determines that--

(A) substantial progress has been made by the Board toward the development of a proposed regulation;

(B) the members of the Board are continuing to negotiate in good faith; and

(C) there is a reasonable expectation that the Board will draft and submit a proposed regulation before the expiration of the extended period of time.

(d) COMMISSION TREATMENT OF PROPOSED REGULATION-

(1) DRAFT REGULATION- Within 30 days after the Commission receives a proposed regulation from the Board under this section the Commission shall initiate a rulemaking proceeding to implement the proposed regulation.

(2) DEFERENCE; DEADLINE- If the Board submits a proposed regulation under this section the Commission, in promulgating a regulation under section 343 of the Communications Act of 1934, shall--

(A) give substantial deference to the proposed regulation submitted by the Board; and

(B) issue a final rule not later than 6 months after the date on which the proceeding was initiated.

(3) COMMISSION ACTION IF NO BOARD ACTION- If the Board does not submit a proposed regulation to the Commission within 1 year after the date of enactment of this Act, plus any extension granted by the Commission under subsection (c), the Commission may not promulgate regulations under section 343 of the Communications Act of 1934, but shall submit recommendations to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce.

(e) ADMINISTRATIVE PROVISIONS-

(1) MEETINGS- The Board shall meet at the call of the Chairman of the



Commission.

(2) EXECUTIVE DIRECTOR- The Chairman of the Commission may, without regard to civil service laws and regulations, appoint and terminate an Executive Director and such other additional personnel as may be necessary to enable the Board to perform its duties. The Executive Director shall be compensated at a rate not to exceed the rate of pay payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(3) TEMPORARY AND INTERMITTENT SERVICES- In carrying out its duty, the Board may procure temporary and intermittent services of consultants and experts under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(4) DETAIL OF GOVERNMENT EMPLOYEES- Upon request of the Board, the head of any Federal agency may detail any Federal Government employee to the Board without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(5) ADMINISTRATIVE SUPPORT- Notwithstanding section 7(c) of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall provide the Board with such administrative and supportive services as are necessary to ensure that the Board can carry out its functions.

(6) TERMINATION- The Board shall terminate on the date on which it submits a proposed regulation to the Commission or at the discretion of the Chairman of the Federal Communications Commission.

## **TITLE V--MUNICIPAL BROADBAND**

### **SEC. 501. SHORT TITLE.**

This title may be cited as the 'Community Broadband Act'.

### **SEC. 502. STATE REGULATION OF MUNICIPAL BROADBAND NETWORKS.**

Section 706 of the Telecommunications Act of 1996 (47 U.S.C. 157 note) is amended--

- (1) by redesignating subsection (c) as subsection (h);
- (2) by inserting after subsection (b) the following:

`(c) LOCAL GOVERNMENT PROVISION OF ADVANCED COMMUNICATIONS CAPABILITY AND SERVICES- No State or local government statute, regulation, or other State or local government legal requirement may prohibit or have the effect of prohibiting any public provider from providing, to any person or any public or private entity, advanced communications capability or any service that utilizes the advanced communications capability provided by such provider.

`(d) Safeguards-

`(1) ANTIDISCRIMINATION- To the extent any public provider regulates competing providers of advanced communications capability, it shall apply its ordinances and rules and policies, including those relating to the use of public rights-of-way, permitting, performance bonding and reporting, without discrimination in favor of itself or any advanced communications capability provider that it owns or is affiliated with, as compared to other providers of such capability or services.

`(2) APPLICATION OF GENERAL LAWS- A public provider may not provide advanced communications capability to the public unless the provision of such capability by that public provider is subject to the same laws and regulations that would apply if the advanced communications capability were being provided by a nongovernmental entity.

`(3) Open access to non-governmental entities- If a public provider initiates a project to provide advanced communications capability to the public, it shall grant to a requesting non-governmental entity the right to place similar facilities in the same conduit, trenches, and locations as the public provider for concurrent or future use under the same conditions as the public provider. A public provider may limit, or refuse to grant, such a right to a requesting non-governmental entity with respect to any such conduit, trench, or location for public safety reasons.

`(4) ENFORCEMENT- Paragraphs (1), (2), and (3) preempt any State or local law, regulation, rule, or practice that is inconsistent with the requirements of those paragraphs. If the Commission determines, after notice and an opportunity for a hearing, that a State or local government is engaging in any act or practice that violates paragraph (1), (2), or (3), the Commission shall take such action as may be necessary to enjoin or restrain the State or local government from engaging in that act or practice.

`(e) PUBLIC-PRIVATE PARTNERSHIPS ENCOURAGED- If a public provider initiates a project to provide advanced communications capability to the public through a public-private partnership, the public provider shall publish a request for proposals in a publication of general circulation in the community in which the project is to be implemented and solicit bids through an open bid

process.

`(f) Protection Against Undue Government Competition With Private Sector-

`(1) NOTICE AND OPPORTUNITY TO BID REQUIRED- If a public provider decides not to initiate a project to provide advanced communications capability to the public through a public-private partnership, then, before the public provider may provide advanced communications capability to the public, it shall--

`(A) publish notice of its intention in media generally available to the public in the area in which it intends to provide such capability; and

`(B) provide an opportunity for commercial enterprises to bid for the rights to provide such capability during the 30-day period following publication of the notice.

`(2) NOTICE REQUIREMENTS- The public provider shall include in the notice required by paragraph (1) a description of the proposed scope of the advanced communications capability to be provided, including--

`(A) the services to be provided (including network capabilities);

`(B) the coverage area;

`(C) service tiers and pricing; and

`(D) any proposal for providing advanced communications capability to low-income areas, or other demographically or geographically defined areas, that are not the same as the terms, service, pricing, or tiers applicable in other portions of the coverage area.

`(3) PRIVATE SECTOR RIGHT OF FIRST REFUSAL- The public provider may proceed with the project only if, during the 30-day period, no private sector entity submits a bid to provide equivalent advanced communications capability of the same scope for the same or lower cost to consumers, as determined by a neutral third party, and demonstrates the requisite technical and financial ability to provide that capability. The neutral third party shall be selected by the public provider, and the private sector entity shall bear the costs of using a neutral third party.

`(4) APPLICATION TO EXISTING ARRANGEMENTS AND PENDING PROPOSALS- This subsection does not apply to--

`(A) any contract or other arrangement under which a public

provider is providing advanced communications capability to the public as of April 20, 2006; or

`(B) any public provider proposal to provide advanced communications capability to the public that, as of April 20, 2006--

`(i) is in the request-for-proposals process;

`(ii) is in the process of being built; or

`(iii) has been approved by referendum but is the subject of a lawsuit brought before March 1, 2006.

`(g) PUBLIC SAFETY EXEMPTION- Subsections (d), (e), and (f) of this section do not apply when a public provider provides advanced communications capabilities other than to the public or to such classes of users as effectively to be available to the public.';

(3) by adding at the end of subsection (h), as redesignated, the following:

`(3) PUBLIC PROVIDER- The term `public provider' means a State or political subdivision thereof, any agency, authority, or instrumentality of a State or political subdivision thereof, or an Indian tribe (as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), or any entity that is owned, controlled, or otherwise affiliated with a State, political subdivision thereof, agency, authority, or instrumentality, or Indian tribe.'; and

(4) by striking `CAPABILITY- ' in paragraph (1) of subsection (h), as redesignated, and inserting `CAPABILITY; ADVANCED COMMUNICATIONS CAPABILITY- ';

(5) by striking `is defined' in paragraph (2) of subsection (h), as redesignated, and inserting `and `advanced communications capability' mean'; and

(6) by striking `as' in that paragraph.

## **TITLE VI--WIRELESS INNOVATION NETWORKS**

### **SEC. 601. SHORT TITLE.**

This title may be cited as the `Wireless Innovation Act of 2006' or the `WIN Act of 2006'.

**SEC. 602. ELIGIBLE TELEVISION SPECTRUM MADE AVAILABLE FOR WIRELESS USE.**

Part I of title III (47 U.S.C. 301 et seq.), as amended by section 453 of this Act, is further amended by adding at the end the following:

**` SEC. 344. ELIGIBLE BROADCAST TELEVISION SPECTRUM MADE AVAILABLE FOR WIRELESS USE.**

` (a) IN GENERAL- Effective 270 days after the date of enactment of the WIN Act of 2006, a certified unlicensed device may use eligible broadcast television frequencies in a manner that protects licensees from harmful interference.

` (b) COMMISSION TO FACILITATE USE- Within 270 days after the date of enactment of that Act, the Commission shall adopt minimal technical and device rules in ET Docket No. 04-186 to facilitate the efficient use of eligible broadcast television frequencies by certified unlicensed devices, which shall include rules and procedures--

` (1) to protect licensees from harmful interference from certified unlicensed devices;

` (2) to require certification of unlicensed devices designed to be operated in the eligible broadcast television frequencies which shall include testing in a laboratory certified by the Commission that demonstrates (A) compliance with the requirements set forth pursuant to this paragraph and (B) that such compliance effectively protects licensees from harmful interference;

` (3) to require manufacturers of such devices to include a means of disabling or modifying the device remotely if the Commission determines that certain certified unlicensed devices may cause harmful interference to licensees;

` (4) to address immediately any complaints from licensees that a certified unlicensed device causes harmful interference including verification, in the field, of actual harmful interference; and

` (5) to limit the operation or use of certified unlicensed devices within any geographic area in which a public safety entity is authorized to operate as a primary licensee within the eligible broadcast television frequencies.

` (c) DEFINITIONS- In this section:

`(1) CERTIFIED UNLICENSED DEVICE- The term `certified unlicensed device' means a device certified under subsection (b)(2).

`(2) ELIGIBLE BROADCAST TELEVISION FREQUENCIES- The term `eligible broadcast television frequencies' means the following frequencies:

`(A) All frequencies between 54 and 72 megaHertz, inclusive.

`(B) All frequencies between 76 and 88 megaHertz, inclusive.

`(C) All frequencies between 174 and 216 megaHertz, inclusive.

`(D) All frequencies between 470 and 608 megaHertz, inclusive.

`(E) All frequencies between 616 and 698 megaHertz, inclusive.

`(3) LICENSEE- The term `licensee' means a licensee, as defined in section 3(24), that holds a license to operate in the eligible broadcast television frequencies and is operating in such frequencies in a manner that is not inconsistent with its license.'

## **TITLE VII--DIGITAL TELEVISION**

### **SEC. 701. ANALOG AND DIGITAL TELEVISION SETS AND CONVERTER BOXES; CONSUMER EDUCATION AND REQUIREMENTS TO REDUCE THE GOVERNMENT COST OF THE CONVERTER BOX PROGRAM.**

(a) Consumer Education Requirements- Section 330 (47 U.S.C. 330) is amended--

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following new subsection:

`(d) Consumer Education Requirements Regarding Analog Receivers-

`(1) REQUIREMENTS FOR MANUFACTURERS- The manufacturer of any analog television set manufactured in the United States or shipped in interstate commerce shall--

`(A) place the appropriate removable label described in paragraph (4) on the screen of such television set; and

`(B) display the consumer information required by paragraph (5)

on the outside of the retail packaging of the television set--

` (i) in a clear and conspicuous manner; and

` (ii) in a manner that cannot be removed.

` (2) REQUIREMENTS FOR IN-STORE RETAILERS- Not later than 60 days after the conclusion of the rulemaking proceeding required under paragraph (5), each in-store retailer shall place adjacent to television sets that such retailer displays for sale or rent, a separate sign containing the consumer information required by paragraph (5).

` (3) REQUIREMENTS FOR OTHER RETAILERS- Not later than 60 days after the conclusion of the rulemaking proceeding required under paragraph (5), any retailer of television sets described in paragraph (2) that sells such television sets via direct mail, catalog, or electronic means, shall include in all advertisements or descriptions of such television set the product and the information described in paragraph (4).

` (4) PRODUCT AND DIGITAL TELEVISION TRANSITION INFORMATION- The following product and digital television transition information shall be displayed as a label on analog television sets, in both English and Spanish:

#### **` CONSUMER ALERT**

` This TV only has an `analog' broadcast tuner and will require a converter box after February 17, 2009 to receive over-the-air broadcasts with an antenna because of the Nation's transition to digital broadcasting on that date as required by Federal law. It should continue to work as before with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.'.

` (5) CONSUMER INFORMATION- The consumer information required by this paragraph shall--

` (A) be developed by the Commission in a rulemaking proceeding concluded not later than 60 days after the date of enactment of the Communications, Consumer's Choice, and Broadband Deployment of 2006;

` (B) clearly explain--

` (i) what the digital transition is;

` (ii) how it serves the public interest;

` (iii) how it will benefit public safety and improve wireless services;

` (iv) how it may affect television viewers, including--

` (I) the deadline for termination of analog television broadcasting;

` (II) the options consumers have after such termination to continue to receive broadcast programming;

` (III) the information that analog-only television sets will continue to work as before with cable and satellite television systems, gaming consoles, VCRs, DVD players and recorders, camcorders, and similar products; and

` (IV) the capabilities of television sets, including digital sets;

` (v) how the transition will affect subscribers of multichannel video programming distributors (as defined in section 602); and

` (vi) that consumers who have analog-only television sets will need a converter box in order to receive over-the-air broadcast programming; and

` (C) include any additional information the Commission deems appropriate with respect to any television set.

` (6) COMMISSION OUTREACH-

` (A) IN GENERAL- Beginning within 1 month after the date of enactment of the Communications, Consumer's Choice, and Broadband Deployment of 2006, the Commission shall engage in a public outreach program to educate consumers about the digital television transition, including the consumer information described in paragraph (5).

` (B) WEBSITE- The Commission shall maintain and publicize a website, or an easily accessible page on its website, containing such consumer information as well as any links to other websites the Commission determines to be appropriate.

` (7) PUBLIC SERVICE ANNOUNCEMENTS- Each day from July 17, 2009, through February 17, 2009, each television broadcast licensee or permittee shall broadcast 2 30-second public service announcements at



such times as the Commission may require notifying the public of the digital transition and containing the address of the website provided by the Commission under paragraph (6) and such additional consumer information as the Commission may require, including the consumer information described in paragraph (5).

` (8) PENALTY- In addition to any other civil or criminal penalty provided by law, the Commission shall issue civil forfeitures for violations of the requirements of this subsection in an amount equal to not more than 3 times the amount of the forfeiture penalty established by section 503(a)(2)(A).

` (9) SUNSET- The requirements of this subsection shall cease to apply to manufacturers and retailers on April 1, 2009, unless the Commission determines that the information required to be displayed under this subsection should continue to be displayed in the public interest.'.

(b) DTV Working Group on Consumer Education, Outreach, and Technical Assistance-

(1) IN GENERAL- Within 60 days after the date of enactment of this Act, the Federal Communications Commission shall establish an advisory committee, to be known as the DTV Working Group, to consult with State and local governments, providers of low income assistance programs, educational institutions, and community groups to promote consumer outreach and to provide logistical assistance to consumers, including converter box delivery and installation.

(2) MEMBERSHIP- The Commission shall appoint to the DTV Working Group representatives of groups involved with the transition to digital television, including the Commission, the National Telecommunications and Information Administration, other Federal agencies, television broadcasters, multichannel video programming distributors, consumer electronics manufacturers and manufacturers of peripheral devices, broadcast antenna and tuner manufacturers, retail providers of consumer electronics equipment, consumers, and public interest groups (including the American Association of Retired Persons). Members of the DTV Working Group shall serve without compensation and shall not be considered Federal employees by reason of their service on the advisory committee.

(3) PURPOSES- The purposes of the DTV Working Group are--

(A) to advise the Commission in creating and implementing a national plan to inform consumers about the digital television transition as required by section 330(d)(6) of the Communications Act of 1934 (47 U.S.C. 330(d)(6));

(B) to ensure that the Commission's national plan includes, at a minimum--

(i) recommended procedures for public service announcements by broadcasters and multichannel video programming distributors, toll-free information hotlines, retail displays or notices, such as making available at the point of sale for television sets and equipment designed to receive over-the-air broadcast television signals a sufficient supply of free handbills containing that consumer information; and

(ii) recommended procedures for direct mail, billboards, and community events related to the digital television transition;

(C) to ensure that the Commission's national plan includes a requirement that all licensed broadcasters in a designated market area submit a joint plan to the Commission addressing the public outreach and public service announcement requirements required by this title to inform consumers in those areas of the transition to digital television that--

(i) includes a description of how each broadcaster will fulfill the public service announcement requirements required under section 330(d)(7) of the Communications Act of 1934 (47 U.S.C. 330(d)(7));

(ii) includes market research by each broadcaster regarding projected consumer demand for converter boxes in their designated market area; and

(iii) will be shared with retailers inside their designated market area so that such retailers may stock the appropriate amount of converter boxes to meet the needs of consumers within each designated market area; and

(D) to provide to the Commission a DTV Progress Report that reflects ongoing and planned efforts by the private sector, both nationally and in various television broadcast markets, to inform consumers about the digital transition and to minimize potential disruption to consumers attributable to the transition to digital broadcasting.

(c) REQUIREMENTS TO PROMOTE SALE OF DIGITAL TELEVISIONS AND CONVERTER BOXES-

(1) DIGITAL TUNER MANDATE- Part I of title III (47 U.S.C. 301 et seq.) is amended by inserting after section 303 the following:

**`SEC. 303A. REQUIREMENTS FOR DIGITAL TELEVISION SETS AND CERTAIN OTHER EQUIPMENT.**

`(a) IN GENERAL- It is unlawful to sell, or offer for sale, at retail after March 1, 2007, a television set with a picture screen 13 inches or greater in size (measured diagonally) unless that television set is equipped with a tuner capable of receiving and decoding digital signals.

`(b) RETAIL DEFINED- In this section, the term `retail' means the first sale for purposes other than resale.'.

(2) COMMISSION NOT TO CHANGE SCHEDULE- The Federal Communications Commission may not revise the digital television reception capability implementation schedule under section 15.117(i) of its regulations (47 C.F.R. 15.117(i)) except to conform that section to the requirements of section 303A of the Communications Act of 1934.

(3) CONVERTER BOXES- The Commission shall set the energy standards for converter boxes. Notwithstanding any other provision of law, those standards shall govern the energy standards for converter boxes sold for use in the United States. This paragraph shall not apply after May 17, 2009.

(d) Downconversion From Digital Signals to Analog Signals.

(1) DIGITAL-TO-ANALOG CONVERSION- Section 614(b)(4) (47 U.S.C. 534(b)(4)) is amended--

(A) by redesignating subparagraph (B) as subparagraph (I); and

(B) by inserting after subparagraph (A) the following:

`(B) DIGITAL VIDEO SIGNAL- With respect to any television station that is transmitting broadcast programming exclusively in the digital television service in a local market, a cable operator of a cable system in that market shall carry any digital video signal requiring carriage under this section and program-related material in the digital format transmitted by that station, without material degradation, if the licensee for that station relies on this section or section 615 to obtain carriage of the digital video signal and program-related material on that cable system in that market.

`(C) MULTIPLE FORMATS PERMITTED- A cable operator of a cable system may offer the digital video signal and program-related material of a local television station described in subparagraph (A) in any analog or digital format or formats, whether or not doing so

requires conversion from the format transmitted by the local television station, so long as--

- ` (i) the cable operator offers the digital video signal and program-related material in the converted analog or digital format or formats without material degradation; and

- ` (ii) also offers the digital video signal and program-related material in the manner or manners required by this paragraph.

` (D) TRANSITIONAL CONVERSIONS- Notwithstanding the requirement in subparagraph (B) to carry the digital video signal and program-related material in the digital format transmitted by the local television station, but subject to the prohibition on material degradation, until February 17, 2014--

- ` (i) a cable operator--

- ` (I) shall offer the digital video signal and program-related material in the format or formats necessary for such stream and material to be viewable on analog and digital televisions; and

- ` (II) may convert the digital video signal and program-related material to standard-definition digital format in lieu of offering it in the digital format transmitted by the local television station;

- ` (ii) notwithstanding clause (i), a cable operator of a cable system with an activated capacity of 550 megahertz or less--

- ` (I) shall offer the digital video signal and program-related material of the local television station described in subparagraph (A), converted to an analog format; and

- ` (II) may, but shall not be required to, offer the digital video signal and program-related material in any digital format or formats.

` (E) LOCATION AND METHOD OF CONVERSION- A cable operator of a cable system may perform any conversion permitted or required by this paragraph at any location, from the cable head-end to the customer premises, inclusive.

` (F) CONVERSIONS NOT TREATED AS DEGRADATION- Any conversion permitted or required by this paragraph shall not, by itself, be treated as a material degradation.

`(G) CARRIAGE OF PROGRAM-RELATED MATERIAL- The obligation to carry program-related material under this paragraph is effective only to the extent technically feasible.

`(H) DEFINITION OF STANDARD-DEFINITION FORMAT- For purposes of this paragraph, a stream shall be in standard definition digital format if such stream meets the criteria for such format specified in the standard recognized by the Commission in section 73.682 of its rules (47 C.F.R. 73.682) or a successor regulation.'.

(2) TIERING-

(A) AMENDMENT TO COMMUNICATIONS ACT- Clause (iii) of section 623(b)(7)(A) (47 U.S.C. 543(b)(7)(A)(iii)) is amended to read as follows:

`(iii) Any analog signal and any digital video signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.'.

(B) EFFECTIVE DATE- With respect to any television broadcast station, this subsection and the amendments made by this paragraph shall take effect on the date the broadcaster ceases transmissions in the analog television service.

(3) MATERIAL DEGRADATION- Section 614 (47 U.S.C. 534) is amended-

(A) by redesignating subsection (h) as subsection (i); and

(B) by inserting after subsection (g) the following:

`(i) MATERIAL DEGRADATION- For purposes of this section and section 615, transmission of a digital signal over a cable system in a compressed bitstream shall not be considered material degradation as long as such compression does not materially affect the picture quality the consumer receives.'.

## **SEC. 702. DIGITAL STREAM REQUIREMENT FOR THE BLIND.**

(a) RULES REINSTATED- The video description rules of the Federal Communications Commission contained in the report and order identified as Implementation of Video Description of Video Programming, Report and Order, 15 F.C.C.R. 15,230 (2000), shall, notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in Motion Picture Association of America, Inc., et al., v. Federal Communications

Commission, et al. (309 F. 3d 796, November 8, 2002), be considered to be authorized and ratified by law.

(b) CONTINUING AUTHORITY OF COMMISSION- The Federal Communications Commission--

(1) shall, within 45 days after the date of enactment of this Act, republish its video description rules contained in the report and order Implementation of Video Description of Video Programming, Report and Order, 15 F.C.C.R. 15,230 (2000);

(2) may amend, repeal, or otherwise modify such rules; and

(3) shall initiate a proceeding within 120 days after the date of enactment of this Act, and complete that proceeding within 1 year, to consider incorporating accessible information requirements in its video description rules.

(c) ACCESSIBLE INFORMATION DEFINED- In this section, the term 'accessible information' may include written information displayed on television screens during regular programming, hazardous warnings and other emergency information, local and national news bulletins, and any other information the Commission deems appropriate.

## **SEC. 703. STATUS OF INTERNATIONAL COORDINATION.**

Until the date on which the international coordination with Canada and Mexico of the DTV table of allotments is complete (as determined by the Federal Communications Commission), the Federal Communications Commission shall submit a report every 6 months on the status of that international coordination to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce.

## **TITLE VIII--PROTECTING CHILDREN**

### **SEC. 801. VIDEO TRANSMISSION OF CHILD PORNOGRAPHY.**

Section 621 (47 U.S.C. 541) is amended by adding at the end the following:

`(j) CHILD PORNOGRAPHY-

`(1) IN GENERAL- A video service provider authorized to provide video service in a local franchise area shall comply with the regulations on child pornography promulgated pursuant to paragraph (2).

(2) Regulations- Not later than 180 days after the date of enactment of the Communications, Consumer's Choice, and Broadband Deployment of 2006, the Commission shall promulgate regulations to require a video service to prevent the distribution of child pornography (as such term is defined in section 254(h)(7)(F)) over its network.'

## **TITLE IX--INTERNET NEUTRALITY**

### **SEC. 901. NEUTRAL NETWORKS FOR CONSUMERS.**

(a) IN GENERAL- Beginning 1 year after the date of enactment of this Act, the Federal Communications Commission shall report annually to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce for 5 years regarding--

- (1) the developments in Internet traffic processing, routing, peering, transport, and interconnection;
- (2) how such developments impact the free flow of information over the public Internet and the consumer experience using the public Internet;
- (3) business relationships between broadband service providers and applications and online user services; and
- (4) the development of and services available over public and private Internet offerings.

(b) DETERMINATIONS AND RECOMMENDATIONS- If the Commission determines that there are significant problems with any of the matters described in subsection (a) the Commission shall make such recommendations in its next annual report under subsection (a) as it deems necessary and appropriate to ensure that consumers can access lawful content and run Internet applications and services over the public Internet subject to the bandwidth purchased and the needs of law enforcement agencies. The Commission shall include recommendations for appropriate enforcement mechanisms but may not recommend additional rulemaking authority for the Commission.

## **TITLE X--MISCELLANEOUS**

### **SEC. 1001. COMMISSIONER PARTICIPATION IN FORUMS AND MEETINGS.**

(a) IN GENERAL- Section 5 (47 U.S.C. 155) is amended by adding at the end the following:

`(f) Meetings-

`(1) ATTENDANCE REQUIRED- Notwithstanding 552b of title 5, United States Code, and section 4(h) of this Act, the Commission may conduct a meeting that is not open to the public if the meeting is attended by--

`(A) all members of the Commission; or

`(B) at least 1 member of the political party whose members are in the minority.

`(2) VOTING PROHIBITED- The Commission may not vote or make any final decision on any matter pending before it in a meeting that is not open to the public, unless--

`(A) otherwise authorized by section 552b(b) of title 5, United States Code; or

`(B) the Commission has moved its operations outside Washington, D.C., pursuant to a Continuity of Operations Plan.

`(3) PUBLICATION OF SUMMARY- If the Commission conducts a meeting that is not open to the public under this section, the Commission shall promptly publish an executive summary describing the matters discussed at that meeting after the meeting ends, except for such matters as the Commission determines may be withheld under section 552b(c) of title 5, United States Code. This paragraph does not apply to a meeting described in paragraph (4).

`(4) QUORUM UNNECESSARY FOR CERTAIN MEETINGS- Neither section 552b of title 5, United States Code, nor paragraph (1) of this subsection applies to--

`(A) a meeting of 3 or more members of the Commission with the President, any person employed by the Office of the President, any official of a Federal, State, or local agency, a Member of Congress or his staff;

`(B) the attendance, by 3 or more members of the Commission, at a forum or conference to discuss general communications issues; or

`(C) a meeting of 3 or more members of the Commission when the Continuity of Operations Plan is in effect and the Commission is operating under the terms of that Plan.

`(5) SAVINGS CLAUSE- Nothing in this subsection shall be construed to prohibit the Commission from doing anything authorized by section 552b



of title 5, United States Code.'.

**SEC. 1002. SEVERABILITY.**

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of such provisions to any person or circumstance shall not be affected thereby.

*END*

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**S.2686**

**Title:** A bill to amend the Communications Act of 1934 and for other purposes.

**Sponsor:** [Sen Stevens](#), Ted [AK] (introduced 5/1/2006)      [Cosponsors](#) (1)

**Related Bills:** [H.R.5252](#)

**Latest Major Action:** 6/13/2006 Senate committee/subcommittee actions. Status: Committee on Commerce, Science, and Transportation. Hearings held.

Jump to: [Summary](#), [Major Actions](#), [All Actions](#), [Titles](#), [Cosponsors](#), [Committees](#), [Related Bill Details](#), [Amendments](#)

**SUMMARY AS OF:**

5/1/2006--Introduced.

Communications, Consumer's Choice, and Broadband Deployment Act of 2006 - Directs the Federal Communications Commission (FCC) to reduce the cost of calling home for U.S. military personnel stationed outside the United States in support of military operations, training exercises, or other approved purposes.

Amends the Digital Television Transition and Public Safety Act of 2005 to direct the Assistant Secretary of Commerce for Communications and Information to allocate a portion of the funds available under such Act for: (1) making interoperable communications system equipment grants for equipment that can utilize reallocated public safety spectrum; and (2) establishing and implementing a strategic technology reserves initiative.

Internet and Universal Service Act of 2006 - Requires each communications service provider to contribute to support universal service (the provision of communications service in rural, insular, and high-cost areas). Outlines requirements for distribution of universal service support to eligible communications carriers. Establishes a Broadband for Unserved Areas Account.

Video Competition and Savings for Consumers Act of 2006 - Amends the Communications Act of 1934 to provide regulatory and franchising requirements for video services and video service providers similar to those currently applicable to cable communications operators. Requires the provision of channels for public, educational, and governmental use. Prohibits the denial of video service access because of income, race, or religion.

Video Content Act - Sports Freedom Act of 2006 - Prohibits multichannel video programming distributors (MVPDs) from engaging in unfair or deceptive acts or practices to hinder or prevent other MVPDs from providing such programming or satellite broadcast programming to consumers.

Digital Content Protection Act of 2006 - Directs the FCC to implement its Report and

Order in the matters of: (1) Digital Broadcast Content Protection; and (2) Digital Output Protection Technology and Recording Method Certifications. Authorizes the FCC to promulgate regulations governing the indiscriminate redistribution of audio content with respect to digital and satellite radio broadcasts. Requires the FCC to establish the Digital Audio Review Board.

Community Broadband Act - Amends the Telecommunications Act of 1996 to prohibit any state or local government statute, regulation, or other legal requirement from prohibiting any public provider from providing, to any person or any public or private entity, advanced communications capability or any service that utilizes the advanced communications capability provided by such provider. Provides safeguards, including that a public provider may not provide advanced communications capability to the public unless the provision of such capability by that public provider is subject to the same laws and regulations that would apply if the advanced communications capability were being provided by a nongovernmental entity.

Wireless Innovation Act of 2006 or WIN Act of 2006 - Makes eligible television spectrum available for wireless use.

Outlines consumer education requirements for analog television receivers, as well as requirements to reduce the government cost of the converter box program.

Outlines requirements for: (1) the protection of children with respect to the video transmission of child pornography; and (2) the free flow of information over the Internet.

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**MAJOR ACTIONS:**

\*\*\*NONE\*\*\*

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**ALL ACTIONS:****5/1/2006:**

Sponsor introductory remarks on measure. (CR S3803-3804)

**5/1/2006:**

Read twice and referred to the Committee on Commerce, Science, and Transportation.

**5/18/2006:**

Committee on Commerce, Science, and Transportation. Hearings held.

**5/25/2006:**

Committee on Commerce, Science, and Transportation. Hearings held.

**6/13/2006:**

Committee on Commerce, Science, and Transportation. Hearings held.

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**TITLE(S):** (*italics indicate a title for a portion of a bill*)

\*\*\*NONE\*\*\*

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**COSPONSORS(1), ALPHABETICAL** [followed by Cosponsors withdrawn]: (Sort: by date)

Sen Inouye, Daniel K. [HI] - 5/1/2006

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**COMMITTEE(S):**

**Committee/Subcommittee: Activity:**

Senate Commerce, Science, and Transportation      Referral, Hearings, In Committee

---

**RELATED BILL DETAILS: (additional related bills may be identified in Status)**

**Bill:**

H.R.5252

**Relationship:**

Related bill identified by CRS

---

**AMENDMENT(S):**

\*\*\*NONE\*\*\*

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# **ATTACHMENT 16**

S 2360 IS

109th CONGRESS

2d Session

**S. 2360**

To ensure and promote a free and open Internet for all Americans.

**IN THE SENATE OF THE UNITED STATES**

**March 2, 2006**

Mr. WYDEN introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

**A BILL**

To ensure and promote a free and open Internet for all Americans.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Internet Non-Discrimination Act of 2006'.

**SEC. 2. FINDINGS.**

Congress finds the following:

(1) Since passage of the Telecommunications Act of 1996, the Internet has grown robustly. Today, Americans are changing how they access the Internet, moving from dial-up to broadband for their home connections. According to the Pew Internet and American Life Project, 72 percent of Americans use the Internet and 59 percent of Americans with home Internet have a high-speed Internet connection.

(2) Americans use the Internet for many daily activities. Over 17 percent of Americans have sold something over the Internet. Everyday, approximately 60,000,000 Americans use search engines to get access to information. 80 percent of Americans have looked online for health care information. In growing numbers, Americans are using the Internet to place phone calls, watch their favorite television shows or movies,

and play games.

(3) The growth of the Internet and its success are due in large part to the freedom that has always existed on the content and applications layer of the Internet. Innovation has thrived on this layer, as anyone with a good idea has the ability to access consumers. The continuation of this freedom is essential for future innovation.

(4) Freedom on the content and applications layer has also led to robust competition for retail goods for consumers. Consumers can shop at thousands upon thousands of retailers from their home computers, including small businesses located miles away in other towns, States, and even countries.

(5) Such freedom is leading to the development of important new entertainment offerings, on-demand video and movie purchases, Internet Protocol television, and enhanced gaming options. The entertainment options available in the future will only be limited by the bandwidth that can be used and the innovation of people all over the world.

(6) Despite the growth of the Internet and increased access to the Internet for Americans, there is very little choice in who provides them high-speed Internet access. According to an April 2005 White Paper by Harold Feld and Gregory Rose, et. al., entitled, 'Connecting the Public: The Truth About Municipal Broadband' only 2 percent of Americans get high-speed Internet access from someone other than their local phone company or cable provider. According to the Federal Communications Commission, approximately 20 percent of Americans do not have a high-speed Internet access provider that offers them service.

(7) As more and more Americans get high-speed access to the Internet without having much choice of who their provider will be, it is important that Congress protect the freedom on the Internet to ensure its continued success.

### **SEC. 3. DEFINITIONS.**

In this Act, the following definitions shall apply:

(1) APPLICATION OR SERVICE- The term 'application or service' means any information or service--

(A) by which an end-user through software or a device engages in an exchange of data or information; and

(B) conveyed over communications.

(2) BITS- The term `bits' or `binary digits' means the smallest unit of information in which form data is transported on the Internet as a single digit number in base-2.

(3) COMMISSION- The term `Commission' means the Federal Communications Commission.

(4) COMMUNICATIONS- The term `communications'--

(A) means any voice, video, or data application or service, regardless of the facilities or technology used, that--

(i) is a transmission to subscribers by use of--

(I) the public rights-of-way;

(II) spectrum;

(III) numbering or addressing resources; or

(IV) other inputs licensed or managed by a unit of local government, or a private entity working in concert with such unit of local government, for the benefit of the public;

(ii) is offered to the public, or as to such classes of subscribers as to be effectively available directly to the public, with or without a fee; and

(iii) enables an end user, as part of such service, to transmit content of their own design or choosing between or among points specified by such user;

(B) includes interactive on-demand services, as such term is defined in section 602(12) of the Communications Act of 1934 (47 U.S.C. 522(12)); and

(C) does not include cable service, as such term is defined in section 602(6) of the Communications Act of 1934 (47 U.S.C. 522 (6)).

(5) CONTENT- The term `content' means information--

(A) in the form of writing, signs, signals, pictures, and sounds of all kinds, including stored information requested by an end user; and



(B) that is generated based on the input or request of such user.

(6) PERSON- The term `person' means any natural person, partnership, firm, association, corporation, limited liability company, or other legal entity.

(7) NETWORK OPERATOR-

(A) IN GENERAL- The term `network operator' means any person who owns, operates, controls, or resells and controls any facility that provides communications directly to a subscriber.

(B) OBLIGATIONS- Any obligation imposed on a network operator by the provisions of this Act shall apply only to the extent that such network operator is engaged in providing communications.

(8) SUBSCRIBER- The term `subscriber' means any person who--

(A) is an end user of an application or service provided through communications; and

(B) consumes or provides goods provided through such application or service.

(9) TRANSMISSION COMPONENT- The term `transmission component' means the portion of communications which enables an end user to transmit content of their own design and choosing between or among points specified by such user.

#### **SEC. 4. OBLIGATIONS OF NETWORK OPERATORS.**

(a) In General- A network operator shall--

(1) not interfere with, block, degrade, alter, modify, impair, or change any bits, content, application or service transmitted over the network of such operator;

(2) not discriminate in favor of itself or any other person, including any affiliate or company with which such operator has a business relationship in--

(A) allocating bandwidth; and

(B) transmitting content or applications or services to or from a subscriber in the provision of a communications;

(3) not assess a charge to any application or service provider not on the

network of such operator for the delivery of traffic to any subscriber to the network of such operator;

(4) offer communications such that a subscriber can access, and a content provider can offer, unaffiliated content or applications or services in the same manner that content of the network operator is accessed and offered, without interference or surcharges;

(5) allow the attachment of any device, if such device is in compliance with part 68 of title 47, Code of Federal Regulations, without restricting any application or service that may be offered or provided using such a device;

(6) treat all data traveling over or on communications in a non-discriminatory way;

(7) offer just, reasonable, and non-discriminatory rates, terms, and conditions on the offering or provision of any service by another person using the transmission component of communications;

(8) provide non-discriminatory access and service to each subscriber; and

(9) post and make available for public inspection, in electronic form and in a manner that is transparent and easily understandable, all rates, terms, and conditions for the provision of any communications.

(b) Preserved Authority of Network Operators- Notwithstanding the requirements described in subsection (a), a network operator--

(1) may--

(A) take reasonable and non-discriminatory measures to protect subscribers from adware, spyware, malware, viruses, spam, pornography, content deemed inappropriate for minors, or any other similarly nefarious application or service that harms the Internet experience of subscribers, if such subscribers--

(i) are informed of the application or service; and

(ii) are given the opportunity to refuse or disable any such preventative application or service;

(B) support an application or service intended to prevent adware, spyware, malware, viruses, spam, pornography, content deemed inappropriate for minors, or any other similarly nefarious application or service that harms the Internet experience of subscribers, if such

subscribers--

(i) are informed of the application or service; and

(ii) are given the opportunity to refuse or disable any such preventative application or service; and

(C) take reasonable and non-discriminatory measures to protect the security of the network of such operator, if such operator faces serious and irreparable harm; and

(2) shall--

(A) give priority to an emergency communication;

(B) comply with any court-ordered law enforcement directive; and

(C) prevent any activity that is unlawful or illegal under any Federal, State, or local law.

## **SEC. 5. COMPLAINTS REGARDING VIOLATIONS.**

(a) Complaint- Any aggrieved party may submit a written complaint to the Commission seeking a ruling that a network operator has violated a requirement described in section 4(a).

(b) Content of Complaint- In any complaint submitted under subsection (a) an aggrieved party shall make a prima facie case that--

(1) a network operator violated a requirement of section 4(a);

(2) such violation was not a preserved authority described in subparagraph (A) or (B) of section 4(b)(1); and

(3) such violation is harmful to such party.

(c) 7-DAY ACCEPTANCE PERIOD- Not later than 7 days after the date of the submission of a complaint under subsection (a), the Commission shall issue a decision regarding its acceptance or denial of the prima facie case made by an aggrieved party.

(d) Cease and Desist-

(1) IN GENERAL- If the Commission accepts the prima facie case of an aggrieved party under subsection (c), a network operator shall be required to cease and desist the action that is the underlying basis of the complaint for the duration of the proceeding on such complaint, until

such time as the Commission may rule that a violation of a requirement of section 4(a) has not occurred.

(2) **AUTHORITY TO EXTEND CEASE AND DESIST ORDER-** The Commission shall have the authority to extend any cease and desist order to any similarly situated person as the Commission determines necessary and appropriate.

(e) **Burden of Proof-** If the Commission accepts the prima facie case of an aggrieved party under subsection (c), a network operator shall bear the burden of proving that--

(1) no violation of section 4(a) occurred; or

(2) such violation was a preserved authority described in section 4(b).

(f) **Final Decision-**

(1) **90-DAY PERIOD-** Not later than 90 days after the date of the submission of a complaint under subsection (a), the Commission shall issue a final decision regarding the request for a ruling contained in such complaint.

(2) **FAILURE TO ISSUE DECISION-** If the Commission fails to issue a decision at the expiration of the 90-day period described in paragraph (1), a violation of a requirement of section 4(a) shall be deemed to have occurred.

(g) **Rules of Construction-**

(1) **DELEGATION-**

(A) **IN GENERAL-** Nothing in this section shall be construed--

(i) to prevent the Commission from delegating any authority granted to it under this section to a relevant office or bureau pursuant to the authority granted the Commission under section 5(c) of the Communications Act of 1934 (47 U.S.C. 155 (c)); or

(ii) to limit the Commission from adopting any appropriate procedures pursuant to any other provision of law.

(B) **LIMITATION-** The rule established under subparagraph (A) shall only apply if at the expiration of the 90-day period described in subsection (f)(1)--

(i) the Commission issues a final decision that is ripe for judicial review; or

(ii) a violation of a requirement of section 4(a) shall be deemed to have occurred under subsection (f)(2).

(2) PETITION FOR RECONSIDERATION-

(A) IN GENERAL- Nothing in this section shall be construed to affect the ability of any eligible party to file a petition for reconsideration under section 405 of the Communications Act of 1934 (47 U.S.C. 405).

(B) TIMING-

(i) 90-DAY PERIOD- Not later than 90 days after the date of the submission of a petition for reconsideration under section 405 of the Communications Act of 1934 (47 U.S.C. 405), the Commission shall issue an order granting or denying such petition.

(ii) FAILURE TO ISSUE AN ORDER- If the Commission fails to issue a decision at the expiration of the 90-day period described in clause (i), the previous decision of the Commission shall be considered affirmed and final for purposes of judicial review.

(3) JUDICIAL REVIEW- Notwithstanding section 402(b) of the Communications Act of 1934 (47 U.S.C. 402(b)) and any other provision of law, any appeal of a decision of the Commission under this section shall be made to United States district court for the district in which the principle place of business of the aggrieved party is located.

(4) INTERVENTION BY THIRD PARTIES- Nothing in this section shall be construed to prevent any interested person from intervening in any appeal of a decision of the Commission in accordance with section 402 (e) of the Communications Act of 1934 (47 U.S.C. 402(e)).

## **SEC. 6. PENALTIES.**

(a) In General- If the Commission issues a ruling under section 5 that a network operator is in violation of a requirement of section 4(a), such network operator shall be subject to the penalties prescribed under section 501 of the Communications Act of 1934 (47 U.S.C. 501).

(b) Separate Violations- Each violation of a requirement of section 4(a) shall be treated as a separate incident for purposes of imposing penalties under

subsection (a).

*END*

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**S.2360**

**Title:** A bill to ensure and promote a free and open Internet for all Americans.

**Sponsor:** Sen Wyden, Ron [OR] (introduced 3/2/2006)      Cosponsors (None)

**Latest Major Action:** 3/2/2006 Referred to Senate committee. Status: Read twice and referred to the Committee on Commerce, Science, and Transportation.

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Jump to: [Summary](#), [Major Actions](#), [All Actions](#), [Titles](#), [Cosponsors](#), [Committees](#), [Related Bill Details](#), [Amendments](#)

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**SUMMARY AS OF:**

3/2/2006--Introduced.

Internet Non-Discrimination Act of 2006 - Prohibits a network operator (an entity that owns, controls, or resells any facility that provides communications services to subscribers) from, among other things: (1) interfering with any bits, content, application, or service transmitted over the operator's network; (2) discriminating in allocating bandwidth and transmitting content, applications, or services to or from a subscriber; or (3) assessing a charge to any application or service provider not on the operator's network for the delivery of traffic to any subscriber to the operator's network. Preserves authority of network operators to: (1) protect subscribers from adware, viruses, spam, content deemed inappropriate for minors, and other applications or service that harms the Internet experience of subscribers; and (2) support an application or service intended to prevent such adware, viruses, content, etc.

Allows an aggrieved party to file a complaint with the Federal Communications Commission (FCC) with respect to alleged network operator violations of such requirements. Provides deadlines with respect to complaint consideration and rulings.

Provides violator penalties.

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**MAJOR ACTIONS:**

\*\*\*NONE\*\*\*

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**ALL ACTIONS:**

**3/2/2006:**

Sponsor introductory remarks on measure. (CR [S1652](#))

**3/2/2006:**

Read twice and referred to the Committee on Commerce, Science, and Transportation. (text of measure as introduced: CR [S1652-1653](#))

**6/8/2006:**

Sponsor introductory remarks on measure. (CR [S5642-5643](#))

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**TITLE(S):** *(italics indicate a title for a portion of a bill)*

\*\*\*NONE\*\*\*

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**COSPONSOR(S):**

\*\*\*NONE\*\*\*

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**COMMITTEE(S):**

**Committee/Subcommittee: Activity:**

Senate Commerce, Science, Referral, In Committee  
and Transportation

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**RELATED BILL DETAILS:**

\*\*\*NONE\*\*\*

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**AMENDMENT(S):**

\*\*\*NONE\*\*\*

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# **ATTACHMENT 17**



HR0307

LRB095 11913 MJR 35166 r

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HOUSE RESOLUTION

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WHEREAS, The growth of a free and open Internet has provided historic advances in the realms of communication, research and economic development; and

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WHEREAS, Development of new technology is a crucial element in the transformation of Illinois' economy to meet future needs; and

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WHEREAS, To encourage broadband deployment and preserve and promote the open and interconnected nature of the Internet, Illinois consumers are entitled to access the lawful Internet content of their choice without interference by their Internet service providers; and

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WHEREAS, To encourage the transformation of Illinois' economy to meet future needs and to further the growth of Illinois' technology industry, Illinois businesses are entitled to, and require, open and unfettered Internet access; and

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WHEREAS, A free and open Internet helps to ensure the free flow of information and political and religious speech that makes for a strong and vibrant democracy; and

1 WHEREAS, The exponential growth of the Internet has  
2 flourished as a result of both the government's "hand's off"  
3 approach, ever increasing competition, as well as fierce  
4 consumer interest; and

5 WHEREAS, Regulation of the Internet may interfere with  
6 future investment and innovations benefiting the health and  
7 well-being of its end user customers; and

8 WHEREAS, Internet users should be given a choice when it  
9 comes to selecting a broadband connection that will meet their  
10 current and future needs for speed, reliability, quality of  
11 service, and capabilities not yet envisioned; and

12 WHEREAS, Broadband connections, services, and applications  
13 should continue to become more affordable and accessible to all  
14 consumers; and

15 WHEREAS, Companies that invest in broadband and  
16 broadband-related applications should be afforded the  
17 flexibility to explore fair and competitive business models and  
18 pricing plans for their products and services; and

19 WHEREAS, Mandated net neutrality regulations would impede  
20 future capital investments in the U.S. broadband  
21 infrastructure, which already lags behind its European and

1 Asian counterparts; therefore, be it

2 RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE  
3 NINETY-FIFTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that  
4 the Illinois House of Representatives calls upon the Congress  
5 of the United States of America to refrain from legislation  
6 that would regulate the Internet and to maintain today's  
7 approach that allows the competitive marketplace to drive  
8 broadband and broadband-related applications development and  
9 deployment free from governmental regulation; and be it further

10 RESOLVED, That a copy of this resolution be sent to the  
11 President of the United States, the members of the Federal  
12 Communications Commission, and to each member of the Illinois  
13 Congressional delegation.

# **ATTACHMENT 18**

# HOUSE BILL 1069

C5

7lr1143

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By: Delegates Taylor, Ali, Barkley, Barve, Benson, Bronrott, Burns, Feldman,  
Gutierrez, Holmes, Hucker, Kaiser, Kelly, N. King, Lee, Montgomery,  
Myers, Oaks, Ramirez, Rice, Ross, Vaughn, and Walker

Introduced and read first time: February 9, 2007

Assigned to: Economic Matters

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## A BILL ENTITLED

AN ACT concerning

### **Public Service Commission – Broadband Internet Service**

FOR the purpose of requiring the Public Service Commission to adopt regulations requiring certain broadband providers to submit certain reports periodically to the Commission on the deployment of certain broadband Internet service to the public; specifying the required contents of the reports; requiring the Commission to publish the reports on the Commission's website; stating the intent of the General Assembly; defining certain terms; and generally relating to broadband internet service in Maryland.

BY adding to

Article – Public Utility Companies

Section 5–107 and 5–108

Annotated Code of Maryland

(1998 Volume and 2006 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

### **Article – Public Utility Companies**

**5–107.**

#### **THE GENERAL ASSEMBLY FINDS:**

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



(1) THAT A BROADBAND PROVIDER THAT OFFERS BROADBAND INTERNET SERVICE TO THE PUBLIC SHOULD NOT PROVIDE OR SELL TO INTERNET CONTENT, APPLICATION, OR SERVICE PROVIDERS, INCLUDING ANY AFFILIATE OF A BROADBAND SERVICE COMPANY, ANY SERVICE THAT PROVIDES, DEGRADES, OR GIVES PRIORITY TO ANY PACKET SOURCE OVER THAT COMPANY'S BROADBAND INTERNET ACCESS SERVICE BASED ON ITS SOURCE, OWNERSHIP, OR DESTINATION; AND

(2) THAT THE PRINCIPLE STATED IN ITEM (1) OF THIS SECTION SHOULD APPLY TO BROADBAND SERVICE FROM THE NETWORK SIDE OF EQUIPMENT ON THE CUSTOMER'S PREMISES UP TO AND INCLUDING THE INTERNET EXCHANGE POINT CLOSEST TO THE CUSTOMER'S PREMISES.

5-108.

(A) (1) IN THIS SECTION THE FOLLOWING TERMS HAVE THE MEANINGS INDICATED.

(2) "BROADBAND PROVIDER" MEANS A PERSON WHO SELLS OR OTHERWISE PROVIDES BROADBAND SERVICE TO CUSTOMERS.

(3) (I) "BROADBAND SERVICE" MEANS AN INTERNET SERVICE WHERE DATA TRANSMISSION SPEEDS EXCEED 768 KILOBITS PER SECOND (KBPS) IN AT LEAST ONE DIRECTION.

(II) "BROADBAND SERVICE" INCLUDES:

1. DIGITAL SUBSCRIBER LINE (DSL);
2. CABLE MODEM;
3. WIRELESS BROADBAND; AND
4. BROADBAND OVER POWER LINES (BPL).

(B) THE COMMISSION SHALL ADOPT REGULATIONS THAT REQUIRE EACH BROADBAND PROVIDER TO SUBMIT A REPORT QUARTERLY TO THE

**COMMISSION ON THE DEPLOYMENT OF BROADBAND SERVICE TO THE PUBLIC THAT EXCEEDS 768 KBPS.**

**(C) THE REPORT SHALL:**

**(1) IDENTIFY WHERE THE BROADBAND PROVIDER PROVIDES BROADBAND SERVICE TO CUSTOMERS IN THE BROADBAND PROVIDER'S SERVICE TERRITORY, BROKEN DOWN BY ZIP CODE PLUS 4;**

**(2) STATE THE PERCENTAGE OF HOUSEHOLDS IN BROADBAND PROVIDER'S SERVICE TERRITORY, BROKEN DOWN BY ZIP CODE PLUS 4, THAT ARE OFFERED BROADBAND SERVICE BY THE PROVIDER AND THE PERCENTAGE OF HOUSEHOLDS THAT SUBSCRIBE TO THE PROVIDER'S BROADBAND SERVICE;**

**(3) STATE THE UPLOAD AND DOWNLOAD DATA TRANSMISSION SPEEDS THAT ARE AVAILABLE TO CUSTOMERS IN THE BROADBAND PROVIDER'S SERVICE TERRITORY, BROKEN DOWN BY ZIP CODE PLUS 4;**

**(4) STATE THE AVERAGE PRICE PER MEGABYTE OF DOWNLOAD AND UPLOAD DATA TRANSMISSION SPEEDS IN THE BROADBAND PROVIDER'S SERVICE TERRITORY, BROKEN DOWN BY ZIP CODE PLUS 4; AND**

**(5) REPORT NEW SERVICES AND UPGRADES TO EXISTING BROADBAND SERVICES IN THE BROADBAND PROVIDER'S SERVICE TERRITORY, BROKEN DOWN BY ZIP CODE PLUS 4.**

**(D) THE COMMISSION SHALL PUBLISH EACH REPORT ON THE COMMISSION'S WEBSITE.**

**SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2007.**



DOUGLAS T. GANSLER  
ATTORNEY GENERAL

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



HTB 1069  
ROBERT A. ZARNOCH  
Assistant Attorney General  
Counsel to the General Assembly

SANDRA BENSON BRANTLEY  
BONNIE A. KIRKLAND  
KATHRYN M. ROWE  
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 27, 2007

The Honorable Mary Ann Love  
165 Lowe House Office Building  
Annapolis, Maryland 21401-1991

Dear Delegate Love:

You have asked for advice concerning House Bill 1069, "Public Service Commission - Broadband Internet Service." Specifically, you have asked whether the bill would be preempted by federal law or regulations, or would violate the Commerce Clause. For the reasons that follow, it is my view that a portion of the bill, if read as a regulatory measure, would raise significant federal preemption issues, and could be found to violate the Commerce Clause.

House Bill 1069 provides that "the General Assembly finds:"

That a broadband provider that offers broadband Internet service to the public should not provide or sell to Internet content, application, or service providers, including any affiliate of a broadband service company, any service that provides, degrades, or gives priority to any packet source over that company's broadband Internet access service based on its source, ownership, or destination; and

That the principle stated in item (1) of this section should apply to broadband service from the network side of equipment on the customer's premises up to and including the Internet Exchange Point closest to the customer's premises.

Ordinarily a "finding" of the General Assembly would impose no substantive requirement on any person. However, you have asked that I assume, for purposes of your question, that this portion of the bill has substantive effect.

The bill also requires that the Public Service Commission ("the PSC") adopt regulations requiring broadband Internet providers to submit a report quarterly to the PSC that would identify where the broadband provider provides services, broken down by nine-digit zip code, the percentage of households in the provider's service territory that are offered service and the percentage that subscribe, the upload and download data transmission speeds in the provider's service territory, the average price per megabyte of download and upload data transmission speeds in the broadband provider's service territory, and new services and upgrades to existing services in the provider's

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service territory. The reports are to be published by the PSC on its website. These provisions are clearly intended to have substantive effect.

There are a variety of technologies available for the provision of broadband Internet access, the most common of which are cable and digital subscriber line ("DSL"). *BellSouth Telecommunications, Inc. v. Cinergy Communications*, 297 F.Supp.2d 946, 950 (E.D.Ky. 2003). Other ways of transmitting high-speed Internet data into homes, including terrestrial- and satellite-based wireless networks, are also emerging. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

It is generally established that state legislation may be preempted by federal law in any one of three ways. State law may be expressly preempted by the provisions of a federal statute. *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 299 (1988). It may seek to legislate in an area in which Congress has acted with such thoroughness as to indicate an intent to occupy the field. *Id.* at 300. Or it may be preempted because there is a conflict between the provisions of state and federal law such that it is impossible to comply with both, or the operation of the state law would "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* State law can also be preempted in these same ways by valid federal regulations. *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, subjects all providers of "telecommunications services" to mandatory common-carrier regulation. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Under Title II, telecommunications carriers must charge just and reasonable, nondiscriminatory rates to their customers, design their systems so that other carriers can interconnect with their communications networks, and contribute to the federal "universal service" fund. *Id.* Information service providers on the other hand, are not subject to mandatory regulation as common carriers.<sup>1</sup> *Id.*

The Communications Act itself does not expressly preempt State regulation of either telecommunications services or information services. However, it is generally seen as intended to permit the FCC to preempt the field with respect to regulation of interstate telecommunications services as common carriers. *Public Service Com'n of Maryland v. F.C.C.*, 909 F.2d 1510, 1515

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<sup>1</sup> The distinction between telecommunications services and information services is drawn by the Telecommunications Act of 1996, Pub.L. 104-104, amendments to 47 U.S.C. § 153, but reflects a similar distinction drawn by the FCC in its *Computer Inquiry* proceedings. See *Petition for Declaratory Ruling*, 19 F.C.C.R. 3307 (WC Docket No. 03-45, February 19, 2004) at fn 60 and related text. *Southwestern Bell Telephone v. Missouri Public Service Com'n*, 461 F.Supp.2d 1055 (E.D.Mo. 2006).

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February 27, 2007  
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(C.A.D.C. 1990).<sup>2</sup> Moreover, the Act states that "it is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 42 U.S.C. § 230(b)(2).

FCC regulations and statements also have not expressly preempted State regulation of broadband providers. However, it seems likely that the FCC would conclude that imposition of common carrier like requirements such as those in the first portion of House Bill 1069 would stand as an obstacle to the accomplishment of the full purposes and objectives of the FCC, and arguably those of Congress as well.

In March of 2002 the FCC issued a Declaratory Ruling concluding that broadband Internet service provided by cable companies is an information service and not a telecommunications service and therefore not subject to mandatory Title II common carrier regulation. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002). In this ruling, the Commission concluded that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." Declaratory Ruling 4802, ¶6. This ruling was upheld by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

Not long after the decision in *Brand X*, the Commission issued a similar ruling with respect to broadband Internet access provided through DSL. *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853 (September 23, 2005). The ruling expressly seeks to "[develop] a consistent regulatory framework across platforms by regulating like services in a similar functional manner," *id.* at 14855, and states that the "appropriate framework" for regulation of DSL is "one that is eligible for a lighter regulatory touch," *id.* at 14856. Specifically, the FCC determined that DSL is an information service, and that carriers would be permitted to offer the service on a common carrier basis or a non-common carrier basis. The FCC stated that this classification was consistent with the holding of *Brand X*, and also would "move closer to crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services," and "best enable" providers "to embrace a market-based approach to their business relationships with ISPs, providing the flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs." *Id.* at 14899. The FCC found insufficient evidence in the record to support a specific prohibition on blocking or otherwise denying access to any lawful Internet content, applications or services, but agreed that such limits would be inconsistent with statutory goals, and stated that they would not hesitate to take action if evidence were presented. *Id.* at 14904. Finally, the FCC found that retention of the nondiscriminatory access requirement would "[impede] deployment of innovative wireline broadband services taking into

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<sup>2</sup> Such preemption is not, however, automatic. *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1<sup>st</sup> Cir. 2006); *Verizon North Inc. v. Telnet Worldwide, Inc.*, 440 F.Supp.2d 700, 714 (W.D.Mich. 2006)

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account technological advances and consumer demand." *Id.* at 14904-14905.<sup>3</sup>

In short, both the federal statute and FCC policy strongly favor allowing the broadband market to grow without common carrier type regulations. Moreover, the FCC has expressly considered and rejected a requirement that DSL services be made available on a non-discriminatory basis to other ISPs, finding that such a requirement would impede progress in the development of the Internet. This type of intentional rejection can support a finding of conflict preemption. *Geler v. American Honda Motor Co.*, 529 U.S. 861 (2000). But the general conflict with the stated policies of Congress and of the FCC would also be likely to lead to a decision by the FCC to preempt any attempt on the part of a State to impose the type of requirements discussed in the first portion of the bill. *See Vonage Holdings Corp. v. Minnesota Public Utilities Com'n*, 290 F.Supp.2d 993 (D.Minn. 2003).

The information requirements present a somewhat different question. Such a requirement would place no restrictions on the functioning of broadband Internet services in the market, but would simply require that they make certain information available to the PSC on a quarterly basis. No provision of federal law or FCC regulation either specifically bars such a requirement or sets out any requirement or policy that information collection would necessarily impede. Moreover, the public availability of such information could arguably advance competition.

I have found no case or ruling on this specific type of information requirement, but disclosure requirements are not inherently preempted by the Act or the regulations. *See Qwest Corp. v. Scott*, 380 F.3d 367 (8<sup>th</sup> Cir. 2004) (Requirement that Qwest provide WorldCom with reports concerning the provision of certain telecommunications services). On the other hand, a request for information may be found to be preempted if the information sought is "unnecessary," or if the collection of the information would place an undue burden on the entity. *Verizon Wireless (VAW) LLC v. Sahr*, 457 F.Supp.2d 940, 956-957 (D.S.D. 2006); *see also Petition for Declaratory Ruling*, 19 F.C.C.R. 3307, 3323 (WC Docket No. 03-45, February 19, 2004). I lack the knowledge of the industry that would be necessary to make this determination. Thus, I cannot say that the reporting requirement would be preempted.

Finally, it is my view that a substantive provision implementing the policy statement of House Bill 1069 could violate the Commerce Clause. Even if the application of this provision alone would not have a significant adverse effect on interstate commerce, it is well-established that State laws that impose inconsistent state to state regulation on an area of interstate commerce will be found to violate the Commerce Clause. *Morgan v. Virginia*, 328 U.S. 373, 386 (1946); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 169 (S.D.N.Y. 1997). While not all regulations affecting

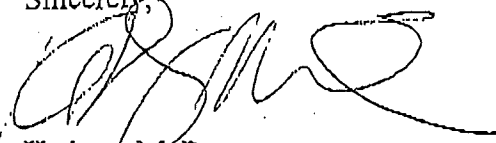
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<sup>3</sup> The PSC had already held that it lacked the authority to set rates for DSL services or otherwise regulate DSL service. *CloseCall America, Inc. v. Verizon Maryland Inc.*, 95 Md.P.S.C. 399, 2004 WL 3235313 (Case No. 8927; Order No. 79638 November 30, 2004).

The Honorable Mary Ann Love  
February 27, 2007  
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the Internet are subject to this analysis, *MaryCle v. First Choice*, 166 Md.App. 481 (2006), it is my view that market regulation of the Internet imposes this risk. See *Petition for Declaratory Ruling*, 19 F.C.C.R. 3307, 3317 (WC Docket No. 03-45, February 19, 2004).

Sincerely,



Kathryn M. Rowe  
Assistant Attorney General

KMR/kmr  
love07.wpd

From: Speaker Michael Busch [mailto:Michael.Busch@house.state.md.us]  
Sent: Wednesday, March 07, 2007 10:53 AM

Subject: RE: Illogical Net Neutrality Idea--Maryland Net Neutrality Proposal

Thank you for contacting my office to share your opinion on HB 1069, the "net neutrality bill."

In response to legislative questions regarding this bill, the Office of the Attorney General issued a letter of advice which says HB 1069 "would raise significant federal preemption issues, and could be found to violate the Commerce Clause." In other words, the Attorney General has advised us market regulation of the Internet is not within the purview of state government.

I respect your concern for protecting consumer access to a free and open internet, but this is a federal issue. I understand net neutrality legislation is currently being considered in Congress, and I encourage you to contact your federal representatives to voice your opinion on this issue.

Again, thank you for contacting my office on HB 1069.

Mike Busch

# **ATTACHMENT 19**

# HOUSE BILL No. 6456

September 12, 2006, Introduced by Reps. Nofs, Proos, Accavitti, Garfield and Hoogendyk  
and referred to the Committee on Energy and Technology.

A bill to provide for state video service authorization; to promote competition in providing video services; to ensure local control of rights-of-way; to provide for fees payable to local units of government; to provide for local programming; and to prescribe the powers and duties of certain state and local agencies and officials.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1       Sec. 1. As used in this act:

2       (a) "Cable operator" means that term as defined in 47 USC  
3       522(5).

4       (b) "Cable service" means that term as defined in 47 USC  
5       522(6).

6       (c) "Cable system" means that term as defined in 47 USC  
7       522(7).



1 (d) "Commission" means the Michigan public service commission.

2 (e) "Franchising entity" means the local unit of government  
3 that requires a franchise to offer video services.

4 (f) "Household" means a house, an apartment, a mobile home, or  
5 any other structure or part of a structure intended for residential  
6 occupancy as separate living quarters.

7 (g) "Incumbent video provider" means a cable operator serving  
8 cable subscribers or a telecommunication provider providing video  
9 services through the provider's existing telephone exchange  
10 boundaries in a particular franchise area within a local unit of  
11 government on the effective date of this act.

12 (h) "IPTV" means internet protocol television.

13 (i) "Local unit of government" means a city, village, or  
14 township.

15 (j) "Low-income household" means a household with an average  
16 annual household income of less than \$35,000.00.

17 (k) "Open video system" or "OVS" means that term as defined in  
18 47 USC 573.

19 (l) "Person" means an individual, corporation, association,  
20 partnership, governmental entity, or any other legal entity.

21 (m) "Public rights-of-way" means the area on, below, or above  
22 a public roadway, highway, street, public sidewalk, alley,  
23 waterway, or utility easements dedicated for compatible uses.

24 (n) "State video service authorization" means the  
25 authorization issued by the commission, regardless of whether the  
26 authorization is designed as a franchise, permit, license,  
27 resolution, contract, certificate, agreement, or otherwise, that

1 authorizes the providing of video services in the state.

2 (o) "Video programming" means that term as defined in 47 USC  
3 522(20).

4 (p) "Video service" means video programming, cable services,  
5 IPTV, or OVS provided through facilities located at least in part  
6 in the public rights-of-way without regard to delivery technology,  
7 including internet protocol technology. This definition does not  
8 include any video programming provided by a commercial mobile  
9 service provider defined in 47 USC 332(d).

10 (q) "Video service provider" or "provider" means an entity  
11 authorized by a state video service authorization to provide video  
12 service.

13 (r) "Video service provider fee" means the amount paid by a  
14 competitive video service provider under section 6.

15 Sec. 2. (1) An incumbent video provider after the expiration  
16 of its franchise shall not provide video services in any local unit  
17 of government without first obtaining a state video service  
18 authorization as provided under this act.

19 (2) A state video service authorization granted under this act  
20 shall constitute a franchise for purposes of 47 USC 541(b)(1). To  
21 the extent required for purposes of 47 USC 521 to 561 only, the  
22 state shall constitute the exclusive franchising authority for  
23 video service providers in this state.

24 (3) No local unit of government may require a video service  
25 provider to obtain a separate franchise or otherwise impose any fee  
26 or franchise requirement except as provided under this act. For  
27 purposes of this subsection, a franchise requirement includes,

1 without limitation, any provision regulating rates charged by video  
2 service providers or requiring video service providers to satisfy  
3 any build-out requirements or deploy any facilities or equipment.

4 (4) Except as otherwise provided under section 5, an incumbent  
5 video provider with an existing franchise to provide video service  
6 in any local unit of government in this state as of the effective  
7 date of this act is not eligible to use or rely upon a state video  
8 service authorization to provide video service under this act in  
9 any local unit of government where it has an existing franchise  
10 agreement until the expiration date of the existing franchise  
11 agreement.

12 Sec. 3. (1) On or after 60 days from the effective date of  
13 this act, an entity that seeks to provide video service in this  
14 state shall file with the commission an application for a state  
15 video service authorization.

16 (2) The application shall be in a form as approved by the  
17 commission and contain a completed affidavit submitted by the  
18 applicant and signed by an officer or general partner of the  
19 applicant affirming all of the following:

20 (a) That the applicant has filed or will timely file with the  
21 federal communications commission all forms required by that agency  
22 in advance of offering video service in this state.

23 (b) That the applicant agrees to comply with all applicable  
24 federal and state statutes and regulations.

25 (c) That the applicant agrees to comply with all valid and  
26 enforceable local regulations regarding the use and occupation of  
27 public rights-of-way in the delivery of the video service,

1 including the police powers of the local units of government in  
2 which the service is delivered.

3 (d) An exact description of the video service area footprint  
4 to be served, as identified by a geographic information system  
5 digital boundary meeting or exceeding national map accuracy  
6 standards.

7 (e) The address and telephone number of the applicant's  
8 principal place of business.

9 (f) The names of the applicant's principal executive officers  
10 and any other persons authorized to represent the applicant before  
11 the commission.

12 (g) The date on which the applicant expects to provide video  
13 services within the area identified under subdivision (d).

14 (3) The commission shall notify an applicant for a state video  
15 service authorization as to whether the applicant's application and  
16 affidavit are complete within 15 business days after the date that  
17 the application is filed. If the application or affidavit is not  
18 complete, the commission shall state in its notice the reasons the  
19 application or affidavit, or both, is incomplete. If the  
20 application and affidavit are complete, the commission shall have  
21 60 days after the submission date of a complete application and  
22 affidavit to issue the state video service authorization. If the  
23 commission does not notify the applicant regarding the completeness  
24 of the application and affidavit or issue the video service  
25 authorization within the time periods required under this  
26 subsection, the application and affidavit shall be considered  
27 complete and the state service authorization issued.

1           (4) The state video service authorization shall be in a form  
2 approved by the commission and contain all of the following:

3           (a) A grant of authority to provide video service in the  
4 service area footprint as provided in the application.

5           (b) A grant of authority to use and occupy the public rights-  
6 of-way in the delivery of the video service, subject to the laws of  
7 this state, including the police powers of the local unit of  
8 government in which the service is delivered.

9           (c) A statement that the grant of authority is subject to  
10 lawful operation of the video service by the applicant or its  
11 successor in interest.

12           (5) The state video service authorization issued by the  
13 commission is fully transferable to any successor in interest to  
14 the applicant to which is it initially granted. A notice of  
15 transfer shall be filed with the commission and the relevant local  
16 unit of government within 15 business days of the completion of the  
17 transfer.

18           (6) The state video service authorization issued by the  
19 commission may be terminated or the video service area footprint  
20 may be modified by the provider by submitting notice to the  
21 commission and the relevant local unit of government.

22           (7) If any of the information contained in the application  
23 changes, the provider shall notify the commission and the relevant  
24 local units of government within 30 days from the date the change  
25 occurs.

26           (8) The state video service authorization shall be for a  
27 period of 10 years from the date it is issued. Before the

1 expiration of the initial authorization or any subsequent renewals,  
2 the provider may apply for an additional 10-year authorization  
3 under this section.

4 (9) The commission's authority to administer this act is  
5 limited to the powers and duties explicitly provided for under this  
6 act.

7 Sec. 4. (1) A video service provider shall designate a  
8 sufficient amount of capacity on its network to provide for the  
9 same number of public, educational, and governmental access  
10 channels as are activated and provided within a local unit of  
11 government by an incumbent video provider under the terms of any  
12 franchise in effect as of the effective date of this act. For the  
13 purposes of this section, a public, educational, or governmental  
14 channel is deemed activated if it is being utilized for public,  
15 educational, or governmental programming within the local unit of  
16 government for at least 8 hours per day.

17 (2) In the event that no public, educational, and governmental  
18 channel is provided within a local unit of government not receiving  
19 any video services on the effective date of this act, a new video  
20 service provider to the local unit of government shall designate a  
21 sufficient amount of capacity on its network to provide for 1 or  
22 more public, educational, and governmental channels.

23 (3) Any public, educational, or governmental channel provided  
24 under this section that is not utilized by the local unit of  
25 government for at least 8 hours per day for 3 consecutive months  
26 may no longer be made available to the local unit of government and  
27 may be programmed at the provider's discretion. At such time as the

1 local unit of government can certify a schedule for at least 8  
2 hours of daily programming for a period of 3 consecutive months,  
3 the provider shall restore the previously reallocated channel.

4 (4) The public, educational, and governmental channels shall  
5 be carried on the basic or lowest service tier. To the extent  
6 feasible, the public, educational, and governmental channels shall  
7 not be separated numerically from other channels carried on the  
8 basic or lowest service tier and the channel number shall be the  
9 same as those used by the incumbent video provider unless  
10 prohibited by federal law.

11 (5) The local unit of government shall ensure that all  
12 transmissions, content, or programming to be retransmitted by a  
13 video service provider is provided in a manner or form that is  
14 capable of being accepted and retransmitted by a provider, without  
15 requirement for additional alteration or change in the content by  
16 the provider, over the particular network of the provider, which is  
17 compatible with the technology or protocol utilized by the provider  
18 to deliver services.

19 (6) Where technically feasible, a video service provider under  
20 this act and an incumbent video provider shall interconnect their  
21 video systems for the purpose of providing applicable programming  
22 for the respective services areas. Interconnection may be  
23 accomplished by direct cable, microwave link, satellite, or other  
24 reasonable method of connection. Video service providers and  
25 incumbent video providers shall negotiate in good faith, and  
26 incumbent video providers may not withhold interconnection.

27 (7) The local unit of government is solely responsible for all

1 content provided over designated public, educational, or  
2 governmental channels. A video service provider shall not exercise  
3 any editorial control over any programming on any channel designed  
4 for public, educational, or governmental use or on any other  
5 channel required by law or a binding agreement with the local unit  
6 of government.

7 (8) A video service provider is not subject to any civil or  
8 criminal liability for any program carried on any channel  
9 designated for public, educational, or governmental use or on any  
10 other channel.

11 (9) Except as otherwise provided in subsection (10), a  
12 provider shall provide subscribers access to the signals of the  
13 local broadcast television licensed by the federal communications  
14 commission to serve those subscribers over the air. This section  
15 does not apply to a low power station unless the station is a  
16 qualified low power station as defined under 47 USC 534(h)(2). A  
17 provider is required to only carry digital broadcast signals to the  
18 extent that a broadcast television station has the right under  
19 federal law or regulation to demand carriage of the digital  
20 broadcast signals by a cable operator on a cable system.

21 (10) To facilitate access by subscribers of a video service  
22 provider to the signals of local broadcast stations under this  
23 section, a station either shall be granted mandatory carriage or  
24 may request retransmission consent with the provider.

25 (11) A provider shall transmit, without degradation, the  
26 signals a local broadcast station delivers to the provider. A  
27 provider is not required to provide a television or radio station



1 valuable consideration in exchange for carriage.

2 (12) A provider shall not do either of the following:

3 (a) Discriminate among or between broadcast stations and  
4 programming providers with respect to transmission of their  
5 signals, taking into account any consideration afforded the  
6 provider by the programming provider or broadcast station. In no  
7 event shall the signal quality as retransmitted by the provider be  
8 required to be superior to the signal quality of the broadcast  
9 stations as received by the provider from the broadcast television  
10 station.

11 (b) Delete, change, or alter a copyright identification  
12 transmitted as part of a broadcast station's signal.

13 (13) A provider shall not be required to utilize the same or  
14 similar reception technology as the broadcast stations or  
15 programming providers.

16 (14) A provider that delivers audio or video programming to  
17 its subscribers shall include all programming providers in a  
18 subscriber programming guide, if any, that lists program schedules.

19 (15) A video service provider shall comply with all federal  
20 communications commission requirements including the distribution  
21 and notification of emergency messages over the emergency alert  
22 system.

23 Sec. 5. (1) No existing franchise agreement with a franchising  
24 entity shall be renewed or extended upon the expiration date of the  
25 agreement as of the effective date of this act.

26 (2) An incumbent video provider that holds a franchise with a  
27 franchising entity is entitled to seek a state video service

1 authorization in the area designated in the existing franchise  
2 under either of the following conditions:

3 (a) Upon the expiration of the existing franchise.

4 (b) Upon both the incumbent video provider and the franchising  
5 entity agreeing to terminate the franchise prior to the expiration  
6 date of the agreement.

7 Sec. 6. (1) Not less than 30 days before the construction or  
8 placement of equipment or the infrastructure necessary to provide  
9 video services to a local unit of government under a state video  
10 service authorization, the provider shall notify in writing the  
11 local unit of government that the provider will be offering video  
12 services within the footprint submitted to the commission under  
13 section 3(2)(d).

14 (2) Except as otherwise provided in this section, a video  
15 service provider shall calculate and pay an annual video service  
16 provider fee to each local unit of government. The fee shall be  
17 equal to 1 of the following, whichever is less:

18 (a) A percentage of gross revenues established by the local  
19 unit of government, not to exceed 5%, that has been filed with the  
20 commission under subsection (4).

21 (b) The lowest percentage of gross revenues paid to the local  
22 unit of government by any incumbent video provider.

23 (3) All fees due under this section shall be due on a  
24 quarterly basis and paid within 45 days after the close of the  
25 quarter. Each payment shall include a statement explaining the  
26 basis for the calculation of the fee.

27 (4) The commission shall annually request from each local unit

1 of government in the state the percentage of gross revenues sought  
2 under this section for the fee required under subsection (2)(a).  
3 For jurisdictions not responding, the amount shall be set at 5%.

4 (5) No fee is due under subsection (2) until the local unit of  
5 government provides supporting documentation to the commission of  
6 the percentages paid by each incumbent video provider.

7 (6) The local unit of government shall not demand any  
8 additional fees or charges from a provider and shall not demand the  
9 use of any other calculation method other than allowed under this  
10 act.

11 (7) Except as otherwise provided under subsection (8), if an  
12 incumbent video provider continues to provide video services after  
13 the expiration of an existing franchise as provided under section  
14 5, the operator shall be subject to the fees required under  
15 subsection (2)(a) or (b).

16 (8) If an incumbent video provider requests to terminate a  
17 franchise under section 5(2)(b) and the local unit of government  
18 does not consent to the termination, upon the expiration of the  
19 franchise, if the provider continues to provide video services as  
20 allowed under section 5(2)(a), the annual video service provider  
21 fee shall be as follows:

22 (a) The first 3% of gross revenues payable to the commission  
23 to be deposited in the general fund to be credited to the  
24 commission to offset the cost of administering this act.

25 (b) Any additional percentage over the amount required under  
26 subdivision (a) not to exceed 2% payable to the local unit of  
27 government. The fee required under this subdivision and subdivision

1 (a) shall not exceed the percentage established under subsection  
2 (4).

3 (c) The fee for public, educational, and governmental channels  
4 required under subsection (13) shall be payable to the local unit  
5 of government.

6 (9) For purposes of this section, "gross revenues" means all  
7 consideration of any kind or nature, including, without limitation,  
8 cash, credits, property, and in-kind contributions received by the  
9 provider from subscribers for the provision of video service by the  
10 video service provider within the jurisdiction of the local unit of  
11 government. Gross revenues shall include all of the following:

12 (a) All charges and fees paid by subscribers for the provision  
13 of video service, including equipment rental, late fees,  
14 insufficient funds fees, fees attributable to video service when  
15 sold individually or as part of a package or bundle, or  
16 functionally integrated, with services other than video service.

17 (b) Any franchise fee imposed on the provider that is passed  
18 on to subscribers.

19 (c) Compensation received by the provider for promotion or  
20 exhibition of any products or services over the video service.

21 (d) Revenue received by the provider as compensation for  
22 carriage of video programming on that provider's video service.

23 (e) All revenue derived from compensation arrangements for  
24 advertising attributable to the local franchise area.

25 (f) Any advertising commissions paid to an affiliated third  
26 party for video service advertising.

27 (10) Gross revenues do not include any of the following:

1 (a) Any revenue not actually received, even if billed, such as  
2 bad debt net of any recoveries of bad debt.

3 (b) Refunds, rebates, credits, or discounts to subscribers or  
4 a municipality to the extent not already offset by subdivision (a)  
5 and to the extent the refund, rebate, credit, or discount is  
6 attributable to the video service.

7 (c) Any revenues received by the provider or its affiliates  
8 from the provision of services or capabilities other than video  
9 service, including telecommunications services, information  
10 services, and services, capabilities, and applications that may be  
11 sold as part of a package or bundle, or functionally integrated,  
12 with video service.

13 (d) Any revenues received by the provider or its affiliates  
14 for the provision of directory or internet advertising, including  
15 yellow pages, white pages, banner advertisement, and electronic  
16 publishing.

17 (e) Any amounts attributable to the provision of video service  
18 to customers at no charge, including the provision of such service  
19 to public institutions without charge.

20 (f) Any tax, fee, or assessment of general applicability  
21 imposed on the customer or the transaction by a federal, state, or  
22 local government or any other governmental entity, collected by the  
23 provider, and required to be remitted to the taxing entity,  
24 including sales and use taxes.

25 (g) Any forgone revenue from the provision of video service at  
26 no charge to any person, except that any forgone revenue exchanged  
27 for trades, barter, services, or other items of value shall be

1 included in gross revenue.

2 (h) Sales of capital assets or surplus equipment.

3 (i) Reimbursement by programmers of marketing costs actually  
4 incurred by the provider for the introduction of new programming.

5 (j) The sale of video service for resale to the extent the  
6 purchaser certifies in writing that it will resell the service and  
7 pay a franchise fee with respect to the service.

8 (11) In the case of a video service that is bundled or  
9 integrated functionally with other services, capabilities, or  
10 applications, the portion of the video provider's revenue  
11 attributable to the other services, capabilities, or applications  
12 shall be included in gross revenue unless the provider can  
13 reasonably identify the division or exclusion of the revenue from  
14 its books and records that are kept in the regular course of  
15 business.

16 (12) Revenue of an affiliate shall be included in the  
17 calculation of gross revenues to the extent the treatment of the  
18 revenue as revenue of the affiliate has the effect of evading the  
19 payment of franchise fees which would otherwise be paid for video  
20 service.

21 (13) A video service provider shall pay to the local unit of  
22 government as support for public, education, and government  
23 programming an annual fee equal to the lesser of 1% of gross  
24 revenues, the percentage of gross revenues required of an incumbent  
25 video provider by a local unit of government, or the amount paid on  
26 a cash basis per subscriber for support for public, education, and  
27 government programming to the local unit of government by the

1 incumbent video provider with the largest number of cable service  
2 subscribers in the local unit of government. The fee shall be due  
3 on a quarterly basis, not more than 45 days after the close of the  
4 quarter for gross revenues received during the calendar quarter.  
5 The local unit of government shall provide data to the video  
6 service provider necessary to calculate the fees due under this  
7 subsection no less than 30 days before the payments of the fees are  
8 due.

9 (14) A video service provider is entitled to a credit applied  
10 toward the fees due under subsection (2) or (8) for all funds  
11 allocated to the local unit of government from annual maintenance  
12 fees paid by the provider for use of public rights-of-way under  
13 section 8 of the metropolitan extension telecommunications rights-  
14 of-way oversight act, 2002 PA 48, MCL 484.3108. The credits shall  
15 be applied on a monthly pro rata basis beginning in the first month  
16 of each calendar year in which the local unit of government  
17 receives its allocation of funds.

18 Sec. 7. (1) No more than every 24 months, a local unit of  
19 government may perform reasonable audits of the video service  
20 provider's calculation of the fees paid to the local unit of  
21 government during the preceding 24-month period only. All records  
22 reasonably necessary for the audits shall be made available by the  
23 provider at the location where the records are kept in the ordinary  
24 course of business. The local unit of government and the video  
25 service provider shall each be responsible for their respective  
26 costs of the audit. Any additional amount due verified by the local  
27 unit of government shall be paid by the provider within 30 days of

1 the local unit of government's submission of an invoice for the  
2 sum. If the sum exceeds 5% of the total fees which the audit  
3 determines should have been paid for the 24-month period, the  
4 provider shall pay the local unit of government's reasonable costs  
5 of the audit. If the audit finds that the provider has not  
6 underpaid the video service provider fee, the local unit of  
7 government shall pay the provider's reasonable costs of the audit.

8 (2) Any claims by a local unit of government that fees have  
9 not been paid as required under section 6, and any claims for  
10 refunds or other corrections to the remittance of the provider,  
11 shall be made within 3 years from the date the compensation is  
12 remitted.

13 (3) Any video service provider may identify and collect the  
14 amount of the video service provider fee as a separate line item on  
15 the regular bill of each subscriber.

16 (4) A video service provider may identify and collect the  
17 amount of the public, educational, and government programming  
18 support fee as a separate line item on the regular bill of a  
19 subscriber.

20 Sec. 8. (1) A local unit of government shall allow a state  
21 video service provider to install, construct, and maintain a  
22 communications network within a public right-of-way and shall  
23 provide the provider with open, comparable, nondiscriminatory, and  
24 competitively neutral access to the public right-of-way.

25 (2) A local unit of government may not discriminate against a  
26 video service provider to provide video service for any of the  
27 following:



1 (a) The authorization or placement of a communications network  
2 in public rights-of-way.

3 (b) Access to a building.

4 (c) A municipal utility pole attachment.

5 (3) A local unit of government may impose on a video service  
6 provider a permit fee only to the extent it imposes such a fee on  
7 incumbent video providers, and any fee shall not exceed the actual,  
8 direct costs incurred by the local unit of government for issuing  
9 the relevant permit. A fee under this section shall not be levied  
10 if the video service provider already has paid a permit fee of any  
11 kind in connection with the same activity that would otherwise be  
12 covered by the permit fee under this section or is otherwise  
13 authorized by law or contract to place the facilities used by the  
14 video service provider in the public rights-of-way or for general  
15 revenue purposes.

16 Sec. 9. (1) A video service provider that has been granted a  
17 state video service authorization may not deny access to service to  
18 any group of potential residential subscribers because of the  
19 income of the residents in the local area in which the group  
20 resides.

21 (2) A provider is considered to have complied with subsection  
22 (1) if the following conditions are met:

23 (a) Within 3 years of the date it began providing video  
24 service under this act, at least 25% of households with access to  
25 the provider's video service are low-income households.

26 (b) Within 5 years of the date it began providing video  
27 service under this act and from that point forward, at least 30% of

1 the households with access to the provider's video service are low-  
2 income households.

3 (3) A video services provider that has been granted a state  
4 video services authorization under this act shall provide access to  
5 its video service to a number of households equal to at least 35%  
6 of the households in the provider's service area within 3 years of  
7 the date it began providing video service under this act and to a  
8 number not less than 50% of these households within 5 years. The  
9 provider shall file a report with the commission no later than the  
10 5 years required by this subsection demonstrating compliance with  
11 this subsection and subsection (2).

12 (4) A video service provider may satisfy the requirements of  
13 this section through the use of alternative technology that offers  
14 service, functionality, and content, which is demonstrably similar  
15 to that provided through the provider's video service system and  
16 may include a technology that does not require the use of any  
17 public right-of-way. The technology utilized to comply with the  
18 requirements of this section shall include local public,  
19 educational, and governmental channels and messages over the  
20 emergency alert system as required under section 4.

21 (5) A video service provider may apply to the commission for a  
22 waiver of or for an extension of time to meet the requirements of  
23 this section if 1 or more of the following apply:

24 (a) The inability to obtain access to public and private  
25 rights-of-way under reasonable terms and conditions.

26 (b) Developments or buildings not being subject to competition  
27 because of existing exclusive service arrangements.

1 (c) Developments or buildings being inaccessible using  
2 reasonable technical solutions under commercial reasonable terms  
3 and conditions.

4 (d) Natural disasters.

5 (e) Factors beyond the control of the holder.

6 (6) The commission may grant the waiver or extension only if  
7 the provider has made substantial and continuous effort to meet the  
8 requirements of this section. If an extension is granted, the  
9 commission shall establish a new compliance deadline. If a waiver  
10 is granted, the commission shall specify the requirement or  
11 requirements waived.

12 (7) Notwithstanding any other provision of this act, a video  
13 service provider using telephone facilities to provide video  
14 service is not obligated to provide such service outside the  
15 provider's existing telephone exchange boundaries.

16 (8) Notwithstanding any other provision of this act, a video  
17 service provider shall not be required to comply with, and a local  
18 unit of government may not impose or enforce, any mandatory build-  
19 out or deployment provisions, schedules, or requirements.

20 Sec. 10. (1) Each provider authorized to provide video service  
21 under this act shall establish a dispute resolution process for its  
22 customers. Each provider shall maintain a local or toll-free  
23 telephone number for customer service contact.

24 (2) The commission shall establish a process to review  
25 disputes which are not resolved under subsection (1), disputes  
26 between a provider and a local unit of government, and disputes  
27 between providers.

1       (3) Each provider shall notify its customers of the resolution  
2 dispute process created under this section.

3       Sec. 11. (1) Except under the terms of a mandatory protective  
4 order, trade secrets and commercial or financial information  
5 submitted under this act to the commission or a local unit of  
6 government are exempt from the freedom of information act, 1976 PA  
7 442, MCL 15.231 to 15.246.

8       (2) If information is disclosed under a mandatory protective  
9 order, then the commission or local unit of government may use the  
10 information for the purpose for which it is required, but shall  
11 remain confidential.

12       (3) There is a rebuttable presumption that costs studies,  
13 customer usage data, marketing studies and plans, and contracts are  
14 trade secrets or commercial or financial information protected  
15 under subsection (1). The burden of removing the presumption under  
16 this subsection is with the party seeking to have the information  
17 disclosed.

18       Sec. 12. The commission shall file a report with the governor  
19 and legislature by February 1 of each year that shall include all  
20 of the following:

21       (a) The status of competition for video services in this  
22 state.

23       (b) Recommendations for legislation, if any.

24       (c) Actions taken by the commission to implement the  
25 provisions of this act.

26       (d) Information regarding all state video service  
27 authorizations granted under this act.

1       Sec. 13. (1) After notice and hearing, if the commission finds  
2   that a person has violated this act, the commission shall order  
3   remedies and penalties to protect and make whole persons who have  
4   suffered damages as a result of the violation, including, but not  
5   limited to, 1 or more of the following:

6       (a) Order the person to pay a fine for the first offense of  
7   not less than \$20,000.00 or more than \$30,000.00. For a second and  
8   any subsequent offense, the commission shall order the person to  
9   pay a fine of not less than \$30,000.00 or more than \$50,000.00.

10      (b) If the person has received a state video service  
11   authorization, revoke the authorization.

12      (c) Issue cease and desist orders.

13      (2) Notwithstanding subsection (1), a fine shall not be  
14   imposed for a violation of this act if the provider has otherwise  
15   fully complied with this act and shows that the violation was an  
16   unintentional and bona fide error notwithstanding the maintenance  
17   of procedures reasonably adopted to avoid the error. Examples of a  
18   bona fide error include clerical, calculation, computer  
19   malfunction, programming, or printing errors. An error in legal  
20   judgment with respect to a person's obligations under this act is  
21   not a bona fide error. The burden of proving that a violation was  
22   an unintentional and bona fide error is on the provider.

23      (3) If the commission finds that a party's complaint or  
24   defense filed under this section is frivolous, the commission shall  
25   award to the prevailing party costs, including reasonable attorney  
26   fees, against the nonprevailing party and their attorney.

Act No. 480  
Public Acts of 2006  
Approved by the Governor  
December 21, 2006  
Filed with the Secretary of State  
December 21, 2006  
EFFECTIVE DATE: January 1, 2007

**STATE OF MICHIGAN  
93RD LEGISLATURE  
REGULAR SESSION OF 2006**

Introduced by Reps. Nofs, Proos, Accavitti, Garfield and Hoogendyk

## **ENROLLED HOUSE BILL No. 6456**

AN ACT to provide for uniform video service local franchises; to promote competition in providing video services in this state; to ensure local control of rights-of-way; to provide for fees payable to local units of government; to provide for local programming; to prescribe the powers and duties of certain state and local agencies and officials; and to provide for penalties.

*The People of the State of Michigan enact:*

Sec. 1. (1) This act shall be known and may be cited as the "uniform video services local franchise act".

(2) As used in this act:

- (a) "Cable operator" means that term as defined in 47 USC 522(5).
- (b) "Cable service" means that term as defined in 47 USC 522(6).
- (c) "Cable system" means that term as defined in 47 USC 522(7).
- (d) "Commission" means the Michigan public service commission.
- (e) "Franchising entity" means the local unit of government in which a provider offers video services through a franchise.
- (f) "Household" means a house, an apartment, a mobile home, or any other structure or part of a structure intended for residential occupancy as separate living quarters.
- (g) "Incumbent video provider" means a cable operator serving cable subscribers or a telecommunication provider providing video services through the provider's existing telephone exchange boundaries in a particular franchise area within a local unit of government on the effective date of this act.
- (h) "IPTV" means internet protocol television.
- (i) "Local unit of government" means a city, village, or township.
- (j) "Low-income household" means a household with an average annual household income of less than \$35,000.00 as determined by the most recent decennial census.
- (k) "Open video system" or "OVS" means that term as defined in 47 USC 573.
- (l) "Person" means an individual, corporation, association, partnership, governmental entity, or any other legal entity.
- (m) "Public rights-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easements dedicated for compatible uses.

(n) "Uniform video service local franchise agreement" or "franchise agreement" means the franchise agreement required under this act to be the operating agreement between each franchising entity and video provider in this state.

(o) "Video programming" means that term as defined in 47 USC 522(20).

(p) "Video service" means video programming, cable services, IPTV, or OVS provided through facilities located at least in part in the public rights-of-way without regard to delivery technology, including internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in 47 USC 332(d) or provided solely as part of, and via, a service that enables users to access content, information, electronic mail, or other services offered over the public internet.

(q) "Video service provider" or "provider" means a person authorized under this act to provide video service.

(r) "Video service provider fee" means the amount paid by a video service provider or incumbent video provider under section 6.

Sec. 2. (1) No later than 30 days from the effective date of this act, the commission shall issue an order establishing the standardized form for the uniform video service local franchise agreement to be used by each franchising entity in this state.

(2) Except as otherwise provided by this act, a person shall not provide video services in any local unit of government without first obtaining a uniform video service local franchise as provided under section 3.

(3) The uniform video service local franchise agreement created under subsection (1) shall include all of the following provisions:

(a) The name of the provider.

(b) The address and telephone number of the provider's principal place of business.

(c) The name of the provider's principal executive officers and any persons authorized to represent the provider before the franchising entity and the commission.

(d) If the provider is not an incumbent video provider, the date on which the provider expects to provide video services in the area identified under subdivision (e).

(e) An exact description of the video service area footprint to be served, as identified by a geographic information system digital boundary meeting or exceeding national map accuracy standards. For providers with 1,000,000 or more access lines in this state using telecommunication facilities to provide video services, the footprint shall be identified in terms of entire wire centers or exchanges. An incumbent video provider satisfies this requirement by allowing a franchising entity to seek right-of-way related information comparable to that required by a permit under the metropolitan extension telecommunications rights-of-way oversight act, 2002 PA 48, MCL 484.3101 to 484.3120, as set forth in its last cable franchise or consent agreement from the franchising entity entered before the effective date of this act.

(f) A requirement that the provider pay the video service provider fees required under section 6.

(g) A requirement that the provider file in a timely manner with the federal communications commission all forms required by that agency in advance of offering video service in this state.

(h) A requirement that the provider agrees to comply with all valid and enforceable federal and state statutes and regulations.

(i) A requirement that the provider agrees to comply with all valid and enforceable local regulations regarding the use and occupation of public rights-of-way in the delivery of the video service, including the police powers of the franchising entity.

(j) A requirement that the provider comply with all federal communications commission requirements involving the distribution and notification of federal, state, and local emergency messages over the emergency alert system applicable to cable operators.

(k) A requirement that the provider comply with the public, education, and government programming requirements of section 4.

(l) A requirement that the provider comply with all customer service rules of the federal communications commission under 47 CFR 76.309(e) applicable to cable operators and applicable provisions of the Michigan consumers protection act, 1976 PA 331, MCL 445.901 to 445.922.

(m) A requirement that the provider comply with the consumer privacy requirements of 47 USC 551 applicable to cable operators.

(n) A requirement that the provider comply with in-home wiring and consumer premises wiring rules of the federal communications commission applicable to cable operators.

(o) A requirement that an incumbent video provider comply with the terms which provide insurance for right-of-way related activities that are contained in its last cable franchise or consent agreement from the franchising entity entered before the effective date of this act.

(p) A grant of authority by the franchising entity to provide video service in the video service area footprint as described under subdivision (e).

(q) A grant of authority by the franchising entity to use and occupy the public rights-of-way in the delivery of the video service, subject to the laws of this state and the police powers of the franchising entity.

(r) A requirement that the parties to the agreement are subject to the provisions of this act.

(s) The penalties provided for under section 14.

Sec. 3. (1) Before offering video services within the boundaries of a local unit of government the video provider shall enter into or possess a franchise agreement with the local unit of government as required by this act.

(2) A franchising entity shall notify the provider as to whether the submitted franchise agreement is complete as required by this act within 15 business days after the date that the franchise agreement is filed. If the franchise agreement is not complete, the franchising entity shall state in its notice the reasons the franchise agreement is incomplete.

(3) A franchising entity shall have 30 days after the submission date of a complete franchise agreement to approve the agreement. If the franchising entity does not notify the provider regarding the completeness of the franchise agreement or approve the franchise agreement within the time periods required under this subsection, the franchise agreement shall be considered complete and the franchise agreement approved.

(4) The uniform video service local franchise agreement issued by a franchising entity or an existing franchise of an incumbent video service provider is fully transferable to any successor in interest to the provider to which it is initially granted. A notice of transfer shall be filed with the franchising entity within 15 days of the completion of the transfer.

(5) The uniform video service local franchise agreement issued by a franchising entity may be terminated or the video service area footprint may be modified, except as provided under section 9, by the provider by submitting notice to the franchising entity.

(6) If any of the information contained in the franchise agreement changes, the provider shall timely notify the franchising entity.

(7) The uniform video service local franchise shall be for a period of 10 years from the date it is issued. Before the expiration of the initial franchise agreement or any subsequent renewals, the provider may apply for an additional 10-year renewal under this section.

(8) As a condition to obtaining or holding a franchise, a franchising entity shall not require a video service provider to obtain any other franchise, assess any other fee or charge, or impose any other franchise requirement than is allowed under this act. For purposes of this subsection, a franchise requirement includes, but is not limited to, a provision regulating rates charged by video service providers, requiring the video service providers to satisfy any build-out requirements, or a requirement for the deployment of any facilities or equipment.

Sec. 4. (1) A video service provider shall designate a sufficient amount of capacity on its network to provide for the same number of public, education, and government access channels that are in actual use on the incumbent video provider system on the effective date of this act or as provided under subsection (14).

(2) Any public, education, or government channel provided under this section that is not utilized by the franchising entity for at least 8 hours per day for 3 consecutive months may no longer be made available to the franchising entity and may be programmed at the provider's discretion. At such time as the franchising entity can certify a schedule for at least 8 hours of daily programming for a period of 3 consecutive months, the provider shall restore the previously reallocated channel.

(3) The franchising entity shall ensure that all transmissions, content, or programming to be retransmitted by a video service provider is provided in a manner or form that is capable of being accepted and retransmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the provider, which is compatible with the technology or protocol utilized by the provider to deliver services.

(4) A video service provider may request that an incumbent video provider interconnect with its video system for the sole purpose of providing access to video programming that is being provided over public, education, and government channels for a franchising entity that is served by both providers. Where technically feasible, interconnection shall be allowed under an agreement of the parties. The video service provider and incumbent video provider shall negotiate in good faith and may not unreasonably withhold interconnection. Interconnection may be accomplished by any reasonable method as agreed to by the providers. The requesting video service provider shall pay the construction, operation, maintenance, and other costs arising out of the interconnection, including the reasonable costs incurred by the incumbent provider.

(5) The person producing the broadcasts is solely responsible for all content provided over designated public, education, or government channels. A video service provider shall not exercise any editorial control over any programming on any channel designed for public, education, or government use.



(6) A video service provider is not subject to any civil or criminal liability for any program carried on any channel designated for public, education, or government use.

(7) Except as otherwise provided in subsection (8), a provider shall provide subscribers access to the signals of the local broadcast television station licensed by the federal communications commission to serve those subscribers over the air. This section does not apply to a low-power station unless the station is a qualified low-power station as defined under 47 USC 534(h)(2). A provider is required to only carry digital broadcast signals to the extent that a broadcast television station has the right under federal law or regulation to demand carriage of the digital broadcast signals by a cable operator on a cable system.

(8) To facilitate access by subscribers of a video service provider to the signals of local broadcast stations under this section, a station either shall be granted mandatory carriage or may request retransmission consent with the provider.

(9) A provider shall transmit, without degradation, the signals a local broadcast station delivers to the provider. A provider is not required to provide a television station valuable consideration in exchange for carriage.

(10) A provider shall not do either of the following:

(a) Discriminate among or between broadcast stations and programming providers with respect to transmission of their signals, taking into account any consideration afforded the provider by the programming provider or broadcast station. In no event shall the signal quality as retransmitted by the provider be required to be superior to the signal quality of the broadcast stations as received by the provider from the broadcast television station.

(b) Delete, change, or alter a copyright identification transmitted as part of a broadcast station's signal.

(11) A provider shall not be required to utilize the same or similar reception technology as the broadcast stations or programming providers.

(12) A public, education, or government channel shall only be used for noncommercial purposes.

(13) Subsections (7) to (11) apply only to a video service provider that delivers video programming in a video service area where the provider is not regulated as a cable operator under federal law.

(14) If a franchising entity seeks to utilize capacity designated under subsection (1) or an agreement under section 13 to provide access to video programming over 1 or more public, governmental, and education channels, the franchising entity shall give the provider a written request specifying the number of channels in actual use on the incumbent video provider's system or specified in the agreement entered into under section 13. The video service provider shall have 90 days to begin providing access as requested by the franchising entity.

Sec. 5. (1) As of the effective date of this act, no existing franchise agreement with a franchising entity shall be renewed or extended upon the expiration date of the agreement.

(2) The incumbent video provider, at its option, may continue to provide video services to the franchising entity by electing to do 1 of the following:

(a) Terminate the existing franchise agreement before the expiration date of the agreement and enter into a new franchise under a uniform video service local franchise agreement.

(b) Continue under the existing franchise agreement amended to include only those provisions required under a uniform video service local franchise.

(c) Continue to operate under the terms of an expired franchise until a uniform video service local franchise agreement takes effect. An incumbent video provider has 120 days after the effective date of this act to file for a uniform video service local franchise agreement.

(3) On the effective date of this act, any provisions of an existing franchise that are inconsistent with or in addition to the provisions of a uniform video service local franchise agreement are unreasonable and unenforceable by the franchising entity.

(4) If a franchising entity authorizes 2 or more video service providers through an existing franchise, a uniform video service local franchise agreement, or an agreement under section 13, the franchising entity shall not enforce any term, condition, or requirement of any franchise agreement that is more burdensome than the terms, conditions, or requirements contained in another franchise agreement.

Sec. 6. (1) A video service provider shall calculate and pay an annual video service provider fee to the franchising entity. The fee shall be 1 of the following:

(a) If there is an existing franchise agreement, an amount equal to the percentage of gross revenues paid to the franchising entity by the incumbent video provider with the largest number of subscribers in the franchising entity.

(b) At the expiration of an existing franchise agreement or if there is no existing franchise agreement, an amount equal to the percentage of gross revenues as established by the franchising entity not to exceed 5% and shall be applicable to all providers.

(2) The fee due under subsection (1) shall be due on a quarterly basis and paid within 45 days after the close of the quarter. Each payment shall include a statement explaining the basis for the calculation of the fee.

(3) The franchising entity shall not demand any additional fees or charges from a provider and shall not demand the use of any other calculation method other than allowed under this act.

(4) For purposes of this section, "gross revenues" means all consideration of any kind or nature, including, without limitation, cash, credits, property, and in-kind contributions received by the provider from subscribers for the provision of video service by the video service provider within the jurisdiction of the franchising entity. Gross revenues shall include all of the following:

(a) All charges and fees paid by subscribers for the provision of video service, including equipment rental, late fees, insufficient funds fees, fees attributable to video service when sold individually or as part of a package or bundle, or functionally integrated, with services other than video service.

(b) Any franchise fee imposed on the provider that is passed on to subscribers.

(c) Compensation received by the provider for promotion or exhibition of any products or services over the video service.

(d) Revenue received by the provider as compensation for carriage of video programming on that provider's video service.

(e) All revenue derived from compensation arrangements for advertising attributable to the local franchise area.

(f) Any advertising commissions paid to an affiliated third party for video service advertising.

(5) Gross revenues do not include any of the following:

(a) Any revenue not actually received, even if billed, such as bad debt net of any recoveries of bad debt.

(b) Refunds, rebates, credits, or discounts to subscribers or a municipality to the extent not already offset by subdivision (a) and to the extent the refund, rebate, credit, or discount is attributable to the video service.

(c) Any revenues received by the provider or its affiliates from the provision of services or capabilities other than video service, including telecommunications services, information services, and services, capabilities, and applications that may be sold as part of a package or bundle, or functionally integrated, with video service.

(d) Any revenues received by the provider or its affiliates for the provision of directory or internet advertising, including yellow pages, white pages, banner advertisement, and electronic publishing.

(e) Any amounts attributable to the provision of video service to customers at no charge, including the provision of such service to public institutions without charge.

(f) Any tax, fee, or assessment of general applicability imposed on the customer or the transaction by a federal, state, or local government or any other governmental entity, collected by the provider, and required to be remitted to the taxing entity, including sales and use taxes.

(g) Any forgone revenue from the provision of video service at no charge to any person, except that any forgone revenue exchanged for trades, barter, services, or other items of value shall be included in gross revenue.

(h) Sales of capital assets or surplus equipment.

(i) Reimbursement by programmers of marketing costs actually incurred by the provider for the introduction of new programming.

(j) The sale of video service for resale to the extent the purchaser certifies in writing that it will resell the service and pay a franchise fee with respect to the service.

(6) In the case of a video service that is bundled or integrated functionally with other services, capabilities, or applications, the portion of the video provider's revenue attributable to the other services, capabilities, or applications shall be included in gross revenue unless the provider can reasonably identify the division or exclusion of the revenue from its books and records that are kept in the regular course of business.

(7) Revenue of an affiliate shall be included in the calculation of gross revenues to the extent the treatment of the revenue as revenue of the affiliate has the effect of evading the payment of franchise fees which would otherwise be paid for video service.

(8) In addition to the fee required under subsection (1), a video service provider shall pay to the franchising entity as support for the cost of public, education, and government access facilities and services an annual fee equal to 1 of the following:

(a) If there is an existing franchise on the effective date of this act, the fee paid to the franchising entity by the incumbent video provider with the largest number of cable service subscribers in the franchising entity as determined by the existing franchise agreement.

(b) At the expiration of the existing franchise agreement, the amount required under subdivision (a) not to exceed 2% of gross revenues.

(c) If there is no existing franchise agreement, a percentage of gross revenues as established by the franchising entity not to exceed 2% to be determined by a community need assessment.

(d) An amount agreed to by the franchising entity and the video service provider.

(9) The fee required under subsection (8) shall be applicable to all providers.

(10) The fee due under subsection (8) shall be due on a quarterly basis and paid within 45 days after the close of the quarter. Each payment shall include a statement explaining the basis for the calculation of the fee.

(11) A video service provider is entitled to a credit applied toward the fees due under subsection (1) for all funds allocated to the franchising entity from annual maintenance fees paid by the provider for use of public rights-of-way, minus any property tax credit allowed under section 8 of the metropolitan extension telecommunications rights-of-way oversight act, 2002 PA 48, MCL 484.3108. The credits shall be applied on a monthly pro rata basis beginning in the first month of each calendar year in which the franchising entity receives its allocation of funds. The credit allowed under this subsection shall be calculated by multiplying the number of linear feet occupied by the provider in the public rights-of-way of the franchising entity by the lesser of 5 cents or the amount assessed under the metropolitan extension telecommunications rights-of-way oversight act, 2002 PA 48, MCL 484.3101 to 484.3120. A video service provider is not eligible for a credit under this subsection unless the provider has taken all property tax credits allowed under the metropolitan extension telecommunications rights-of-way oversight act, 2002 PA 48, MCL 484.3101 to 484.3120.

(12) All determinations and computations made under this section shall be pursuant to generally accepted accounting principles.

(13) The commission within 30 days after the enactment into law of any appropriation to it shall ascertain the amount of the appropriation attributable to the actual costs to the commission in exercising its duties under this act and shall be assessed against each video service provider doing business in this state. Each provider shall pay a portion of the total assessment in the same proportion that its number of subscribers for the preceding calendar year bears to the total number of video service subscribers in the state. The first assessment made under this act shall be based on the commission's estimated number of subscribers for each provider in the year that the appropriation is made. The total assessment under this subsection shall not exceed \$1,000,000.00 annually. This subsection does not apply after December 31, 2009.

Sec. 7. (1) No more than every 24 months, a franchising entity may perform reasonable audits of the video service provider's calculation of the fees paid under section 6 to the franchising entity during the preceding 24-month period only. All records reasonably necessary for the audits shall be made available by the provider at the location where the records are kept in the ordinary course of business. The franchising entity and the video service provider shall each be responsible for their respective costs of the audit. Any additional amount due verified by the franchising entity shall be paid by the provider within 30 days of the franchising entity's submission of an invoice for the sum. If the sum exceeds 5% of the total fees which the audit determines should have been paid for the 24-month period, the provider shall pay the franchising entity's reasonable costs of the audit.

(2) Any claims by a franchising entity that fees have not been paid as required under section 6, and any claims for refunds or other corrections to the remittance of the provider, shall be made within 3 years from the date the compensation is remitted.

(3) Any video service provider may identify and collect as a separate line item on the regular monthly bill of each subscriber an amount equal to the percentage established under section 6(1) applied against the amount of the subscriber's monthly bill.

(4) A video service provider may identify and collect as a separate line item on the regular monthly bill of each subscriber an amount equal to the percentage established under section 6(8) applied against the amount of the subscriber's monthly bill.

Sec. 8. (1) A franchising entity shall allow a video service provider to install, construct, and maintain a video service or communications network within a public right-of-way and shall provide the provider with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way.

(2) A franchising entity may not discriminate against a video service provider to provide video service for any of the following:

(a) The authorization or placement of a video service or communications network in public rights-of-way.

(b) Access to a building owned by a governmental entity.

(c) A municipal utility pole attachment.

(3) A franchising entity may impose on a video service provider a permit fee only to the extent it imposes such a fee on incumbent video providers, and any fee shall not exceed the actual, direct costs incurred by the franchising entity for issuing the relevant permit. A fee under this section shall not be levied if the video service provider already has paid a permit fee of any kind in connection with the same activity that would otherwise be covered by the permit fee under

this section or is otherwise authorized by law or contract to place the facilities used by the video service provider in the public rights-of-way or for general revenue purposes.

Sec. 9. (1) A video service provider shall not deny access to service to any group of potential residential subscribers because of the race or income of the residents in the local area in which the group resides.

(2) It is a defense to an alleged violation of subsection (1) if the provider has met either of the following conditions:

(a) Within 3 years of the date it began providing video service under this act, at least 25% of households with access to the provider's video service are low-income households.

(b) Within 5 years of the date it began providing video service under this act and from that point forward, at least 30% of the households with access to the provider's video service are low-income households.

(3) If a video service provider is using telecommunication facilities to provide video services and has more than 1,000,000 telecommunication access lines in this state, the provider shall provide access to its video service to a number of households equal to at least 25% of the households in the provider's telecommunication service area in the state within 3 years of the date it began providing video service under this act and to a number not less than 50% of these households within 6 years. A video service provider is not required to meet the 50% requirement in this subsection until 2 years after at least 30% of the households with access to the provider's video service subscribe to the service for 6 consecutive months.

(4) Each provider shall file an annual report with the franchising entity and the commission regarding the progress that has been made toward compliance with subsections (2) and (3).

(5) Except for satellite service, a video service provider may satisfy the requirements of this section through the use of alternative technology that offers service, functionality, and content, which is demonstrably similar to that provided through the provider's video service system and may include a technology that does not require the use of any public right-of-way. The technology utilized to comply with the requirements of this section shall include local public, education, and government channels and messages over the emergency alert system as required under section 4.

(6) A video service provider may apply to the franchising entity, and, in the case of subsection (3), the commission, for a waiver of or for an extension of time to meet the requirements of this section if 1 or more of the following apply:

(a) The inability to obtain access to public and private rights-of-way under reasonable terms and conditions.

(b) Developments or buildings not being subject to competition because of existing exclusive service arrangements.

(c) Developments or buildings being inaccessible using reasonable technical solutions under commercial reasonable terms and conditions.

(d) Natural disasters.

(e) Factors beyond the control of the provider.

(7) The franchising entity or commission may grant the waiver or extension only if the provider has made substantial and continuous effort to meet the requirements of this section. If an extension is granted, the franchising entity or commission shall establish a new compliance deadline. If a waiver is granted, the franchising entity or commission shall specify the requirement or requirements waived.

(8) Notwithstanding any other provision of this act, a video service provider using telephone facilities to provide video service is not obligated to provide such service outside the provider's existing telephone exchange boundaries.

(9) Notwithstanding any other provision of this act, a video service provider shall not be required to comply with, and a franchising entity may not impose or enforce, any mandatory build-out or deployment provisions, schedules, or requirements except as required by this section.

Sec. 10. (1) A video service provider shall not do in connection with the providing of video services to its subscribers and the commission may enforce compliance with any of the following to the extent that the activities are not covered by section 2(3)(l):

(a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing video service that is false, misleading, or deceptive. As used in this subdivision, "material information" includes, but is not limited to, all applicable fees, taxes, and charges that will be billed to the subscriber, regardless of whether the fees, taxes, or charges are authorized by state or federal law.

(b) Charge a customer for a subscribed service for which the customer did not make an initial affirmative order. Failure to refuse an offered or proposed subscribed service is not an affirmative order for the service.

(c) If a customer has canceled a service, charge the customer for service provided after the effective date the service was canceled.

(d) Cause a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction by making a false, deceptive, or misleading statement or by failing to inform the customer of a material fact, the omission of which is deceptive or misleading.

(e) Represent or imply that the subject of a transaction will be provided promptly, or at a specified time, or within a reasonable time, if the provider knows or has reason to know that it will not be so provided.

(f) Cause coercion and duress as a result of the time and nature of a sales presentation.

(2) Each video service provider shall establish a dispute resolution process for its customers. Each provider shall maintain a local or toll-free telephone number for customer service contact.

(3) The commission shall submit to the legislature no later than June 1, 2007 a proposed process to be added to this act that would allow the commission to review disputes which are not resolved under subsection (2), disputes between a provider and a franchising entity, and disputes between providers.

(4) Each provider shall notify its customers of the dispute resolution process created under this section.

Sec. 11. (1) Except under the terms of a mandatory protective order, trade secrets and commercial or financial information submitted under this act to the franchising entity or commission are exempt from the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(2) If information is disclosed under a mandatory protective order, then the franchising entity or commission may use the information for the purpose for which it is required, but the information shall remain confidential.

(3) There is a rebuttable presumption that costs studies, customer usage data, marketing studies and plans, and contracts are trade secrets or commercial or financial information protected under subsection (1). The burden of removing the presumption under this subsection is with the party seeking to have the information disclosed.

Sec. 12. (1) The commission's authority to administer this act is limited to the powers and duties explicitly provided for under this act, and the commission shall not have the authority to regulate or control a provider under this act as a public utility.

(2) The commission shall file a report with the governor and legislature by February 1 of each year that shall include information on the status of competition for video services in this state and recommendations for any needed legislation. A video service provider shall submit to the commission any information requested by the commission necessary for the preparation of the annual report required under this subsection. The obligation of a video service provider under this subsection is limited to the submission of information generated or gathered in the normal course of business.

Sec. 13. This act does not prohibit a local unit of government and a video service provider from entering into a voluntary franchise agreement that includes terms and conditions different than those required under this act, including, but not limited to, a reduction in the franchise fee in return for the video service provider making available to the franchising entity services, equipment, capabilities, or other valuable consideration. This section does not apply unless for each provider servicing the franchise entity it is technically feasible and commercially practicable to comply with similar terms and conditions in the franchise agreement and it is offered to the other provider.

Sec. 14. (1) After notice and hearing, if the commission finds that a person has violated this act, the commission shall order remedies and penalties to protect and make whole persons who have suffered damages as a result of the violation, including, but not limited to, 1 or more of the following:

(a) Except as otherwise provided under subdivision (b), order the person to pay a fine for the first offense of not less than \$1,000.00 or more than \$20,000.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$2,000.00 or more than \$40,000.00.

(b) If the video service provider has less than 250,000 telecommunication access lines in this state, order the person to pay a fine for the first offense of not less than \$200.00 or more than \$500.00. For a second and any subsequent offense, the commission shall order the person to pay a fine of not less than \$500.00 or more than \$1,000.00.

(c) If the person has received a uniform video service local franchise, revoke the franchise.

(d) Issue cease and desist orders.

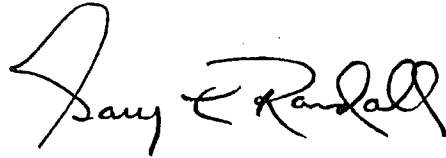
(2) Notwithstanding subsection (1), a fine shall not be imposed for a violation of this act if the provider has otherwise fully complied with this act and shows that the violation was an unintentional and bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error. Examples of a bona fide error include clerical, calculation, computer malfunction, programming, or printing errors. An error in legal judgment with respect to a person's obligations under this act is not a bona fide error. The burden of proving that a violation was an unintentional and bona fide error is on the provider.

(3) If the commission finds that a party's complaint or defense filed under this section is frivolous, the commission shall award to the prevailing party costs, including reasonable attorney fees, against the nonprevailing party and their attorney.

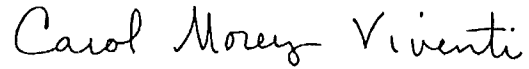
(4) Any party of interest shall have the same rights to appeal and review an order or finding of the commission under this act as provided under the Michigan telecommunications act, 1991 PA 179, MCL 484.2101 to 484.2604.

Enacting section 1. This act takes effect January 1, 2007.

This act is ordered to take immediate effect.



\_\_\_\_\_  
Clerk of the House of Representatives



\_\_\_\_\_  
Secretary of the Senate

Approved \_\_\_\_\_

\_\_\_\_\_  
Governor

# ATTACHMENT 20



Monday, December 17, 2007

## Bill Text - A01423

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### STATE OF NEW YORK

1423--A

2007-2008 Regular Sessions

I N A S S E M B L Y

January 9, 2007

Introduced by M. of A. BRODSKY -- Multi-Sponsored by -- M. of A. ROSENTHAL, SPANO -- read once and referred to the Committee on Corporations, Authorities and Commissions -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public service law, in relation to authorizing statewide cable franchises for the purposes of competitive cable service, promoting the wide-spread development of high-capacity broadband internet access, and increasing the availability and quality of services in this key economic development area and ensuring the safety, reliability and affordability of telecommunications services

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. The public service law is amended by adding a new article  
2 11-A to read as follows:

3 ARTICLE 11-A  
4 STATEWIDE CABLE FRANCHISING AND REGULATION  
5 SECTION 231. DEFINITIONS.  
6 232. AUTHORIZATION TO PROVIDE CABLE SERVICE.  
7 233. PUBLIC SERVICE COMMISSION RESPONSIBILITIES.  
8 234. APPLICATION FOR STATEWIDE CABLE FRANCHISE.  
9 235. LENGTH OF STATEWIDE FRANCHISE.  
10 236. TERMINATION OF A STATEWIDE FRANCHISE.  
11 237. ABANDONMENT OF SERVICE.  
12 238. MUNICIPAL POWER AND REGULATION OVER FRANCHISE HOLDERS.  
13 239. PAYMENT AND REMITTANCE OF FRANCHISE FEE.  
14 240. PUBLIC, EDUCATIONAL AND GOVERNMENT CHANNELS.  
15 241. CABLE OPERATOR'S COMMUNITY COMMITMENT.  
16 242. CONSUMER PROTECTION RULES.  
17 243. NEUTRAL INTERNET AND BROADBAND NETWORKS.  
18 244. DEPLOYMENT REQUIREMENTS FOR STATEWIDE CABLE FRANCHISE.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets { } is old law to be omitted.

LBD01063-03-7



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1 245. DISCRIMINATION IN THE PROVISIONING OF SERVICE PROHIBITED.

2 246. ENFORCEMENT.

3 S 231. DEFINITIONS. THE WORDS AND PHRASES USED IN THIS ARTICLE SHALL  
4 HAVE THE FOLLOWING MEANINGS UNLESS A DIFFERENT MEANING CLEARLY APPEARS  
5 IN THE CONTEXT.

6 1. "CABLE SERVICE" SHALL MEAN THE ONE-WAY TRANSMISSION TO SUBSCRIBERS  
7 OF VIDEO PROGRAMMING; OR OTHER PROGRAMMING SERVICE, AND SUBSCRIBER  
8 INTERACTION, IF ANY, WHICH IS REQUIRED FOR THE SELECTION OR USE OF SUCH  
9 VIDEO PROGRAMMING OR OTHER PROGRAMMING SERVICE, REGARDLESS OF THE TECH-  
10 NOLOGY UTILIZED BY A CABLE TELEVISION COMPANY TO ENABLE SUCH SELECTION  
11 OR USE.

12 2. "CABLE OPERATOR" SHALL MEAN ANY PERSON OR GROUP OF PERSONS (A) WHO  
13 PROVIDES CABLE SERVICE OVER A CABLE SYSTEM AND DIRECTLY OR THROUGH ONE  
14 OR MORE AFFILIATES OWNS A SIGNIFICANT INTEREST IN SUCH CABLE SYSTEM, OR  
15 (B) WHO OTHERWISE CONTROLS OR IS RESPONSIBLE FOR, THROUGH ANY ARRANGE-  
16 MENT, THE MANAGEMENT AND OPERATION OF SUCH A CABLE SYSTEM, AS SET FORTH  
17 IN 47 U.S.C. S 522(5).

18 3. "CABLE SYSTEM" SHALL MEAN ANY FACILITY, CONSISTING OF A SET OF  
19 CLOSED TRANSMISSION PATHS AND ASSOCIATED SIGNAL GENERATION, RECEPTION  
20 AND CONTROL EQUIPMENT THAT IS DESIGNED TO PROVIDE CABLE SERVICE WHICH  
21 INCLUDES VIDEO PROGRAMMING, WITHOUT REGARD TO THE TECHNOLOGY USED TO  
22 DELIVER SUCH VIDEO PROGRAMMING, INCLUDING INTERNET PROTOCOL TECHNOLOGY  
23 OR ANY SUCCESSOR TECHNOLOGY AND WHICH IS PROVIDED TO MULTIPLE SUBSCRIB-  
24 ERS WITHIN A COMMUNITY, AS SET FORTH IN 47 U.S.C. S 522(7), BUT SUCH  
25 TERM DOES NOT INCLUDE:

26 (A) A FACILITY THAT SERVES ONLY TO RETRANSMIT THE TELEVISION SIGNALS  
27 OF ONE OR MORE TELEVISION BROADCAST STATIONS;

28 (B) A FACILITY THAT SERVES SUBSCRIBERS WITHOUT USING ANY PUBLIC  
29 RIGHT-OF-WAY;

30 (C) A FACILITY OF A COMMON CARRIER WHICH IS SUBJECT, IN WHOLE OR IN  
31 PART, TO THE PROVISIONS OF TITLE II OF THE COMMUNICATIONS ACT OF 1934,  
32 47 U.S.C. S 201 ET SEQ., EXCEPT THAT SUCH FACILITY SHALL BE CONSIDERED A  
33 CABLE SYSTEM (OTHER THAN FOR PURPOSES OF 47 U.S.C. S 541(C)) TO THE  
34 EXTENT SUCH FACILITY IS USED IN THE TRANSMISSION OF VIDEO PROGRAMMING  
35 DIRECTLY TO SUBSCRIBERS, UNLESS THE EXTENT OF SUCH USE IS SOLELY TO  
36 PROVIDE INTERACTIVE ON-DEMAND SERVICES;

37 (D) AN OPEN VIDEO SYSTEM THAT COMPLIES WITH 47 U.S.C. S 573; OR

38 (E) ANY FACILITIES OF ANY ELECTRIC UTILITY USED SOLELY FOR OPERATING  
39 ITS ELECTRIC UTILITY SYSTEM.

40 4. "CATV COMPANY" SHALL MEAN ANY PERSON OR GROUP OF PERSONS (A) WHO  
41 PROVIDES CABLE SERVICE OVER A CABLE SYSTEM AND DIRECTLY OR THROUGH ONE  
42 OR MORE AFFILIATES OWNS A SIGNIFICANT INTEREST IN SUCH CABLE SYSTEM, OR

43 (B) WHO OTHERWISE CONTROLS OR IS RESPONSIBLE FOR, THROUGH ANY ARRANGE-  
44 MENT, THE MANAGEMENT AND OPERATION OF SUCH A CABLE SYSTEM.

45 5. "CATV SYSTEM" SHALL MEAN ANY FACILITY WHICH RECEIVES AND AMPLIFIES  
46 THE SIGNALS BROADCAST BY ONE OR MORE TELEVISION STATIONS AND REDISTRIB-  
47 UTES SUCH SIGNALS BY WIRE, CABLE OR OTHER MEANS, OR WHICH DISTRIBUTES  
48 SIGNALS IT ORIGINATES OR WHICH ARE ORIGINATED BY ANOTHER FOR VIEWING BY  
49 SUBSCRIBERS, WHETHER THE WIRE, CABLE OR OTHER FACILITIES ARE OWNED OR  
50 LEASED. A "CATV SYSTEM" SHALL NOT INCLUDE:

51 (A) THE POLES OR OTHER FACILITIES OF ANY TELEPHONE CORPORATION USED TO  
52 PROVIDE CHANNEL SERVICE AS A COMMON CARRIER,

53 (B) A SYSTEM SERVING NOT MORE THAN TWO HUNDRED FIFTY SUBSCRIBERS, OR

54 (C) A MASTER ANTENNA SYSTEM SERVICING SUBSCRIBERS SITUATED ON PROPERTY  
55 UNDER COMMON OWNERSHIP.

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1 6. "COMMISSION" SHALL MEAN THE PUBLIC SERVICE COMMISSION OR ANY  
2 SUCCESSOR AGENCY.

3 7. "FRANCHISE" SHALL MEAN AN INITIAL AUTHORIZATION, OR RENEWAL OF AN  
4 AUTHORIZATION, ISSUED BY A FRANCHISING AUTHORITY, REGARDLESS OF WHETHER  
5 THE AUTHORIZATION IS DESIGNATED AS A FRANCHISE, PERMIT, LICENSE, RESOL-  
6 UTION, CONTRACT, CERTIFICATE, AGREEMENT, OR OTHERWISE, THAT AUTHORIZES  
7 THE CONSTRUCTION AND OPERATION OF A CABLE SYSTEM IN THE PUBLIC  
8 RIGHTS-OF-WAY.

9 8. "FRANCHISE HOLDER" OR "HOLDER" SHALL MEAN A PERSON WHO HAS RECEIVED  
10 A STATE-WIDE FRANCHISE, BUT HAS NOT TRANSFERRED OR TERMINATED SUCH FRAN-  
11 CHISE AUTHORIZATION, IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE.

12 9. "FRANCHISING AUTHORITY" SHALL MEAN THE PUBLIC SERVICE COMMISSION  
13 AND MUNICIPALITIES WHICH ARE ENTITLED TO REQUIRE FRANCHISES AND IMPOSE  
14 FEES IN ACCORDANCE WITH 47 U.S.C. SS 522(10) AND 542, RESPECTIVELY.

15 10. "GROSS REVENUES" SHALL MEAN ANY AND ALL REVENUES, INCLUDING CASH,  
16 CREDITS, PROPERTY OR OTHER CONSIDERATION OF ANY KIND OR NATURE ARISING  
17 FROM, ATTRIBUTABLE TO, OR IN ANY WAY DERIVED DIRECTLY OR INDIRECTLY FROM  
18 THE OPERATION OF THE FRANCHISEE'S CABLE SYSTEM (INCLUDING THE STUDIOS  
19 AND OTHER FACILITIES ASSOCIATED THEREWITH) TO PROVIDE CABLE SERVICES.  
20 GROSS REVENUES INCLUDE, BY WAY OF ILLUSTRATION AND NOT LIMITATION,  
21 MONTHLY FEES CHARGED SUBSCRIBERS FOR ANY BASIC, OPTIONAL, PREMIUM, PER-  
22 CHANNEL, PER-PROGRAM SERVICE, OR CABLE PROGRAMMING SERVICE; INSTALLA-  
23 TION, DISCONNECTION, RECONNECTION, AND CHANGE-IN-SERVICE FEES; LEASED  
24 CHANNEL FEES; LATE FEES AND ADMINISTRATIVE FEES, PAYMENTS, OR OTHER  
25 CONSIDERATION RECEIVED FROM PROGRAMMERS FOR CARRIAGE OF PROGRAMMING ON  
26 THE SYSTEM; REVENUES FROM RENTALS OR SALES OF CONVERTERS OR OTHER EQUIP-  
27 MENT; ANY STUDIO RENTAL, PRODUCTION EQUIPMENT, AND PERSONNEL FEES;  
28 ADVERTISING REVENUES; BARTER; REVENUES FROM PROGRAM GUIDES; REVENUES  
29 FROM THE SALE OR CARRIAGE OF OTHER CABLE SERVICES; AND REVENUES FROM  
30 HOME SHOPPING CHANNELS AND OTHER REVENUE SHARING ARRANGEMENTS. GROSS  
31 REVENUES SHALL INCLUDE REVENUES RECEIVED BY ANY ENTITY OTHER THAN THE  
32 FRANCHISEE, AN AFFILIATE, OR ANOTHER ENTITY THAT OPERATES THE SYSTEM  
33 WHERE NECESSARY TO PREVENT EVASION OR AVOIDANCE OF THE OBLIGATION UNDER  
34 THIS STATUTE TO PAY THE FRANCHISE FEE. GROSS REVENUES SHALL NOT INCLUDE:

35 (A) AMOUNTS NOT ACTUALLY RECEIVED, EVEN IF BILLED, SUCH AS BAD DEBT;  
36 REFUNDS, REBATES OR DISCOUNTS TO SUBSCRIBERS OR THIRD PARTIES; OR REVEN-  
37 UE IMPUTED FROM THE PROVISION OF CABLE SERVICES FOR FREE OR AT REDUCED  
38 RATES TO ANY PERSON AS REQUIRED OR ALLOWED BY LAW, INCLUDING, WITHOUT  
39 LIMITATION, THE PROVISION OF SUCH SERVICES TO PUBLIC INSTITUTIONS,  
40 PUBLIC SCHOOLS, GOVERNMENTAL ENTITIES, OR EMPLOYEES, OTHER THAN FORGONE  
41 REVENUE CHOSEN NOT TO BE RECEIVED IN EXCHANGE FOR TRADES, BARTERS,  
42 SERVICES, OR OTHER ITEMS OF VALUE; OR

43 (B) ANY REVENUE FROM ANY CHARGES OR FEES DERIVED FROM SERVICES CLASSI-  
44 FIED AS NON-CABLE SERVICES AND INFORMATION SERVICES AND ANY OTHER REVEN-  
45 UES ATTRIBUTED BY THE HOLDER OF A CERTIFICATE OF APPROVAL OR SYSTEMWIDE  
46 FRANCHISE TO NON-CABLE SERVICES IN ACCORDANCE WITH FEDERAL COMMUNI-  
47 CATIONS COMMISSIONS RULES, REGULATIONS, STANDARDS, OR ORDERS.

48 IN THE CASE OF CABLE SERVICE THAT MAY BE BUNDLED OR INTEGRATED FUNC-  
49 TIONALLY WITH OTHER SERVICES, CAPABILITIES OR APPLICATIONS, THE GROSS  
50 REVENUES SHALL ONLY INCLUDE THOSE CHARGES OR FEES DERIVED FROM OR  
51 ATTRIBUTABLE TO THE PROVISION OF CABLE SERVICE, AS REFLECTED ON THE  
52 BOOKS AND RECORDS OF THE HOLDER OF A CERTIFICATE OF APPROVAL OR A  
53 SYSTEM-WIDE FRANCHISE, AS THE CASE MAY BE, IN ACCORDANCE WITH THE RULES,  
54 REGULATIONS, STANDARDS AND ORDERS OF THE FEDERAL COMMUNICATIONS COMMIS-  
55 SION.

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1 11. "INCUMBENT CABLE OPERATOR" SHALL MEAN THE CABLE OPERATOR SERVING  
2 THE LARGEST NUMBER OF CABLE SUBSCRIBERS IN A PARTICULAR MUNICIPAL FRAN-  
3 CHISE AREA ON THE EFFECTIVE DATE OF THIS ARTICLE.

4 12. "MUNICIPALITY" SHALL MEAN A CITY OR TOWN WITHIN THE STATE.

5 13. "PERSON" SHALL MEAN AN INDIVIDUAL, PARTNERSHIP, ASSOCIATION, JOINT  
6 STOCK COMPANY, TRUST, CORPORATION, GOVERNMENT ENTITY, LIMITED LIABILITY  
7 COMPANY OR ANY OTHER ENTITY.

8 14. "PUBLIC RIGHT-OF-WAY" SHALL MEAN THE AREA ON, BELOW OR ABOVE A  
9 PUBLIC ROADWAY, HIGHWAY, STREET, PUBLIC SIDEWALK, ALLEY, WATERWAY, OR  
10 UTILITY EASEMENT IN WHICH A MUNICIPALITY HAS AN INTEREST.

11 15. "VIDEO PROGRAMMING" SHALL MEAN PROGRAMMING PROVIDED BY, OR GENER-  
12 ALLY CONSIDERED COMPARABLE TO, PROGRAMMING PROVIDED BY A TELEVISION  
13 BROADCAST STATION, AS SET FORTH IN 47 U.S.C. S 522 (20).

14 S 232. AUTHORIZATION TO PROVIDE CABLE SERVICE. 1. NOTWITHSTANDING ANY  
15 OTHER LAW TO THE CONTRARY AND SUBJECT TO THE PROVISIONS OF THIS ARTICLE,  
16 A PERSON SEEKING TO PROVIDE CABLE SERVICE IN THE STATE AFTER THE EFFEC-  
17 TIVE DATE OF THIS ARTICLE MAY FILE AN APPLICATION FOR A STATEWIDE FRAN-  
18 CHISE WITH THE COMMISSION AS REQUIRED BY THIS SECTION. THIS ARTICLE DOES  
19 NOT PRECLUDE CABLE OPERATORS FROM FILING INDIVIDUAL APPLICATIONS UNDER  
20 ARTICLE ELEVEN OF THIS CHAPTER, PROVIDED HOWEVER THAT A PERSON FILING AN  
21 APPLICATION FOR A STATEWIDE FRANCHISE WITH THE COMMISSION SHALL BE  
22 REQUIRED UPON RECEIPT OF SUCH FRANCHISE TO COMPLY WITH SECTION TWO  
23 HUNDRED FORTY-TWO OF THIS ARTICLE WITH REGARD TO ALL IN-STATE BROADBAND  
24 AND BROADBAND-CAPABLE FACILITIES AND LINES BUILT DURING THE INITIAL  
25 BUILD-OUT PERIOD PURSUANT TO THE AUTHORIZATION PROVIDED BY SUCH FRAN-  
26 CHISE, AND FOR THE PERIOD OF THE INITIAL BUILD-OUT PERIOD WITH REGARD TO  
27 SUCH PERSON'S IN-STATE BROADBAND AND BROADBAND-CAPABLE FACILITIES AND  
28 LINES IN EXISTENCE WHEN SUCH FRANCHISE BECOMES EFFECTIVE.

29 2. A PERSON, INCLUDING AN INCUMBENT CABLE OPERATOR, PROVIDING CABLE  
30 SERVICE UNDER A FRANCHISE AGREEMENT WITH A FRANCHISING AUTHORITY WHICH  
31 EXISTED PRIOR TO THE EFFECTIVE DATE OF THIS ARTICLE IS NOT SUBJECT TO  
32 THIS SECTION UNTIL THE FRANCHISE AGREEMENT EXPIRES AT THE END OF ITS  
33 ORIGINAL OR ANY MUTUALLY AGREEABLE RENEWAL TERM, OR UNLESS AND UNTIL THE  
34 FRANCHISING AUTHORITY AND ENTITY PROVIDING CABLE SERVICE MUTUALLY AGREE  
35 TO TERMINATE THE EXISTING FRANCHISE AGREEMENT.

36 3. NOTHING IN THIS SECTION SHALL RESTRICT A CABLE OPERATOR FROM APPLY-  
37 ING TO THE COMMISSION FOR A STATEWIDE FRANCHISE TO PROVISION CABLE  
38 SERVICES IN TERRITORIES OF THE STATE FOR WHICH IT DOES NOT HAVE AN  
39 EXISTING FRANCHISE AGREEMENT WITH A FRANCHISING AUTHORITY. FOR PURPOSES  
40 OF THIS SECTION, A CABLE OPERATOR WILL BE DEEMED TO HAVE A FRANCHISE TO  
41 PROVIDE CABLE SERVICE IN THE JURISDICTION OF A SPECIFIC FRANCHISING  
42 AUTHORITY IF ANY AFFILIATE, PREDECESSOR OR SUCCESSOR ENTITY OF THE CABLE  
43 OPERATOR MAINTAINS A FRANCHISE GRANTED BY THAT FRANCHISING AUTHORITY.  
44 THE TERMS "AFFILIATE, PREDECESSOR OR SUCCESSOR ENTITY" IN THIS SECTION  
45 SHALL INCLUDE BUT NOT BE LIMITED TO ANY ENTITY RECEIVING, OBTAINING OR  
46 OPERATING UNDER A FRANCHISE FROM A FRANCHISING ENTITY FOR CABLE SERVICE  
47 THROUGH THE GRANT OF A FRANCHISE, MERGER, SALE, ASSIGNMENT, RESTRUCTUR-  
48 ING, OR ANY OTHER TYPE OF TRANSACTION.

49 4. THE COMMISSION SHALL HAVE THE FRANCHISING AUTHORITY TO ISSUE STATE-  
50 WIDE FRANCHISES FOR THE PROVISIONING OF CABLE SERVICE UNDER THIS ARTI-  
51 CLE. NEITHER THE COMMISSION NOR ANY MUNICIPALITY IN THE STATE MAY  
52 REQUIRE THE FRANCHISE HOLDER TO OBTAIN ANY SEPARATE OR ADDITIONAL FRAN-  
53 CHISE OR OTHERWISE IMPOSE ANY FEE OR OTHER REQUIREMENT, INCLUDING BUT  
54 NOT LIMITED TO THE REGULATION OF CABLE SERVICE RATES, ON ANY FRANCHISE  
55 HOLDER AS A CONDITION OF PROVIDING CABLE SERVICE, EXCEPT AS PROVIDED IN  
56 THIS ARTICLE.

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1 5. 16 NYCRR S 895.3, AS AMENDED FROM TIME TO TIME, SHALL NOT APPLY TO  
2 THIS ARTICLE.

3 S 233. PUBLIC SERVICE COMMISSION RESPONSIBILITIES. 1. THE COMMISSION  
4 SHALL ASSIGN EXISTING PERMANENT STAFF OF SUCH LEGAL, TECHNICAL AND OTHER  
5 EMPLOYEES OF THE COMMISSION AS MAY BE REQUIRED FOR THE PROPER CONDUCT OF  
6 ITS CABLE FRANCHISING RESPONSIBILITIES UNDER THIS ARTICLE. THE POWERS  
7 AND DUTIES OF THE PUBLIC SERVICE COMMISSION WITH RESPECT TO STATEWIDE  
8 FRANCHISES SHALL NOT EXCEED THOSE PRESCRIBED IN THIS ARTICLE.

9 2. THE COMMISSION SHALL BE RESPONSIBLE FOR ESTABLISHING ADDITIONAL  
10 ADMINISTRATIVE PROCEDURES AND REGULATIONS NOT EXPLICITLY GRANTED IN THIS  
11 ARTICLE FOR THE ISSUANCE OF STATEWIDE FRANCHISES IN ACCORDANCE WITH THE

12 PROVISIONS OF THIS ARTICLE. THE COMMISSION'S ADMINISTRATIVE POWERS AND  
 13 DUTIES SHALL BE LIMITED TO THE PROVISION FOUND IN SECTION TWO HUNDRED  
 14 THIRTY-FOUR OF THIS ARTICLE AND ADDITIONAL POWERS INCLUDING THE:

15 (A) DEVELOPMENT OF PROCEDURES TO SUBMIT, REVIEW AND DOCUMENT APPLICA-  
 16 TIONS FILED WITH THE COMMISSION;

17 (B) REVIEW OF THE INITIAL SUBMISSION AND ANY UPDATES OF THE GENERAL  
 18 DESCRIPTION OF THE SERVICE AREA FOOTPRINT TO BE SERVED OR EXPANDED,  
 19 INCLUDING, IF APPLICABLE, ANY AREA WITHIN A MUNICIPALITY TO BE SERVED BY  
 20 AN APPLICANT;

21 (C) DETERMINATION AND NOTICE OF INCOMPLETE APPLICATIONS;

22 (D) APPROVAL OF APPLICATIONS AND AMENDED APPLICATIONS, OR DENIAL OF  
 23 SUCH APPLICATIONS, WITHIN THE PERIODS DESIGNATED UNDER THE PROVISIONS OF  
 24 THIS ARTICLE;

25 (E) ISSUANCE TO APPLICANTS WHOSE APPLICATIONS ARE APPROVED FOR STATE-  
 26 WIDE FRANCHISES TO PROVIDE CABLE SERVICE IN THE SERVICE AREA FOOTPRINT  
 27 DESCRIBED IN THE APPLICATION; TO CONSTRUCT, UPGRADE, OPERATE OR MAINTAIN  
 28 A NETWORK CAPABLE OF PROVIDING SUCH SERVICE, AND TO USE AND OCCUPY THE  
 29 PUBLIC RIGHTS-OF-WAY IN THE DELIVERY OF THAT SERVICE;

30 (F) DEVELOPMENT OF PROCEDURES TO REVIEW AND DOCUMENT THE TRANSFER OR  
 31 TERMINATION OF A STATEWIDE FRANCHISE;

32 (G) ESTABLISH GUIDELINES IN ADDITION TO THOSE DEVELOPED BY MUNICI-  
 33 PALITIES UNDER SECTION TWO HUNDRED THIRTY-EIGHT OF THIS ARTICLE, TO DEAL  
 34 WITH ANY CONSUMER COMPLAINTS OR COMPLAINTS ALLEGING VIOLATIONS OF ANY  
 35 PROVISIONS OF THIS ARTICLE. SUCH GUIDELINES SHALL BE EASILY ACCESSIBLE  
 36 TO RESIDENTS OF THE STATE AND SHALL BE POSTED ON THE INTERNET. THE  
 37 COMMISSION SHALL ALSO PROVIDE CONSUMER COMPLAINT FORMS ON THE INTERNET  
 38 EVEN IF MUNICIPALITIES ESTABLISH THEIR OWN COMPLAINT FORMS. IN SUCH  
 39 CASES, MUNICIPALITIES AND THE COMMISSION WILL WORK COOPERATIVELY TO  
 40 ADDRESS CONSUMER COMPLAINTS.

41 S 234. APPLICATION FOR STATEWIDE CABLE FRANCHISE. 1. ANY PERSON WISH-  
 42 ING TO PROVIDE CABLE SERVICE IN THE STATE AFTER THE EFFECTIVE DATE OF  
 43 THIS ARTICLE MAY FILE AN APPLICATION FOR A STATEWIDE FRANCHISE WITH THE  
 44 COMMISSION AS REQUIRED BY THIS SECTION. A STATEWIDE FRANCHISE APPLICA-  
 45 TION SHALL BE ACCOMPANIED BY AN APPLICATION FEE OF TEN THOUSAND DOLLARS  
 46 THAT SHALL BE USED BY THE COMMISSION TO CARRY OUT THE PURPOSES OF THIS  
 47 ARTICLE. NOTHING IN THIS SECTION REQUIRES THAT ANY PERSON OR ENTITY FILE  
 48 AN APPLICATION FOR A STATEWIDE FRANCHISE.

49 2. APPLICATIONS FOR A STATEWIDE FRANCHISE SHALL CONTAIN BUT NOT BE  
 50 LIMITED TO:

51 (A) A STATEMENT THAT THE APPLICANT HAS FILED OR WILL TIMELY FILE WITH  
 52 THE FEDERAL COMMUNICATIONS COMMISSION ALL FORMS REQUIRED BY THAT AGENCY  
 53 IN ADVANCE OF OFFERING CABLE SERVICE IN THIS STATE;

54 (B) A STATEMENT THAT THE APPLICANT AGREES TO COMPLY WITH ALL OTHER  
 55 APPLICABLE FEDERAL, STATE STATUTES AND REGULATIONS AND ALL GENERALLY  
 56 APPLICABLE MUNICIPAL ORDINANCES AND REGULATIONS, INCLUDING WITHOUT LIMI-

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1 TATION MUNICIPAL ORDINANCES AND REGULATIONS REGARDING THE TIME, PLACE  
 2 AND MANNER OF USING AND OCCUPYING PUBLIC RIGHTS-OF-WAY ADOPTED IN  
 3 ACCORDANCE WITH STATE AND FEDERAL LAW;

4 (C) A GENERAL DESCRIPTION OF THE SERVICE AREA FOOTPRINT TO BE SERVED,  
 5 INCLUDING, IF APPLICABLE, ANY AREA WITHIN A MUNICIPALITY TO BE SERVED BY  
 6 THE APPLICANT. SUCH DESCRIPTION MAY BE SET FORTH ON ONE OR MORE MAPS. IF  
 7 THE APPLICANT IS A TELEPHONE CORPORATION OR AN AFFILIATE OF A TELEPHONE  
 8 CORPORATION, THE SERVICE AREA WILL INCLUDE A DESCRIPTION OF THE TERRITO-  
 9 RY IN WHICH THE COMPANY PROVIDES TELEPHONE SERVICE. DESCRIPTIONS OF  
 10 SERVICE AREA FOOTPRINTS SHALL BE UPDATED BY THE APPLICANT PRIOR TO THE  
 11 EXPANSION OF CABLE SERVICE TO A PREVIOUSLY UNDESIGNATED SERVICE AREA  
 12 AND, UPON SUCH EXPANSION, WRITTEN NOTICE SHALL BE GIVEN TO THE COMMIS-  
 13 SION OF THE NEW SERVICE AREA TO BE SERVED BY THE APPLICANT. THE  
 14 STATE-ISSUED FRANCHISE AREA AND ANY SERVICE AREA WITHIN THE FRANCHISE  
 15 AREA MAY EXTEND BEYOND THE AREA OR AREAS WHERE THE APPLICANT HAS PRE-EX-

16 LISTING AUTHORITY TO OCCUPY THE PUBLIC RIGHTS-OF-WAY;  
17 (D) THE LOCATION OF THE APPLICANT'S PRINCIPAL PLACE OF BUSINESS, THE  
18 NAMES OF THE APPLICANT'S PRINCIPAL EXECUTIVE OFFICERS, AND THE NAME,  
19 ADDRESS AND TELEPHONE NUMBER OF AN OFFICER, GENERAL PARTNER OR OTHER  
20 EMPLOYEE OF THE APPLICANT WHO WILL BE RESPONSIBLE FOR ONGOING COMMUNI-  
21 CATIONS WITH THE COMMISSION;  
22 (E) THE NAME AND LOCATION OF THE PRINCIPAL PLACE OF BUSINESS OF THE  
23 APPLICANT'S PARENT COMPANY, IF ANY;  
24 (F) THE SIGNATURE OF AN OFFICER OR GENERAL PARTNER OF THE APPLICANT  
25 VERIFYING THE INFORMATION SET FORTH IN THE APPLICATION;  
26 (G) DEMONSTRATE THE FINANCIAL, TECHNICAL, MANAGERIAL AND LEGAL CHARAC-  
27 TER AND OTHER QUALIFICATIONS NEEDED TO CONSTRUCT, OPERATE, AND MAINTAIN  
28 THE NECESSARY PLANT AND TO PROVIDE SERVICE IN A SAFE, ADEQUATE AND PROP-  
29 ER MANNER;  
30 (H) PROVIDE A RECORD OF COMPLIANCE WITH LOCAL, STATE AND FEDERAL LAWS;  
31 AND  
32 (I) PROVIDE ADDITIONAL INFORMATION AS NEEDED BY THE COMMISSION.  
33 3. UPON FILING AN APPLICATION WITH THE COMMISSION FOR A SYSTEM-WIDE  
34 FRANCHISE AGREEMENT PURSUANT TO SUBDIVISION TWO OF THIS SECTION, THE  
35 APPLICANT SHALL INCLUDE A LIST OF THE SPECIFIC MUNICIPALITIES TO WHICH  
36 CATV SERVICE WILL BE PROVIDED OR EXTENDED, THE ANTICIPATED CONSTRUCTION  
37 AND DEPLOYMENT DATES, AND THE ANTICIPATED DATE ON WHICH SERVICE WILL BE  
38 OFFERED AND A CERTIFIED STATEMENT THAT SUCH DEPLOYMENT WILL MEET THE  
39 REQUIREMENTS OF SECTION TWO HUNDRED FORTY-FOUR OF THIS ARTICLE. THE  
40 APPLICANT WILL CONCURRENTLY PROVIDE A COPY OF THE APPLICATION TO EACH  
41 AFFECTED MUNICIPALITY.  
42 4. WITHIN FIFTEEN BUSINESS DAYS AFTER IT RECEIVES THE APPLICATION, THE  
43 COMMISSION SHALL:  
44 (A) DETERMINE WHETHER AN APPLICATION SUBMITTED IS INCOMPLETE; AND  
45 (B) IF SO, THE COMMISSION SHALL NOTIFY THE APPLICANT THAT THE APPLICA-  
46 TION IS INCOMPLETE AND IDENTIFY THE INFORMATION THAT THE COMMISSION MUST  
47 RECEIVE FROM THE APPLICANT TO MAKE THE APPLICATION COMPLETE.  
48 5. WITHIN SIXTY BUSINESS DAYS AFTER IT RECEIVES THE COMPLETED APPLICA-  
49 TION, THE COMMISSION SHALL APPROVE THE APPLICATION AND ISSUE A STATEWIDE  
50 FRANCHISE TO THE APPLICANT, OR DENY THE APPLICATION. WITHIN SIXTY DAYS  
51 OF THE RECEIPT THEREOF, THE COMMISSION SHALL SCHEDULE THREE PUBLIC HEAR-  
52 INGS TO BE HELD IN DIFFERENT GEOGRAPHICAL AREAS OF THE STATE TO GAIN  
53 PUBLIC COMMENT IN CONSIDERATION OF THE APPLICATION. ON OR BEFORE THE  
54 EXPIRATION OF THE SIXTY-DAY PERIOD, THE COMMISSION SHALL ISSUE AN ORDER  
55 IN WRITING APPROVING THE APPLICATION IF THE APPLICANT HAS COMPLIED WITH  
56 THE REQUIREMENTS FOR A STATEWIDE FRANCHISE, OR THE COMMISSION SHALL

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1 DISAPPROVE THE APPLICATION IN WRITING CITING THE REASONS FOR DISAPPROVAL  
2 IF THE BOARD DETERMINES THAT THE APPLICATION FOR A STATEWIDE FRANCHISE  
3 DOES NOT COMPLY WITH THE REQUIREMENTS FOR A STATEWIDE FRANCHISE. THE  
4 COMMISSION MAY DENY THE APPLICATION IF THE APPLICANT HAS FAILED TO STATE  
5 IN THE APPLICATION THE INFORMATION AND REPRESENTATIONS REQUIRED BY  
6 SUBDIVISION TWO OF THIS SECTION. IF THE COMMISSION DENIES THE APPLICA-  
7 TION, IT MUST SPECIFY WITH PARTICULARITY THE REASON OR REASONS FOR THE  
8 DENIAL, AND THE APPLICANT MAY AMEND ITS APPLICATION TO CURE ANY DEFICI-  
9 CIENCY. THE COMMISSION SHALL DECIDE SUCH AMENDED APPLICATION WITHIN TEN  
10 BUSINESS DAYS OF ITS SUBMISSION TO THE COMMISSION BY THE APPLICANT. IF  
11 THE COMMISSION DENIES THE APPLICATION, THE COMMISSION SHALL SCHEDULE A  
12 PUBLIC MEETING WITH THE APPLICANT TO EXPLAIN TO THE APPLICANT THE  
13 REASONS FOR THE COMMISSION'S DISAPPROVAL. SUCH MEETING SHALL BE SCHED-  
14 ULED NO LATER THAN THIRTY DAYS FOLLOWING THE EXPIRATION OF THE SIXTY-DAY  
15 REVIEW PERIOD AS REQUIRED BY THIS SECTION. THE APPLICANT SHALL HAVE  
16 THIRTY DAYS FOLLOWING THE DATE OF THE MEETING WITH THE COMMISSION TO  
17 FILE AN APPEAL OF THE BOARD'S DECISION. THE COMMISSION SHALL THEREAFTER  
18 SCHEDULE AN ADMINISTRATIVE HEARING NOT LATER THAN THE THIRTIETH DAY  
19 FOLLOWING THE DATE OF THE FILING OF THE APPLICANT'S APPEAL IN ORDER TO

20 CONSIDER THE APPLICANT'S APPEAL. THE COMMISSION SHALL ISSUE A FINAL  
21 DECISION IN WRITTEN FORM ON THE APPLICANT'S APPEAL NOT LATER THAN THE  
22 SIXTIETH DAY FOLLOWING THE ADMINISTRATIVE HEARING, REQUIRED BY THIS  
23 SUBDIVISION, ON THE APPLICANT'S APPEAL. AFTER AN ADMINISTRATIVE PERIOD  
24 AN APPLICANT MAY CHALLENGE A DENIAL OF ITS APPLICATION OR AMENDED APPLI-  
25 CATION IN ANY COURT OF COMPETENT JURISDICTION.

26 6. A STATEWIDE FRANCHISE AUTHORIZATION ISSUED BY THE COMMISSION SHALL  
27 CONTAIN:

28 (A) A GRANT OF A FRANCHISE TO PROVIDE CABLE SERVICE IN THE SERVICE  
29 AREA FOOTPRINT DESCRIBED IN THE APPLICATION; TO CONSTRUCT, UPGRADE,  
30 OPERATE OR MAINTAIN A NETWORK CAPABLE OF PROVIDING SUCH SERVICE, EXCEPT  
31 WHERE THIS GRANT IS NOT REQUIRED AND TO USE AND OCCUPY THE PUBLIC  
32 RIGHTS-OF-WAY IN THE DELIVERY OF THAT SERVICE; AND

33 (B) A STATEMENT THAT THE FRANCHISE GRANT IN SUBDIVISION ONE OF THIS  
34 SECTION IS SUBJECT TO LAWFUL OPERATION OF THE CABLE SERVICE BY THE  
35 APPLICANT OR ITS SUCCESSOR IN INTEREST.

36 7. AN APPLICANT HAVING PRE-EXISTING AUTHORITY TO UTILIZE THE PUBLIC  
37 RIGHTS-OF-WAY IS REQUIRED TO OBTAIN A STATEWIDE FRANCHISE PRIOR TO THE  
38 ACTUAL PROVISION OF CABLE SERVICE ON A COMMERCIAL BASIS DIRECTLY TO  
39 SUBSCRIBERS. HOWEVER, SUCH AN APPLICANT IS NOT REQUIRED TO OBTAIN A  
40 STATEWIDE FRANCHISE OR ANY MUNICIPALITY AUTHORIZATION, EXCEPT FOR BEING  
41 SUBJECT TO MUNICIPALITY RIGHT-OF-WAY REQUIREMENTS, IN ORDER TO  
42 CONSTRUCT, UPGRADE, OPERATE OR MAINTAIN A NETWORK THAT IS CAPABLE OF  
43 PROVIDING CABLE SERVICE.

44 8. A SYSTEM-WIDE FRANCHISE ISSUED BY THE BOARD SHALL BE NONTRANSFERA-  
45 BLE, EXCEPT BY WRITTEN CONSENT OF THE BOARD.

46 S 235. LENGTH OF STATEWIDE FRANCHISE. A STATEWIDE FRANCHISE ISSUED BY  
47 THE COMMISSION SHALL BE VALID FOR TEN YEARS FROM THE DATE OF ISSUANCE.  
48 RENEWAL OF A SYSTEM-WIDE FRANCHISE SHALL BE VALID FOR A PERIOD OF  
49 FIFTEEN YEARS FROM THE DATE OF THE RENEWAL ISSUANCE, AND THE COMMISSION  
50 SHALL ESTABLISH RULES GOVERNING THE RENEWAL OF A SYSTEM-WIDE FRANCHISE.

51 S 236. TERMINATION OF A STATEWIDE FRANCHISE. 1. A FRANCHISE SHALL  
52 TERMINATE AT THE EXPIRATION OF ITS TERM OR OTHERWISE IN ACCORDANCE WITH  
53 THE PROVISIONS THEREOF, UNLESS, PRIOR THERETO, THE COMMISSION OTHERWISE  
54 ORDERS. THE COMMISSION MAY SO ORDER ONLY IF IT FINDS, AFTER PUBLIC  
55 NOTICE AND OPPORTUNITY FOR A HEARING, THAT THE FRANCHISEE:

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1 (A) HAS COMMITTED A MATERIAL BREACH OF ITS FRANCHISE OR ANY APPLICABLE  
2 PROVISION OF THIS ARTICLE OR OF THE REGULATIONS PROMULGATED HEREUNDER  
3 AND HAS FAILED, WITHOUT REASONABLE JUSTIFICATION, TO CURE SAID BREACH  
4 WITHIN SIXTY DAYS AFTER HAVING RECEIVED WRITTEN NOTICE THEREOF FROM THE  
5 COMMISSION; OR

6 (B) HAS NOT MET THE REQUIREMENTS OF SECTIONS TWO HUNDRED FORTY-THREE  
7 AND TWO HUNDRED FORTY-FOUR OF THIS ARTICLE;

8 (C) HAS ENGAGED IN BLOCKING OF LAWFUL CONTENT OR WEB SITES OR SERVICES  
9 OF COMPETITORS, OR REFUSED TO INTERCONNECT ITS FACILITIES WITH THE  
10 FACILITIES OF ANOTHER PROVIDER OF BROADBAND NETWORK SERVICES ON REASON-  
11 ABLE AND NONDISCRIMINATORY TERMS OR CONDITIONS; OR

12 (D) HAS BEEN ADJUDICATED AS BANKRUPT OR HAS FILED A VOLUNTARY PETITION  
13 FOR BANKRUPTCY OR REORGANIZATION OR FOR AN ORDER PROTECTING ITS ASSETS  
14 FROM THE CLAIMS OF CREDITORS AND THE COMMISSION FINDS THAT TERMINATION  
15 OF THE FRANCHISE OR CERTIFICATE OF CONFIRMATION UNDER SUCH CONDITIONS IS  
16 IN THE BEST INTEREST OF THE PUBLIC.

17 2. UPON TERMINATION OF A FRANCHISE OR CERTIFICATE OF CONFIRMATION, THE  
18 CABLE OPERATOR SHALL DISPOSE OF ITS FACILITIES IN ACCORDANCE WITH THE  
19 PROVISIONS OF THE FRANCHISE OR CERTIFICATE. HOWEVER, ON MOTION OF ANY  
20 INTERESTED PARTY OR UPON ITS OWN MOTION, AND AFTER PUBLIC NOTICE AND  
21 OPPORTUNITY FOR HEARING, IF THE COMMISSION FINDS THAT THE CONTINUED  
22 PRESENCE OF THE FACILITIES IN ANY PUBLIC THOROUGHFARE WOULD POSE A  
23 NUISANCE TO THE MUNICIPALITY OR ITS RESIDENTS, THE OPERATOR SHALL REMOVE  
24 ITS FACILITIES WITHIN SUCH PERIOD AS THE COMMISSION SHALL ORDER. IN THE

25 ABSENCE OF ANY APPLICABLE FRANCHISE OR CERTIFICATE PROVISION OR ORDER BY  
26 THE COMMISSION TO THE CONTRARY, THE CABLE TELEVISION COMPANY MAY ABANDON  
27 ITS FACILITIES.

28 S 237. ABANDONMENT OF SERVICE. 1. NO CABLE OPERATOR MAY ABANDON ANY  
29 SERVICE OR PORTION THEREOF WITHOUT GIVING SIX MONTHS' PRIOR WRITTEN  
30 NOTICE TO THE COMMISSION AND TO THE FRANCHISOR, IF ANY, AND TO THE MUNI-  
31 CIPALITIES IT SERVES.

32 2. WHEN ABANDONMENT OF ANY SERVICE IS PROHIBITED BY A FRANCHISE, NO  
33 CABLE OPERATOR MAY ABANDON SUCH SERVICE WITHOUT WRITTEN CONSENT OF THE  
34 COMMISSION. IN GRANTING SUCH CONSENT, THE COMMISSION MAY IMPOSE SUCH  
35 TERMS, CONDITIONS OR REQUIREMENTS AS IN ITS JUDGMENT ARE NECESSARY TO  
36 PROTECT THE PUBLIC INTEREST.

37 S 238. MUNICIPAL POWER AND REGULATION OVER FRANCHISE HOLDERS. A MUNI-  
38 CIPALITY MAY:

39 1. EXERCISE ITS PUBLIC RIGHTS-OF-WAY AUTHORITY OVER FRANCHISE HOLDERS,  
40 INCLUDING REQUIRING FRANCHISE HOLDERS TO FOLLOW MUNICIPAL ORDINANCES AS  
41 WELL AS ALL APPLICABLE LOCAL, STATE AND FEDERAL LAWS;

42 2. RECEIVE, MEDIATE, AND RESOLVE CABLE SERVICE QUALITY COMPLAINTS FROM  
43 A FRANCHISE HOLDER'S CUSTOMERS WITHIN THE MUNICIPALITY;

44 3. REQUIRE A FRANCHISE HOLDER WHO IS PROVIDING CABLE SERVICE WITHIN  
45 THE MUNICIPALITY TO REGISTER WITH THE MUNICIPALITY, MAINTAIN A POINT OF  
46 CONTACT, AND PROVIDE NOTICE OF ANY FRANCHISE AUTHORIZATION TRANSFER TO  
47 THE MUNICIPALITY WITHIN FOURTEEN BUSINESS DAYS AFTER THE COMPLETION OF  
48 THE TRANSFER;

49 4. ESTABLISH REASONABLE GUIDELINES REGARDING THE USE OF PUBLIC, EDUCA-  
50 TIONAL, AND GOVERNMENTAL ACCESS CHANNELS WITHIN THE MUNICIPALITY IN  
51 ADDITION TO THOSE ESTABLISHED IN SECTION TWO HUNDRED FORTY-ONE OF THIS  
52 ARTICLE.

53 S 239. PAYMENT AND REMITTANCE OF FRANCHISE FEE. 1. THE FRANCHISE HOLD-  
54 ER WHO OFFERS CABLE SERVICE WITHIN THE JURISDICTION OF A MUNICIPALITY  
55 SHALL CALCULATE AND REMIT TO THE MUNICIPALITY AT THE END OF EACH CALEN-  
56 DAR YEAR QUARTER A FRANCHISE FEE, AS PROVIDED IN THIS SECTION. THE OBLI-

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1 GATION TO CALCULATE AND REMIT THE FRANCHISE FEE TO A MUNICIPALITY BEGINS  
2 IMMEDIATELY UPON PROVISION OF CABLE SERVICE WITHIN THAT MUNICIPALITY'S  
3 JURISDICTION, BUT THE FIRST REMITTANCE SHALL NOT BE DUE UNTIL THE END OF  
4 THE FIRST CALENDAR YEAR QUARTER THAT IS LATER THAN ONE HUNDRED EIGHTY  
5 DAYS AFTER THE PROVISION OF CABLE SERVICE BEGAN.

6 2. THE FRANCHISE FEE SHALL BE CALCULATED AS A PERCENTAGE OF THE HOLD-  
7 ER'S GROSS REVENUES, AS DEFINED IN SECTION TWO HUNDRED THIRTY-ONE OF  
8 THIS ARTICLE AND SHALL BE FIVE PERCENT. A MUNICIPALITY MAY, BY ORDI-  
9 NANCE, CHANGE THE PERCENTAGE APPLIED TO THE GROSS REVENUES OF THE HOLD-  
10 ER.

11 3. NO FEE UNDER THIS SECTION WILL BECOME DUE UNTIL THE MUNICIPALITY  
12 CERTIFIES AND PROVIDES DOCUMENTATION TO THE FRANCHISE HOLDER SUPPORTING  
13 THE PERCENTAGE PAID BY ANY INCUMBENT CABLE OPERATOR SERVING THE AREA  
14 WITHIN THE MUNICIPALITY'S JURISDICTION.

15 4. NO MUNICIPALITY OR ANY OTHER POLITICAL SUBDIVISION OF THIS STATE  
16 MAY ASSESS ANY ADDITIONAL FEES OR CHARGES OR REQUIRE OTHER REMUNERATION  
17 OF ANY KIND FROM THE FRANCHISE HOLDER OTHER THAN AS SET FORTH IN THIS  
18 SECTION, PROVIDED, HOWEVER, THAT THE PROVISION OF IN-KIND SERVICES OR  
19 SUPPORT, PERSONNEL AND FUNDING DEDICATED TO PUBLIC, EDUCATIONAL AND  
20 GOVERNMENT FACILITIES AND SERVICES SHALL NOT BE CONSIDERED ADDITIONAL  
21 FEES, CHARGES OR REMUNERATION.

22 5. FOR PURPOSES OF THIS SECTION, IN THE CASE OF A CABLE SERVICE THAT  
23 MAY BE BUNDLED OR INTEGRATED FUNCTIONALLY WITH OTHER SERVICES, CAPABILI-  
24 TIES OR APPLICATIONS, THE FRANCHISE FEE SHALL BE APPLIED ONLY TO THE  
25 GROSS REVENUES, AS DEFINED IN THIS ARTICLE, ATTRIBUTABLE TO CABLE  
26 SERVICE OR THE USE OF THE CABLE SYSTEM AND FACILITIES, AS REFLECTED ON  
27 THE BOOKS AND RECORDS OF THE HOLDER IN ACCORDANCE WITH GENERALLY  
28 ACCEPTED ACCOUNTING PRINCIPLES AND FEDERAL COMMUNICATIONS COMMISSION

29 RULES, REGULATIONS, STANDARDS OR ORDERS, AS APPLICABLE.

30 6. THE FRANCHISE FEE SHALL BE REMITTED TO THE APPLICABLE MUNICIPALITY  
31 QUARTERLY, WITHIN FORTY-FIVE DAYS AFTER THE END OF THE QUARTER FOR THE  
32 PRECEDING CALENDAR QUARTER. EACH PAYMENT SHALL BE ACCOMPANIED BY A  
33 SUMMARY EXPLAINING THE BASIS FOR THE CALCULATION OF THE FRANCHISE FEE.  
34 NOT MORE THAN ONCE ANNUALLY, A MUNICIPALITY MAY EXAMINE THE FRANCHISE  
35 HOLDER'S BUSINESS RECORDS TO THE EXTENT REASONABLY NECESSARY TO ENSURE  
36 COMPENSATION IN ACCORDANCE WITH THIS SECTION. EACH PARTY SHALL BEAR THE  
37 PARTY'S OWN COSTS OF THE EXAMINATION. ANY CLAIMS BY A MUNICIPALITY THAT  
38 COMPENSATION IS NOT IN ACCORDANCE WITH THIS SECTION, AND ANY CLAIMS FOR  
39 REFUNDS OR OTHER CORRECTIONS TO THE REMITTANCE OF THE FRANCHISE HOLDER,  
40 MUST BE MADE WITHIN THREE YEARS AND FORTY-FIVE DAYS OF THE END OF THE  
41 QUARTER FOR WHICH COMPENSATION IS REMITTED, OR THREE YEARS FROM THE DATE  
42 OF REMITTANCE, WHICHEVER IS LATER. EITHER A MUNICIPALITY OR THE FRAN-  
43 CHISE HOLDER MAY, IN THE EVENT OF A DISPUTE CONCERNING COMPENSATION  
44 UNDER THIS SECTION, BRING AN ACTION IN A COURT OF COMPETENT JURISDIC-  
45 TION.

46 S 240. PUBLIC, EDUCATIONAL AND GOVERNMENT CHANNELS. 1. IN ADDITION TO  
47 THE REQUIREMENTS SET FORTH IN 16 NYCRR SEC. 894.4 (AS MAY BE AMENDED  
48 FROM TIME TO TIME), THE FRANCHISE HOLDER SHALL PROVIDE THE MUNICIPALITY  
49 WITH CAPACITY IN ITS CABLE SYSTEM TO ALLOW PUBLIC, EDUCATIONAL, AND  
50 GOVERNMENTAL (PEG) ACCESS CHANNELS FOR NONCOMMERCIAL PROGRAMMING. FOR  
51 THE PURPOSES OF THIS SECTION, PEG CHANNELS SHALL BE DEFINED AS ANALOG  
52 CHANNELS OF SIX MEGAHERTZ BANDWIDTH OR THE SAME AS ANY OTHER CHANNEL ON  
53 THE BASIC TIER, WHICHEVER IS GREATER. IN ADDITION TO THE REQUIREMENTS  
54 SET FORTH IN THIS SECTION, THE COMMISSION MAY ISSUE ADDITIONAL RULES OR  
55 GUIDELINES REGARDING PEG ACCESS CHANNELS. THE HOLDER SHALL PROVIDE THE

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1 SAME ANCILLARY SERVICES TO THE PEG CHANNELS AND ENTITIES AS THE INCUM-  
2 BENT PROVIDER.

3 2. THE FRANCHISE HOLDER SHALL DESIGNATE A SUFFICIENT AMOUNT OF CAPACI-  
4 TY ON ITS CABLE SYSTEM TO ALLOW THE PROVISION OF A COMPARABLE NUMBER OF  
5 PEG CHANNELS OR HOURS OF PROGRAMMING THAT THE INCUMBENT CABLE OPERATOR  
6 HAS ACTIVATED AND PROVIDED WITHIN THE MUNICIPALITY UNDER THE TERMS OF  
7 ITS FRANCHISE AGREEMENT AS OF THE EFFECTIVE DATE OF THIS ARTICLE. IF A  
8 MUNICIPALITY DID NOT HAVE PEG ACCESS CHANNELS AS OF THAT DATE, THE CABLE  
9 OPERATOR SHALL FURNISH TO THE MUNICIPALITY UPON REQUEST UP TO THREE PEG  
10 CHANNELS FOR A MUNICIPALITY WITH A POPULATION OF AT LEAST FIFTY THOUSAND  
11 AND UP TO TWO PEG CHANNELS FOR A MUNICIPALITY WITH A POPULATION OF LESS  
12 THAN FIFTY THOUSAND. FOR THE PURPOSES OF THIS SECTION, A PEG CHANNEL IS  
13 DEEMED ACTIVATED IF IT IS BEING UTILIZED FOR PEG PROGRAMMING WITHIN THE  
14 MUNICIPALITY FOR AT LEAST EIGHT HOURS PER DAY AND IF SUCH PROGRAMMING IS  
15 NOT BROADCAST MORE THAN ONCE IN EVERY EIGHT HOURS. THE HOLDER SHALL HAVE  
16 TWELVE MONTHS FROM THE DATE THE MUNICIPALITY REQUESTS SUCH PEG CHANNELS  
17 TO DESIGNATE THE CAPACITY; PROVIDED, HOWEVER, THAT THE TWELVE-MONTH  
18 PERIOD SHALL BE TOLLED BY ANY PERIOD DURING WHICH THE DESIGNATION OR  
19 PROVISION OF PEG CHANNEL CAPACITY IS TECHNICALLY INFEASIBLE, INCLUDING  
20 ANY FAILURE OR DELAY OF THE INCUMBENT CABLE OPERATOR TO MAKE ADEQUATE  
21 INTERCONNECTION AVAILABLE, AS REQUIRED BY THIS SECTION. IN CITIES WITH A  
22 POPULATION OF ONE MILLION OR MORE PERSONS, IF A SYSTEM HAS TOTAL ACTI-  
23 VATED BANDWIDTH IN EXCESS OF EIGHT HUNDRED SIXTY-TWO MEGAHERTZ THEN AT  
24 LEAST TWO ADDITIONAL PEG CHANNELS SHALL BE SET ASIDE BY THE HOLDER,  
25 INCLUDING ONE FOR PUBLIC ACCESS.

26 3. THE FRANCHISE HOLDER MAY SUBMIT TO THE COMMISSION AN APPLICATION TO  
27 CEASE PROVIDING ANY PEG CHANNEL PROVIDED PURSUANT TO THIS SECTION THAT  
28 IS NOT UTILIZED BY THE MUNICIPALITY FOR AT LEAST EIGHT HOURS PER DAY,  
29 AND EXCEPT AS PROVIDED HEREIN, THE CHANNEL MAY THEREAFTER BE PROGRAMMED  
30 AT THE FRANCHISE HOLDER'S DISCRETION. THE COMMISSION MAY HOLD A HEARING  
31 IN THE MUNICIPALITY TO AID IN MAKING ITS DETERMINATION WHETHER TO  
32 APPROVE THE APPLICATION. THE COMMISSION SHALL ISSUE A DECISION WITHIN  
33 THIRTY BUSINESS DAYS OF THE FRANCHISEE'S APPLICATION. IF THE MUNICI-



34 PALITY SUBSEQUENTLY CERTIFIES TO THE COMMISSION AND HOLDER A SCHEDULE  
35 FOR AT LEAST EIGHT HOURS OF DAILY NON-REPEAT PEG CHANNEL PROGRAMMING PER  
36 CHANNEL, THE HOLDER SHALL RESTORE THE PEG CHANNEL OR CHANNELS FOR THE  
37 USE OF THE MUNICIPALITY FOR AS LONG AS THE MUNICIPALITY USES THE CHANNEL  
38 OR CHANNELS FOR AT LEAST EIGHT HOURS A DAY.

39 4. THE CONTENT AND OPERATION OF ANY PEG ACCESS CHANNEL PROVIDED PURSU-  
40 ANT TO THIS SECTION SHALL BE THE RESPONSIBILITY OF THE MUNICIPALITY,  
41 RECEIVING THE BENEFIT OF SUCH CHANNEL, AND THE FRANCHISE HOLDER BEARS  
42 ONLY THE RESPONSIBILITY FOR THE TRANSMISSION OF SUCH CHANNEL, SUBJECT TO  
43 REASONABLE TECHNOLOGICAL CONSTRAINTS. THE FRANCHISE HOLDER SHALL BE  
44 RESPONSIBLE FOR PROVIDING THE CONNECTIVITY, AS WELL AS OTHER EQUIPMENT  
45 NECESSARY, TO EACH PEG ACCESS CHANNEL PROGRAMMING DISTRIBUTION LOCATION  
46 AND FOR DOING SO WITHOUT CHARGE FOR UP TO THE FIRST TWO HUNDRED FEET OF  
47 THE HOLDER'S CONNECTING FACILITIES.

48 5. THE MUNICIPALITY, OR ITS DESIGNEES, MUST ENSURE THAT ALL TRANS-  
49 MISSIONS, CONTENT, OR PROGRAMMING TO BE TRANSMITTED OVER A PEG ACCESS  
50 CHANNEL OR FACILITY BY A FRANCHISE HOLDER ARE PROVIDED OR SUBMITTED TO  
51 THE CABLE OPERATOR IN A MANNER OR FORM THAT IS CAPABLE OF BEING ACCEPTED  
52 AND TRANSMITTED BY THE CABLE OPERATOR, WITHOUT REQUIREMENT FOR ADDI-  
53 TIONAL ALTERATION OR CHANGE IN THE CONTENT BY THE CABLE OPERATOR, OVER  
54 THE CABLE SYSTEM OF THE CABLE OPERATOR. THE MUNICIPALITY'S, OR ITS  
55 DESIGNEES' PROVISION OF PEG CONTENT TO THE HOLDER SHALL CONSTITUTE  
56 AUTHORIZATION FOR THE HOLDER TO CARRY SUCH CONTENT INCLUDING, AT THE

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1 HOLDER'S OPTION, BEYOND THE JURISDICTIONAL BOUNDARIES OF THE MUNICI-  
2 PALITY.

3 6. THE FRANCHISE HOLDER AND AN INCUMBENT CABLE OPERATOR SHALL USE  
4 REASONABLE EFFORTS TO INTERCONNECT THEIR CABLE SYSTEMS FOR THE PURPOSE  
5 OF PROVIDING PEG PROGRAMMING. INTERCONNECTION MAY BE ACCOMPLISHED BY  
6 DIRECT CABLE, MICROWAVE LINK, SATELLITE, OR OTHER REASONABLE METHOD OF  
7 CONNECTION. FRANCHISE HOLDERS AND INCUMBENT CABLE OPERATORS SHALL NEGO-  
8 TIATE IN GOOD FAITH AND INCUMBENT CABLE OPERATORS MAY NOT WITHHOLD  
9 INTERCONNECTION OF PEG CHANNELS. IN THE EVENT A FRANCHISE HOLDER AND AN  
10 INCUMBENT CABLE OPERATOR CANNOT REACH A MUTUALLY ACCEPTABLE INTERCON-  
11 NECTION AGREEMENT, THEN THE DUTY OF THE HOLDER SHALL BE DISCHARGED IF  
12 THE HOLDER MAKES INTERCONNECTION AVAILABLE TO THE CHANNEL ORIGINATOR AT  
13 A POINT ON THE HOLDER'S NETWORK DETERMINED BY THE HOLDER.

14 7. THE PEG CHANNELS SHALL BE FOR THE EXCLUSIVE USE OF THE LOCAL ENTITY  
15 OR ITS DESIGNEE TO PROVIDE PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHAN-  
16 NELS. THE PEG CHANNELS SHALL BE USED ONLY FOR NONCOMMERCIAL PURPOSES.  
17 HOWEVER, ADVERTISING, UNDERWRITING, OR SPONSORSHIP RECOGNITION MAY BE  
18 CARRIED ON THE CHANNELS FOR THE PURPOSE OF FUNDING PEG-RELATED ACTIV-  
19 ITIES. THE PEG CHANNELS SHALL ALL BE CARRIED ON THE BASIC SERVICE TIER.  
20 TO THE EXTENT FEASIBLE, THE PEG CHANNELS SHALL NOT BE SEPARATED NUMER-  
21 ICALLY FROM OTHER CHANNELS CARRIED ON THE BASIC SERVICE TIER AND THE  
22 CHANNEL NUMBERS FOR THE PEG CHANNELS SHALL BE THE SAME CHANNEL NUMBERS  
23 USED BY THE INCUMBENT CABLE OPERATOR UNLESS PROHIBITED BY FEDERAL LAW.  
24 AFTER THE INITIAL DESIGNATION OF PEG CHANNEL NUMBERS, THE CHANNEL  
25 NUMBERS SHALL NOT BE CHANGED WITHOUT THE AGREEMENT OF THE LOCAL ENTITY  
26 UNLESS THE CHANGE IS REQUIRED BY FEDERAL LAW. EACH CHANNEL SHALL BE  
27 CAPABLE OF CARRYING A NATIONAL TELEVISION SYSTEM COMMITTEE (NTSC) TELE-  
28 VISION SIGNAL.

29 8. THE CONTENT TO BE PROVIDED OVER THE PEG CHANNEL CAPACITY PROVIDED  
30 PURSUANT TO THIS SECTION SHALL BE THE RESPONSIBILITY OF THE LOCAL ENTITY  
31 OR ITS DESIGNEE RECEIVING THE BENEFIT OF THAT CAPACITY, AND THE HOLDER  
32 OF A STATE FRANCHISE BEARS ONLY THE RESPONSIBILITY FOR THE TRANSMISSION  
33 OF THAT CONTENT, SUBJECT TO TECHNOLOGICAL RESTRAINTS.

34 9. THE PEG SIGNAL SHALL BE RECEIVABLE BY ALL SUBSCRIBERS, WHETHER THEY  
35 RECEIVE DIGITAL OR ANALOG SERVICE, OR A COMBINATION THEREOF, WITHOUT THE  
36 NEED FOR ANY EQUIPMENT OTHER THAN THE EQUIPMENT NECESSARY TO RECEIVE THE  
37 LOWEST COST TIER OF SERVICE. THE PEG ACCESS CAPACITY PROVIDED SHALL BE

38 OF SIMILAR QUALITY AND FUNCTIONALITY TO THAT OFFERED BY COMMERCIAL CHAN-  
39 NELS ON THE LOWEST COST TIER OF SERVICE UNLESS THE SIGNAL IS PROVIDED TO  
40 THE HOLDER AT A LOWER QUALITY OR WITH LESS FUNCTIONALITY.

41 10. AFTER JANUARY FIRST, TWO THOUSAND SEVEN, AND UNTIL THE EXPIRATION  
42 OF THE INCUMBENT CABLE OPERATOR'S FRANCHISE, IF THE INCUMBENT CABLE  
43 OPERATOR HAS EXISTING UNSATISFIED OBLIGATIONS UNDER THE FRANCHISE TO  
44 REMIT TO THE LOCAL ENTITY OR ITS DESIGNEE ANY CASH PAYMENTS FOR THE  
45 ONGOING COSTS OF PUBLIC, EDUCATIONAL, AND GOVERNMENT ACCESS CHANNEL  
46 FACILITIES, THE LOCAL ENTITY, OR ITS DESIGNEE FOR THE PUBLIC ACCESS  
47 CHANNELS, SHALL DIVIDE THOSE CASH PAYMENTS AMONG ALL CABLE OR VIDEO  
48 PROVIDERS AS PROVIDED IN THIS SECTION. THE FEE SHALL BE THE HOLDER'S PRO  
49 RATA PER SUBSCRIBER SHARE OF THE CASH PAYMENT REQUIRED TO BE PAID BY THE  
50 INCUMBENT CABLE OPERATOR TO THE LOCAL ENTITY OR ITS DESIGNEE COMMUNITY  
51 ACCESS ORGANIZATION FOR THE COSTS OF PEG CHANNEL FACILITIES. ALL VIDEO  
52 SERVICE PROVIDERS AND THE INCUMBENT CABLE OPERATOR SHALL BE SUBJECT TO  
53 THE SAME REQUIREMENTS FOR RECURRING PAYMENTS FOR THE SUPPORT OF PEG  
54 CHANNEL FACILITIES, WHETHER EXPRESSED AS A PERCENTAGE OF GROSS REVENUE  
55 OR AS AN AMOUNT PER SUBSCRIBER, PER MONTH, OR OTHERWISE.

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1 11. A LOCAL ENTITY SHALL ESTABLISH A PAYMENT FOR THE ONGOING SUPPORT  
2 OF THE COST OF PEG FACILITIES AND SERVICES THAT WOULD BECOME EFFECTIVE  
3 SUBSEQUENT TO THE EXPIRATION OF ANY FEE IMPOSED BY THIS ARTICLE,  
4 PROVIDED, HOWEVER, THAT NO SUCH FEE SHALL BE ALLOCATED SUCH THAT ANY  
5 COMMUNITY ACCESS ORGANIZATION IS RECEIVING ANYTHING LESS THAN WHAT IT IS  
6 RECEIVING FROM THE CABLE OPERATOR ON THE EFFECTIVE DATE OF THIS LEGIS-  
7 LATION, AND PROVIDED, HOWEVER, THAT EVERY LOCAL ENTITY SHALL BE ENTITLED  
8 TO A PAYMENT OF NOT LESS THAN TWO PERCENT FROM THE HOLDER OF A STATE  
9 FRANCHISE FOR THE ONGOING SUPPORT OF THE COST OF PEG FACILITIES AND  
10 SERVICES. IF, ON DECEMBER THIRTY-FIRST, TWO THOUSAND SIX, A LOCAL ENTI-  
11 TY OR ITS DESIGNEE WAS IMPOSING A SEPARATE FEE TO SUPPORT PEG CHANNEL  
12 FACILITIES THAT IS IN EXCESS OF TWO PERCENT, THAT ENTITY OR ITS DESIGNEE  
13 MAY ESTABLISH A FEE NO GREATER THAN THAT SEPARATE FEE, AND IN NO EVENT  
14 GREATER THAN THREE PERCENT, TO SUPPORT PEG ACTIVITIES. IF THE PEG  
15 SUPPORT FEE IMPOSED BY A LOCAL ENTITY OR ITS DESIGNEE IS EXPRESSED IN A  
16 MANNER OTHER THAN AS A PERCENTAGE OF GROSS REVENUES, THE LOCAL ENTITY OR  
17 ITS DESIGNEE COMMUNITY ACCESS ORGANIZATION MAY CONVERT THAT FEE TO A  
18 CURRENTLY EQUIVALENT PERCENTAGE OF GROSS REVENUES AT ANY TIME. THE LOCAL  
19 ENTITY OR ITS DESIGNEE MAY ADOPT REQUIREMENTS FOR THE PROVISION OF PEG-  
20 RELATED IN-KIND RESOURCES BY ALL CABLE AND VIDEO SERVICE PROVIDERS.

21 12. RULES AND REGULATIONS ADOPTED BY THE COMMUNITY ACCESS ORGANIZATION  
22 SHALL GOVERN THE USE OF ANY CHANNEL TIME ON THE PUBLIC CHANNELS AS WELL  
23 AS THE EQUIPMENT, FACILITIES AND SERVICES RELATED TO THE PUBLIC CHAN-  
24 NELS.

25 13. THE COMMISSION, THROUGH AN ADMINISTRATIVE PROCEEDING SHALL HAVE  
26 THE ORIGINAL JURISDICTION TO ENFORCE ANY REQUIREMENTS UNDER THIS SECTION  
27 TO RESOLVE ANY DISPUTE REGARDING THE REQUIREMENTS SET FORTH IN THIS  
28 SECTION. AFTER THE ADMINISTRATIVE PROCESS IS EXHAUSTED, A COURT OF  
29 COMPETENT JURISDICTION SHALL HAVE JURISDICTION TO ENFORCE ANY REQUIRE-  
30 MENT UNDER THIS SECTION OR RESOLVE ANY DISPUTE REGARDING THE REQUIRE-  
31 MENTS SET FORTH IN THIS SECTION, AND NO CABLE OPERATOR MAY BE BARRED  
32 FROM THE PROVISION OF CABLE SERVICE OR BE REQUIRED TO TERMINATE CABLE  
33 SERVICE AS A RESULT OF SUCH DISPUTE OR ENFORCEMENT ACTION.

34 S 241. CABLE OPERATOR'S COMMUNITY COMMITMENT. 1. CABLE OPERATORS  
35 SHALL INSTALL AND RETAIN OR PROVIDE, WITHOUT CHARGE, ONE SERVICE OUTLET  
36 ACTIVATED FOR BASIC SERVICE TO ANY AND ALL FIRE STATIONS, PUBLIC SCHOOLS  
37 POLICE STATIONS, PUBLIC LIBRARIES AND OTHER SUCH BUILDINGS USED FOR  
38 MUNICIPAL PURPOSES.

39 2. CABLE OPERATORS SHALL PROVIDE INTERNET SERVICE, WITHOUT CHARGE,  
40 THROUGH ONE SERVICE OUTLET ACTIVATED FOR BASIC SERVICE TO ANY AND ALL  
41 FIRE STATIONS, PUBLIC SCHOOLS, POLICE STATIONS, PUBLIC LIBRARIES, AND  
42 OTHER SUCH BUILDING USED FOR MUNICIPAL PURPOSES.

43 S 242. CONSUMER PROTECTION RULES. 1. EVERY CABLE OPERATOR SHALL  
44 PROVIDE SAFE, ADEQUATE AND RELIABLE SERVICE IN ACCORDANCE WITH APPLICA-  
45 BLE LAWS, REGULATIONS, AND FRANCHISE REQUIREMENTS. CABLE OPERATORS WITH  
46 A STATEWIDE FRANCHISE ARE SUBJECT TO THE REQUIREMENTS UNDER SECTIONS TWO  
47 HUNDRED TWENTY-FOUR AND TWO HUNDRED TWENTY-FOUR-A OF THIS CHAPTER AND  
48 ANY OTHER CUSTOMER SERVICE STANDARDS PERTAINING TO THE PROVISION OF  
49 VIDEO SERVICE ESTABLISHED BY FEDERAL LAW OR REGULATION OR ADOPTED BY  
50 SUBSEQUENT ENACTMENT OF THE LEGISLATURE. ALL CUSTOMER SERVICE AND  
51 CONSUMER PROTECTION STANDARDS UNDER THIS SECTION SHALL BE INTERPRETED  
52 AND APPLIED TO ACCOMMODATE NEWER OR DIFFERENT TECHNOLOGIES WHILE MEETING  
53 OR EXCEEDING THE GOALS OF THESE STANDARDS.  
54 2. IN ADDITION, CABLE OPERATORS:  
55 (A) SHALL CLEARLY AND CONSPICUOUSLY DISCLOSE TO USERS, IN PLAIN  
56 LANGUAGE, ACCURATE INFORMATION CONCERNING ANY TERMS, CONDITIONS, OR

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1 LIMITATIONS ON THE BROADBAND NETWORK SERVICE THEY OFFER, THE SPEEDS OF  
2 THE DOWNLOAD AND UPLOADING SPEEDS OF THE PROVIDER'S INTERNET SERVICE;  
3 (B) PROVIDE THEIR BROADBAND NETWORK SERVICES ON REASONABLE AND NONDIS-  
4 CRIMINATORY TERMS AND CONDITIONS SUCH THAT ANY PERSON CAN OFFER OR  
5 PROVIDE CONTENT, APPLICATIONS, OR SERVICES TO OR OVER THE NETWORK IN A  
6 MANNER THAT IS AT LEAST EQUAL TO THE MANNER IN WHICH THE PROVIDER OR ITS  
7 AFFILIATES OFFER CONTENT, APPLICATIONS, AND SERVICES, FREE OF ANY  
8 SURCHARGE ON THE BASIS OF THE CONTENT, APPLICATION, OR SERVICE;  
9 (C) INTERCONNECT THEIR FACILITIES WITH THE FACILITIES OF OTHER PROVID-  
10 ERS OF BROADBAND NETWORK SERVICES ON REASONABLE AND NONDISCRIMINATORY  
11 TERMS OR CONDITIONS.

12 S 243. NEUTRAL INTERNET AND BROADBAND NETWORKS. 1. CABLE OPERATORS  
13 SHALL NOT:

14 (A) BLOCK, IMPAIR, DISCRIMINATE AGAINST, OR INTERFERE WITH THE ABILITY  
15 OF ANY PERSON TO USE INTERNET BASED TRAFFIC BASED ON THE SOURCE, DESTI-  
16 NATION, OR OWNERSHIP OF THE INTERNET TRAFFIC THAT CARRIES VIDEO SERVICE,  
17 IN A MANNER THAT DEGRADES OR OTHERWISE NEGATIVELY IMPACTS THE ACCESS TO,  
18 OR THE QUALITY OF SERVICES RECEIVED BY AN END USER;

19 (B) ENGAGE IN ANY EXCLUSIVE OR PREFERENTIAL DEALINGS REGARDING THE  
20 CARRIAGE AND TREATMENT OF INTERNET TRAFFIC, INCLUDING, BUT NOT LIMITED  
21 TO, TRAFFIC THAT CARRIES VIDEO PROGRAMMING OR VIDEO SERVICE, WITH AN  
22 AFFILIATE OR THIRD PARTY PROVIDER OF INTERNET APPLICATIONS, SERVICES,  
23 CONTENT, OR VIDEO SERVICES;

24 (C) IMPOSE AN ADDITIONAL CHARGE TO AVOID ANY CONDUCT THAT IS PROHIBIT-  
25 ED BY THIS SECTION;

26 (D) PROHIBIT A USER FROM ATTACHING OR USING A DEVICE ON THE PROVIDER'S  
27 INTERNET OR BROADBAND NETWORK THAT DOES NOT PHYSICALLY DAMAGE OR MATE-  
28 Rially DEGRADE OTHER USERS' UTILIZATION OF THE NETWORK.

29 2. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PREVENT A BROADBAND  
30 OR INTERNET NETWORK PROVIDER FROM TAKING REASONABLE AND NONDISCRIMINATO-  
31 RY MEASURES:

32 (A) TO MANAGE THE FUNCTIONING OF ITS NETWORK TO PROTECT THE SECURITY  
33 AND TO OFFER PARENTAL CONTROLS AND OTHER CONSUMER PROTECTION MEASURES OF  
34 SUCH NETWORK AND BROADBAND OR INTERNET NETWORK SERVICES IF SUCH MANAGE-  
35 MENT DOES NOT RESULT IN DISCRIMINATION AMONG THE CONTENT, APPLICATIONS,  
36 OR SERVICES ON THE NETWORK;

37 (B) TO GIVE PRIORITY TO EMERGENCY COMMUNICATIONS; OR

38 (C) TO PREVENT A VIOLATION OF A FEDERAL OR STATE LAW, OR TO COMPLY  
39 WITH AN ORDER OF A COURT TO ENFORCE SUCH LAW, OR SUCH OTHER ACTION  
40 AGAINST NETWORK THREATS AS MAY BE AUTHORIZED IN SECTION TWO HUNDRED  
41 FIFTEEN OF THIS CHAPTER.

42 S 244. DEPLOYMENT REQUIREMENTS FOR STATEWIDE CABLE FRANCHISE. 1. AS  
43 PART OF ANY FRANCHISE ISSUED BY THE COMMISSION IN THIS ARTICLE, A CABLE  
44 OPERATOR SHALL BE REQUIRED TO:

45 (A) BEGIN PROVIDING CABLE SERVICE ON A COMMERCIAL BASIS, WITHIN THREE  
46 YEARS OF ISSUANCE OF THE SYSTEM-WIDE FRANCHISE, IN:

47 (I) EACH COUNTY SEAT THAT IS WITHIN THE CATV COMPANY'S SERVICE AREA;  
48 AND  
49 (II) EACH MUNICIPALITY WITHIN THE CATV COMPANY'S SERVICE AREA THAT HAS  
50 A POPULATION DENSITY GREATER THAN SEVENTY-ONE HUNDRED ELEVEN PERSONS PER  
51 SQUARE MILE OF LAND AREA, AS DETERMINED BY THE MOST RECENT FEDERAL  
52 DECENNIAL CENSUS, PROVIDED, HOWEVER, THAT IF SUCH COUNTY SEATS ARE NOT  
53 LOCATED WITHIN OR CONTIGUOUS TO SUCH MUNICIPALITIES, EACH SUCH COUNTY  
54 SEAT SHALL BE INTERCONNECTED TO THE NEAREST MUNICIPALITY WITH A POPU-  
55 LATION DENSITY GREATER THAN PERSONS PER SQUARE MILE OF LAND AREA BY THE  
56 CABLE OPERATOR; AND

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1 (B) MAKE CABLE TELEVISION SERVICE AVAILABLE THROUGHOUT THE RESIDENTIAL  
2 AREAS ON A COMMERCIAL BASIS, BEFORE THE BEGINNING OF THE SIXTH YEAR  
3 AFTER THE ISSUANCE OF THE SYSTEM-WIDE FRANCHISE, IN:

4 (I) EACH MUNICIPALITY WITHIN THE STATE THAT HAS A POPULATION DENSITY  
5 GREATER THAN FIVE HUNDRED ONE PERSONS PER SQUARE MILE OF LAND AREA, AS  
6 DETERMINED BY THE MOST RECENT FEDERAL DECENNIAL CENSUS; AND

7 (II) THROUGHOUT THE RESIDENTIAL AREAS OF ANY MUNICIPALITIES SERVED BY  
8 CENTRAL OFFICES LOCATED WITHIN A COUNTY SEAT WITHIN THE FRANCHISEE'S  
9 SERVICE AREA, SUBJECT TO THE CABLE OPERATOR'S LINE EXTENSION POLICY;  
10 PROVIDED, HOWEVER, A CATV COMPANY MAY APPLY TO THE COMMISSION FOR AN  
11 EXEMPTION FROM THIS REQUIREMENT IF THE BOARD FINDS, AFTER CONDUCTING A  
12 HEARING WITH FULL NOTICE AND OPPORTUNITY TO BE HEARD, THAT THE AREAS IN  
13 QUESTION ARE AREAS IN WHICH THE CATV COMPANY IS UNABLE TO ACCESS THE  
14 PUBLIC RIGHTS-OF-WAY UNDER REASONABLE TERMS AND CONDITIONS.

15 2. THE REQUIREMENTS OF SUBDIVISION ONE OF THIS SECTION SHALL ONLY  
16 APPLY TO CABLE OPERATORS THAT ON THE DATE OF THE ISSUANCE OF THE  
17 SYSTEM-WIDE FRANCHISE PROVIDE MORE THAN FORTY PERCENT OF THE LOCAL  
18 EXCHANGE TELEPHONE SERVICE MARKET IN THIS STATE; AND TO CABLE OPERATORS  
19 THAT ON THE DATE OF THE ISSUANCE OF THE SYSTEM-WIDE FRANCHISE PROVIDE  
20 TWO HUNDRED FIFTY THOUSAND OR MORE LOCAL EXCHANGE TELEPHONE LINES IN  
21 THIS STATE;

22 3. INCUMBENT CABLE COMPANIES THAT BECOME STATEWIDE FRANCHISE HOLDERS  
23 SHALL NOT REDUCE THE NUMBER OR PERCENTAGE OF HOUSEHOLDS SERVED; WILL  
24 BUILD OUT TO ALL RESIDENTIAL HOUSEHOLDS SUBJECT TO THE OPERATOR'S LINE  
25 EXTENSION POLICY WITHIN THREE YEARS; AND WILL UPGRADE THEIR FACILITIES  
26 TO THE ENTIRE SERVICE AREA WITHIN THREE YEARS OF THE DATE THE CABLE  
27 OPERATOR UPGRADES ANY PART OF ITS FACILITIES.

28 4. WITHIN THREE YEARS OF THE ISSUANCE OF THE SYSTEM-WIDE FRANCHISE ALL  
29 OTHER STATEWIDE FRANCHISE HOLDERS SHALL FULLY COMPLETE A SYSTEM CAPABLE  
30 OF PROVIDING CABLE SERVICE TO ALL HOUSEHOLDS WITHIN THE CABLE OPERATOR'S  
31 SERVICE AREA, SUBJECT TO THE CABLE OPERATOR'S LINE EXTENSION POLICY.

32 S 245. DISCRIMINATION IN THE PROVISIONING OF SERVICE PROHIBITED. 1.  
33 THE FRANCHISE HOLDER SHALL BECOME CAPABLE OF PROVIDING CABLE SERVICE TO  
34 ALL HOUSEHOLDS WITHIN THE DESIGNATED SERVICE AREA FOOTPRINT. A CABLE  
35 OPERATOR THAT HAS BEEN GRANTED A STATEWIDE FRANCHISE UNDER THIS ARTICLE  
36 SHALL NOT DENY ACCESS TO CABLE SERVICE TO ANY GROUP OF POTENTIAL RESI-  
37 DENTIAL SUBSCRIBERS BECAUSE OF THE INCOME OR RACE OF THE RESIDENTS IN  
38 THE LOCAL AREA IN WHICH SUCH GROUP RESIDES. A FRANCHISEE MUST SUBMIT TO  
39 THE COMMISSION A DEPLOYMENT SCHEDULE, SETTING FORTH THE MUNICIPALITIES  
40 TO BE SERVED, THE DATE SERVICE SHALL BEGIN IN EACH PROPOSED MUNICI-  
41 PALITY, AND A DATE CERTAIN BY WHICH EACH COMMUNITY WILL BE ABLE TO  
42 RECEIVE CABLE SERVICE. THE COMMISSION WILL ENSURE THAT THE BUILD-OUT  
43 PROCESS IS NOT DISCRIMINATORY BASED ON AN AREA'S CLASS OR RACE. IF  
44 DEPLOYMENT OF CABLE SERVICES UNDER A STATEWIDE FRANCHISE IS SCHEDULED  
45 FOR DEPLOYMENT IN A GIVEN AREA, THE CABLE OPERATOR MUST OFFER SERVICE TO  
46 ALL RESIDENTS WITHIN THE GEOGRAPHIC AREA OR THE COMMISSION MAY TERMINATE  
47 THE FRANCHISE PURSUANT TO SECTION TWO HUNDRED THIRTY-SIX OF THIS ARTI-  
48 CLE.

49 2. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE FRANCHISE HOLDER  
50 SHALL COMPLY WITH CUSTOMER SERVICE REQUIREMENTS SET FORTH IN ARTICLE

51 ELEVEN OF THIS CHAPTER, AT 47 C.F.R. S 76.309(C) AND ANY OTHER CUSTOMER  
52 SERVICE STANDARDS PERTAINING TO THE PROVISION OF VIDEO SERVICE ESTAB-  
53 LISHED BY FEDERAL LAW OR REGULATION OR BY SUBSEQUENT ENACTMENT OF THE  
54 LEGISLATURE. ALL CUSTOMER SERVICE AND CONSUMER PROTECTION STANDARDS  
55 UNDER THIS SECTION SHALL BE INTERPRETED AND APPLIED TO ACCOMMODATE NEWER

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1 OR DIFFERENT TECHNOLOGIES WHILE MEETING OR EXCEEDING THE GOALS OF THESE  
2 STANDARDS.

3 3. IF THE COMMISSION DETERMINES THAT A CABLE OPERATOR HAS DENIED  
4 ACCESS OF CABLE SERVICE TO A GROUP OF POTENTIAL RESIDENTIAL SUBSCRIBERS  
5 BECAUSE OF THE INCOME LEVELS OF THE RESIDENTS OF THE LOCAL AREA IN WHICH  
6 SUCH GROUP RESIDES OR HAS FAILED TO MEET THE REQUIREMENTS OF THE  
7 SECTION, THE COMMISSION IS AUTHORIZED TO, AFTER CONDUCTING A HEARING  
8 WITH FULL NOTICE AND OPPORTUNITY TO BE HEARD, IMPOSE MONETARY PENALTIES  
9 OF NOT LESS THAN FIFTY THOUSAND DOLLARS, NOR MORE THAN ONE HUNDRED THOU-  
10 SAND DOLLARS PER MUNICIPALITY, NOT TO EXCEED A TOTAL OF THREE MILLION  
11 SIX HUNDRED FIFTY THOUSAND DOLLARS PER YEAR FOR ALL VIOLATIONS. A MUNI-  
12 CIPALITY IN WHICH THE PROVIDER OFFERS CABLE SERVICE SHALL BE AN APPRO-  
13 PRIATE PARTY IN ANY SUCH PROCEEDING.

14 S 246. ENFORCEMENT. THE EXCLUSIVE REMEDY FOR ENFORCING THE PROVISIONS  
15 OF THIS ARTICLE, NOTWITHSTANDING SPECIFIC SECTIONS OF THIS ARTICLE,  
16 SHALL BE AN ACTION IN A COURT OF COMPETENT JURISDICTION BROUGHT BY  
17 EITHER THE MUNICIPALITY, THE ATTORNEY GENERAL ON BEHALF OF THE COMMIS-  
18 SION OR OTHER INJURED PARTY. AT LEAST SIXTY DAYS BEFORE BRINGING SUCH AN  
19 ACTION, THE MUNICIPALITY OR ATTORNEY GENERAL SHALL SERVE THE FRANCHISE  
20 HOLDER WITH A NOTICE SETTING OUT THE ALLEGED VIOLATION AND STATING THAT  
21 AN ACTION MAY BE BROUGHT UNLESS THE HOLDER CORRECTS THE ALLEGED  
22 VIOLATION OR ENTERS INTO A BINDING AGREEMENT TO CORRECT THE VIOLATION  
23 WITHIN THE SIXTY-DAY NOTICE PERIOD. THE NOTICE SHALL CONTAIN A SUFFI-  
24 CIENTLY DETAILED DESCRIPTION OF THE ALLEGED VIOLATION TO ENABLE THE  
25 FRANCHISE HOLDER TO MAKE A SPECIFIC RESPONSE.

26 S 2. This act shall take effect immediately.

Contact Webmaster

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Monday, December 17, 2007

## Bill Summary - A01423

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[See Bill Text](#)

### A01423 Summary:

BILL NO      A01423A  
SAME AS      No same as  
SPONSOR      Brodsky  
COSPNSR  
MLTSPNSR    Rosenthal, Spano

Add Art 11-A SS231 - 246, Pub Serv L

Establishes statewide cable franchises for the purposes of competitive cable service, promoting the widespread development of high-capacity broadband internet access, and increasing the availability and quality of services in this key economic development area, and ensuring the safety, reliability, and affordability of telecommunications services.

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### A01423 Actions:

BILL NO      A01423A

01/09/2007 referred to corporations, authorities and commissions  
04/12/2007 amend (t) and recommit to corporations, authorities and commissions  
04/12/2007 print number 1423a

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### A01423 Votes:

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### A01423 Memo:

BILL NUMBER: A1423A

TITLE OF BILL: An act to amend the public service law, in relation to authorizing statewide cable franchises for the purposes of competitive cable service, promoting the wide-spread development of high-capacity broadband internet access, and increasing the availability and quality of services in this key economic development area and ensuring the safety, reliability and affordability of telecommunications services

PURPOSE OR GENERAL IDEA OF BILL: To provide cable service choices to consumers, called the "consumer cable choice act of 2007."

SUMMARY OF SPECIFIC PROVISIONS:

S 1. Short title.

S 2 Legislative intent.

S 3 Adds a new article 11-A to the public service law called "statewide cable franchising and regulation" which includes these new sections:

S 231 Definitions.

S 232 Authorization to provide cable service. This section will allow, but not require, cable operators to file statewide franchises with the public Service Commission (PSC).

S 233 Responsibilities of the Public Service Commission. The Act will give the PSC oversight responsibilities as well as set forth the terms and conditions of the application process. In addition, it will require the PSC to establish an online complaint form for violations of this article.

S 234 Application of a statewide franchise. Sets forth the requirements a cable operator must submit in an application for a statewide franchise including the footprints of the proposed areas to be served, and forms required by the Federal Communications Commission (FCC), the cable operator's business and corporate information, as well as other requirements. This section will establish the review process including: requiring a series of public hearings and the administrative hearing process for denied applications. Finally, it would require a \$5,000.00 application fee.

S 235 Length of a statewide franchise. The Act will set the initial statewide franchise for 10 years. Renewals of franchises would be for an additional 15 years.

S 236 Termination of a statewide franchise. This section will establish rules that allow the PSC to terminate a statewide franchise if the cable operator violates provisions of this article. As part of the Act's requirements will be to call for network neutrality-which would require that cable companies do not favor particular network destinations or classes of applications over others to preserve the free flow of ideas and information on any Internet capable networks. If a cable company does violate the terms and provisions of net neutrality it establishes grounds for termination of such franchise.

S 237 Abandonment of service. The Act will create rules for abandoning service including giving the power to the PSC to approve all abandonment of services.

S 238 Municipal power and regulation over franchise holders. The Act will retain municipalities' cable regulatory powers.

S 239 Payment and remittance of franchise fees The Act will set the franchise fees at 5%.

S 240 PEG channels The Act will require that the current regulations governing PEG channels be followed in addition for additional PEG

channels and services not contained in the current regulations. For example every statewide franchise will have to allot analog channels of six megahertz bandwidth as well as the creation of a separate PEG access fund.

S 241 Cable operator's community commitment. The Act will require cable operators to provide free cable and high speed Internet service to hospitals, schools, firehouses and other important community/municipal organizations.

S 242 Consumer protection rules. existing consumer protection rules protection requirements.

Requires cable companies follow the as well as includes additional consumer

S 243 Neutral internet and broadband networks. Requires that broadband and other Internet networks follow the long-standing policy of net neutrality.

S 244 Deployment requirements for statewide cable franchise. The Act will require that and cable operator awarded a statewide franchise deploy the infrastructure and service to particular areas at certain specified dates to ensure that consumers do get a real choice in service., Specifically, within three years the cable operator would have to deploy service to areas with a population of 7,100 person per square mile and within six years of the franchise will have to expand service to areas with a population density of 501 people per square mile.

S 245 Discrimination in the provisioning of service is prohibited. The Act includes anti-redlining provisions. If the PSC finds that a cable operator is redlining, the Commission may terminate the franchise as well as impose fines and penalties on the cable operator.

S 246 Enforcement.

S 4 Applicability of other laws.

S 5 Severability Clause.

S 6. Enactment date.

JUSTIFICATION: The State has a responsibility to promote adequate, affordable and efficient cable services to its residents and encourage

the optimum development of community-service potentials of the cable television medium.

Technology is ever-changing and it is imperative that the State of New York allows for many sources of technological competition to provide the goal of adequate and affordable cable services to residents.

This Act is a step in providing a balanced approach to providing consumers cable choice and allowing for areas of the State to have access to developing broadband technologies. Currently, other states have enacted laws to provide choice for cable service including: California, Indiana, New Jersey, Michigan, Kansas, North Carolina, South Carolina, Texas and Virginia.

Other states have also moved statewide franchise bills through the legislative process including Pennsylvania, Connecticut, Georgia,



Missouri, New Hampshire and Tennessee, among others. Contrary to various reports, this bill protects all municipal power, save the power to approve the franchise, and sets the fees, public access and other social protections at a ceiling so that municipalities, community groups and other interested parties have the most progressive and comprehensive franchise possible. In the end this section is to protect the consumer and strengthen the economy, while preserving locality's power to regulate franchises.

The GAO, FCC and other studies show that only statewide franchises cause rate reductions of 20-25%. In addition, Towns, cities and villages will receive a 40% increase in payments from cable companies.

#### A. ADDITIONAL CONSUMER AND LOCAL GOVERNMENT: PROTECTIONS

While other states have enacted laws to provide choice, this bill would require other important protections to protect local input, community input, citizen access to television channels, the free flow of ideas and information on broad-brand networks and other consumer protections. This is the most progressive statewide cable franchise in the country that will protect consumers, bring choice, protects the power of municipalities and require social responsibility on behalf of cable providers.

1. It maintains and exceeds financial commitments to local governments.

The Act has a progressive franchise fee schedule that includes a 5% franchise fee, free cable and Internet service to municipal buildings and agencies and a separate fund to maintain and build quality PEG channels. Finally, tax loopholes and other financial gimmicks used by the cable companies to reduce municipal payments are outlawed.

2. It maintains municipal oversight to tailor the provider's commitment to the community's needs.

The Statewide franchise will allow municipalities the various powers to retain all their historic powers including:

- \* The power of municipalities to exercise their power over public rights-of-way;
- \* Receive, mediate and resolve cable service quality complaints from a franchise holder's customers within the municipality;
- \* Require a franchise holder who is providing cable service within the municipality to register with the municipality, maintain a point of contact, and provide notice of any franchise authorization transfer to the municipality within fourteen business days after the completion of the transfer; and
- \* Establish guidelines regarding the use of public, educational, and governmental access channels within the municipality.

3. It protects and allows for progressive public access.

In many parts of the State, PEG channels are woefully inadequate in providing access and programming opportunities to citizens. This bill would create a strong system of PEG channels for it provides the necessary funding and channel space. The Act will require that the current regulations governing PEG channels be followed including additional PEG channels and services not contained in the current

regulations. For example every statewide franchise will have to allot analog channels of six megahertz bandwidth. In addition, the Act would create a separate fund specifically for PEG channels to maintain a reliable service and community network. This is the most progressive language in the State or country.

4. It requires a continued commitment to the community.

The Act will require cable operators to provide free cable and high speed Internet service to hospitals, schools, firehouses and other important community/municipal organizations. In addition, the Act includes antiredlining provisions. If the PSC finds that a cable operator is redlining, the Commission may terminate the franchise as well as impose fines and penalties on the cable operator.

#### B. REQUIRING COMPANIES TO PROVIDE COMPETITIVE SERVICES AND STOPPING THE "CHERRY PICKING" PROBLEM.

Contrary to various reports, this Act would mandate that cable operators fulfill their obligation to provide choice by requiring certain build-out dates as well as impose fines to any company that is found to discriminate against a class or race of people by not providing service to communities. Specifically, any evidence of redlining by a company results in significant penalties.

This bill will require that the franchisee provide service to a majority of New Yorkers to ensure that competition is offered throughout the State. This bill would require that any statewide franchise provide: service to over half the State's consumers (including in the upstate, western, central and downstate portion of the State) within three years of receiving a statewide franchise, and service to over 85% of New Yorkers within five years. This is among the most progressive deployment requirements in the country.

#### C. WHY THE NEED FOR THE STATEWIDE FRANCHISE?

It has been argued that there is no need for a statewide franchise because any company can file for a local franchise now and further, that it is unfair to companies that have had to file for local franchises to now compete with a statewide model. However, the technology and market has changed considerably since the first cable franchises.

It took years for cable companies to offer cable service and broadband service to the entire State, so a local franchise-by-local franchise approach will not deploy and create the competitive market that consumers deserve.

Moreover, a review of franchises throughout New York has shown that many municipalities get shortchanged. This bill sets protects municipalities by statutorily requiring the financial and community incentives that are needed in franchises. Finally, and most importantly, in the end the consumer wins because of lower cable rates.

#### D. THE STATEWIDE FRANCHISE PROVIDES CHOICE, CREATES JOBS AND SPURS THE ECONOMY

The Cable Choice Act provides residents all the consumer protections and statutory requirements for adequate, efficient and affordable service while providing choice of service providers. This carefully constructed legislation will promote and facilitate the deployment of

advanced technologies and new reliable and affordable services to all classes and communities and protect New York's ability to compete in the national and international marketplace for industry and jobs.

#### E. PROTECTING THE NEUTRALITY OF THE INTERNET

The proposal includes net neutrality language-whereby networks would not be able to favor one particular network destination or class of applications over others--to ensure that the free flow of ideas of the Internet. Although the Federal Government has eliminated net neutrality rules, the State has every right and obligation to build this important consumer protection in as a condition of a new model of cable and broadband deployment.

Net Neutrality is not in itself a new idea. Its roots date back to the 1860's with Common Carrier legislation for telegraphs. Those laws made it unlawful for anyone owning or operating a telegraph line to refuse to receive dispatch from any other company or person owning or operating any telegraph line in the state, or refuse or willfully neglect to transmit the same in good faith, without partiality. The offense would result in the forfeiture of all right and franchises associated with telegraph transmission in the state. In 2005 the Federal Communications Commission incorrectly decided that common carrier status need not apply to telecommunication providers. There is no logical reason to overturn statutes that have worked for over 140 years. Our legislation will update an existing statute in order to ensure consumer protection and public safety by providing equal telecommunications access for all New Yorkers.

PREVIOUS LEGISLATIVE HISTORY: A. 11549 of 2006.

FISCAL IMPLICATION: Not known.

EFFECTIVE DATE:; This act shall take effect on the 120th day after it shall have become a law.

Contact Webmaster

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# ATTACHMENT 21



## 2006-2007 Policies for the Jurisdiction of the: Communications, Technology and Interstate Commerce Committee

Note: In order to print one policy, you must highlight it and click on selection in your print option.

[Communications, Technology and Interstate Commerce](#)

[Standing Committee Main Page](#)

[Staff Contact](#)

### Policies:

<a href="#">NEW Cradle to Grave Electronics Management</a> <i>(Joint Policy with Environment and Natural Resources Committee)</i>	<a href="#">The Internet and Electronic Commerce</a>	<a href="#">NEW Nexus in the New Economy: Ensuring a Level Playing Field for all Commerce</a> <i>(Joint policy with the Budget and Revenue Committee)</i>	<a href="#">NEW Network Neutrality</a> (Action Resolution)
<a href="#">Spectrum Management</a>	<a href="#">NEW State Sovereignty To Use Tax Policy For Economic Growth</a> (Action Resolution)	<a href="#">NEW National Conference of State Legislatures Supports and Urges Enactment of S. 2152, The Sales Tax Simplification and Fairness Act.</a> (Action Resolution). <i>(Joint with Budget and Revenue Committee)</i>	<a href="#">NEW NCSL Opposes Congressional Efforts To Preempt State Laws With Regard To Municipal BroadBand Networks</a> (Action Resolution)
<a href="#">Twenty-First Century Telecommunications</a>	<a href="#">NEW Video Franchise Reform</a>		



### Cradle to Grave Electronics Management

NCSL has long recognized that technology and technology equipment are important and essential to US participation in the global economy. NCSL has long recognized the need to manage solid waste in an environmentally, economically, and politically acceptable manner. As outlined in its Solid Waste Management policy, NCSL believes that source reduction and recycling offer the most economically and environmentally sound methods for dealing with a significant percentage of the solid waste stream.

An ever growing segment of the solid waste stream is comprised of discarded electronic equipment. Such electronic waste or e-waste is entering the national waste stream at an increasing rate due to a number of contributing factors. These include the expanding pervasiveness of electronics, rapid technological advances and the subsequently shorter lifespan of electronics technologies and a large inventory of obsolete electronics.

*Adopted by the Executive Committee Task Force on State & Local Taxation of Telecommunications & Electronic Commerce on Monday, August 14, 2006*

*Adopted by the NCSL Standing Committees on Budgets & Revenue and Communications, Technology & Interstate Commerce on Tuesday, August 15, 2006*

*Adopted by the NCSL annual business meeting on Thursday, August 17, 2006*

July 2009



## Network Neutrality

WHEREAS, NCSL in its policy statement, "The Internet and Electronic Commerce" recognizes the unprecedented advances a free and open Internet has fostered across all aspects of end user customers' lives, and

WHEREAS, the exponential growth of the Internet has flourished as a result of both the government's 'hand's off' approach, ever increasing competition, as well as fierce consumer interest, and

WHEREAS, regulation of the Internet may interfere with future investment and innovations benefiting the health and well-being of its end user customers, and

WHEREAS, Internet users should be given a choice when it comes to selecting a broadband connection that will meet their current and future needs for speed, reliability, quality of service, and capabilities not yet envisioned, and

WHEREAS, broadband connections, services, and applications should continue to become more affordable and accessible to all consumers, and

WHEREAS, companies that invest in broadband and broadband-related applications should be afforded the flexibility to explore fair and competitive business models and pricing plans for their products and services, and

WHEREAS, mandated net neutrality regulations that go beyond the FCC's broadband policy statement would impede future capital investments in the U.S.' broadband infrastructure, which already lags behind its European and Asian counterparts, and

WHEREAS, according to a 2006 International Telecommunications Union (ITU) study of 2004 data, the U.S. ranked 16<sup>th</sup> in broadband penetration and could decline further as proposed net neutrality regulations places more of the cost burden onto the end user, exacerbating an already disturbing trend of a 'digital divide' within our country.

THEREFORE, LET IT BE RESOLVED, that the National Conference of State Legislatures calls upon the Congress of the United States of America to maintain today's approach that allows the competitive marketplace to drive broadband and broadband-related applications development and deployment.

BE IT FURTHER RESOLVED that, in the event Congressional legislative action is deemed warranted, that the Congress avoid adopting new rules and limit such action to providing the FCC with clear authority to oversee, but not proactively intervene in, the broadband Internet marketplace by adopting principles that focus on assessing whether the market continues to ensure that consumers can:

- (1) receive meaningful information regarding their broadband service plans;
- (2) have access to their choice of legal Internet content within the bandwidth limits and quality of service of their service plan;
- (3) 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; and
- (4) be permitted to attach any devices they choose to their broadband connection at the consumer's premise, 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: and

BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the President of the United States, members of Congress and the members of the Federal Communications Commission.

# **ATTACHMENT 22**

# Key Committee Issue

[Federal Relations Home](#)

11/30/2006

## telecommunications

### Background

#### ***Rewrite of the 1996 Telecommunications Act***

When Congress enacted the Telecommunications Act in 1996 (P.L.104-104), the objective was to open up markets to competition by removing unnecessary regulatory barriers to entry. At that time, industry consisted of service-specific networks that did not compete with one another: circuit-switched networks provided telephone service and coaxial cable networks provided cable service. The 1996 Act created distinct regulatory regimes for these service-specific networks. The deployment of digital technologies in these previously distinct networks has led to market convergence and new competition, as telephone, cable, satellite and wireless networks can offer voice, data, and video services over a single broadband platform.

Currently, communications services provided by different network technologies are competing with one another and receiving different regulatory treatment. Critically, the 1996 Act created a classification, "information services," that is not subject to either telephone or cable regulation. Today, voice and video services provided using Internet protocol technology may be classified as information services and therefore not subject to regulation.

### Senate Activity

Before recessing for the July 4<sup>th</sup> recess, the Senate Commerce, Science and Transportation Committee approved by a vote of 15-7, an 11-title telecommunications measure. The bill, titled the Advanced Telecommunications and Opportunity Reform (ATOR Act) is referred by the number HR 5252. Like the House bill, the ATOR Act establishes national franchising system. Unlike the House bill, the Senate committee mark contains several proposals that preempt states authority. These include:

- imposition of a three-year moratorium on new "discriminatory" (that is, wireless-specific) state or local taxes on mobile services.
- a permanent moratorium on Internet access taxes.
- preemption of state-wide franchising solutions that streamline and improve video franchising;
- replacement of robust state consumer protection standards with federal standards established by federal bureaucrats;
- preemption of state authority to enforce basic state contract and consumer protection laws on cell phone providers; and
- preemption of states' ability to enforce any state law that regulates satellite providers.

Below is a summary of the bill:

#### ***Video Franchising***

The bill states that franchisees have to comply with state and local law and municipal rights-of-way



regulations; eliminating a requirement that state and local government pay the applicants' attorney fees if they lose a franchise-fee dispute; granting property owners a right of action against video franchisees for damages caused by installing, operating, or removing facilities; eliminating a requirement that localities reimburse franchisees for any costs of operating an institutional network that exceed 1 percent of gross revenues; and requiring that franchisee audits be conducted in accordance with procedures established by the Federal Communications Commission (FCC).

The bill would lengthen the time state and local authorities have to consider franchise applications, and gives more enforcement authority to states and localities rather than the FCC. In addition, changes include clarifying that state and local governments can revoke a franchise for failure to comply with the franchise agreement terms; authorizing state attorneys general to bring redlining complaints; requiring a video service provider to provide up to three public, educational and governmental (PEG) channels if there is no incumbent already serving the area; and requiring franchise authorities to report to the FCC on video service deployment, so that the FCC in turn can report to Congress.

### ***Universal Service***

The bill would eliminate a requirement that providers offer connections of at least 3 megabits per second to be eligible for support; require the FCC to provide relief for low-volume users whose universal service charges might increase under a new contribution system; and clarify that subscribers cannot be subject to a duplicative universal service assessment in which they would face payments based on their phone number and their usage.

### ***Interoperable Communications***

The bill adds details on the allocation of \$1 billion in wireless communication interoperability grants to be administered by the National Telecommunications and Information Administration. The bill clarifies that the money can be used for Internet protocol technologies, such as bridging systems that do not use 700 megahertz spectrum but that enable otherwise incompatible communications devices to work together.

### ***Municipal Broadband***

The bill also would eliminate the original version's requirement that cities grant private-sector firms a "right of first refusal" before going ahead with plans to launch a municipal network. The revised version would require a city to consider a public-private partnership and to seek commercial bids, but allow a city to still go ahead with its own project. The revised version also clarifies that federal funds will not be used for municipal networks.

### ***Build-Out Requirement***

The bill contains no build-out requirement. Instead, it contains a new reporting requirement. Three years after enactment of the bill, state and local franchise authorities will be required to report to the FCC on video service deployment in their areas. The FCC will aggregate the data every four years and present it to Congress, which then could identify any discrimination.

Also, state attorneys general will be able to receive "redlining" complaints and be required to act on or dismiss complaints within 180 days

### **House Activity**

On Thursday, June 8<sup>th</sup>, 2006, the House passed the Communications Opportunity, Promotion and Enhancement (COPE) Act (H.R. 5252) by a vote of 321-101.

The core provisions of the measure create new competition in the video market between cable operators and telephone companies through negotiated national franchises at the Federal Communications Commission (FCC). The measure's national franchise process would replace the current franchising system, where potential video service providers must negotiate franchising contracts with municipal governments or with state governments that have enacted state-wide franchising processes.

The chamber adopted a manager's amendment that clarifies what constitutes a franchise area; that entities seeking a national video franchise must agree to comply with FCC consumer protection and customer service requirements; that national franchisees are subject to all cable operator provisions of Title VI of the Communications Act other than those specifically excepted in the COPE bill; and that nothing in the bill affects existing law governing attachments to utility poles.

Also, the COPE Act gives the FCC authority to enforce the four net neutrality principles it adopted last year that allow consumers to access all lawful Internet content and services. However, it does not prevent broadband providers from favoring their own online traffic or the traffic of business affiliates. An amendment to require phone and cable companies to give equal treatment to similar types of Internet traffic was defeated (by a vote of 152-69).

Other amendments the House approved include provisions that would:

- increase penalties (to \$750,000 from \$500,000) against video service providers that deny service to residents because of income;
- preserve the FCC's authority to require Voice-over-Internet-Protocol (VoIP) service providers to contribute to the Universal Service Fund when they interconnect, either directly or indirectly, with incumbent local exchange carrier networks, and to properly compensate network owners for the use of their network; and
- clarify language giving the FCC exclusive authority to adjudicate network neutrality "does not affect the applicability of the antitrust laws to cases involving network neutrality or the jurisdiction of the courts to hear such cases."

A recent Congressional Budget Office (CBO) report estimates that implementing the COPE Act would impose costs of up to \$350 million on state and local government by 2011, since it preempts state and local laws on rights of way fees. The CBO report said the House bill would erase benefits that state and local government are accustomed to, such as institutional broadband networks, wireless networks in schools, and libraries and other services.

## **IGA Position**

Governors support a federal framework that is broad enough to allow states the flexibility to retain state and territorial authority over intrastate communications.

Governors support the concept of universal service and the states' ability to establish higher definitions of universal service and to raise funds needed to sustain a higher level of service.

## **Policy Reference:**

DC-08, State Priorities in Communications Policy

## **Committee Letters:**

- Letter

July 20, 2006 letter (from the executive directors of the Big Seven state and local government organizations) to Senate Majority Leader Frist and Senate Minority Leader Reid urging them to oppose the Advanced Telecommunications and Opportunity Reform – Consumers' Choice and Broadband Deployment Act of 2006 (H.R. 5252)

- Letter

May 30, 2006 letter (from Governor Huckabee and Governor Napolitano) to House Energy and Commerce Committee Chairman Barton and Ranking Member Dingell raising state concerns with the proposed Communications Opportunity, Promotion and Enhancement (COPE) Act (H.R. 5252).

- Letter

October 19, 2005 letter (from Governor Huckabee and Governor Napolitano) to Senate Commerce, Science, and Transportation Committee Chairman Stevens and Ranking Member Inouye; and to House Energy and Commerce Committee Chairman Barton and Ranking Member Dingell supporting their efforts to establish the earliest possible date certain for the clearing of channels allocated for public safety use by the Federal Communications Commission.

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# ATTACHMENT 23

**Title 35-A, Chapter 93, ADVANCED TECHNOLOGY  
INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

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**Chapter 93: ADVANCED TECHNOLOGY INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

**§9201. Short title (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

This chapter may be known and cited as "the Advanced Technology Infrastructure Act." [2005, c. 665, §3 (new).]

35-A §09201

Short title

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9202. Definitions (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [2005, c. 665, §3 (new).]

**1. Advanced communications technology infrastructure.** "Advanced communications technology infrastructure" means any communications technology infrastructure or infrastructure improvement that expands the deployment of, or improves the quality of, broadband availability and wireless service coverage.  
[2005, c. 665, §3 (new).]

**2. Authority.** "Authority" means the ConnectME Authority established in section 9203.  
[2005, c. 665, §3 (new).]

**3. Communications service.** "Communications service" means any wireline voice, satellite, data, fixed wireless data or video retail service.  
[2005, c. 665, §3 (new).]

**4. Communications service provider.** "Communications service provider" means:

A. Any entity offering communications service to customers in the State; or [2005, c. 665, §3 (new).]

B. Any facilities-based provider of wireless voice or data retail service that voluntarily chooses to be assessed by the authority pursuant to section 9211. [2005, c. 665, §3 (new).]  
[2005, c. 665, §3 (new).]

**5. Unserved or underserved area.** "Unserved or underserved area" means an area that the authority pursuant to section 9204, subsection 2, paragraph B determines to meet criteria established by the authority by rule adopted pursuant to section 9205, subsection 3 in accordance with section 9204, subsection 1.  
[2005, c. 665, §3 (new).]

35-A §09202

**Title 35-A, Chapter 93, ADVANCED TECHNOLOGY  
INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

Definitions

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9203. ConnectME Authority (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

**1. Establishment; membership.** The ConnectME Authority is established to stimulate investment in advanced communications technology infrastructure in unserved or underserved areas. The authority is created as a body corporate and politic and a public instrumentality of the State. The exercise by the authority of powers conferred by this chapter is considered to be the performance of essential governmental functions. The authority consists of the following 5 voting members:

- A. The chair of the Public Utilities Commission or the chair's designee; [2005, c. 665, §3 (new) .]
- B. The Chief Information Officer of the State, or the officer's designee; [2005, c. 665, §3 (new) .]
- C. One representative of consumers, appointed by the Governor; and [2005, c. 665, §3 (new) .]
- D. Two members with significant knowledge of communications technology, appointed by the Governor. [2005, c. 665, §3 (new) .]

Compensation of members is as provided in Title 5, section 12004-G, subsection 33-F.  
[2005, c. 665, §3 (new) .]

**2. Terms; chair; vacancies.** All members are appointed for 3-year terms. The Governor shall appoint a chair from among the 3 members appointed by the Governor. In the event of a vacancy in the membership, the Governor shall appoint a replacement member for the remainder of that vacated term. Each member of the authority serves until that member's successor is appointed and qualified. Any member of the authority is eligible for reappointment.  
[2005, c. 665, §3 (new) .]

**3. Officers; quorum.** The authority may elect a secretary and a treasurer, who may, but need not, be members of the authority. Three members of the authority constitute a quorum, and the affirmative vote of 3 members is necessary for any action taken by the authority.  
[2005, c. 665, §3 (new) .]

**4. Participation by members.** A member may participate in a meeting of the authority and place a vote electronically or telephonically as long as members of the public have an opportunity to listen to the deliberations of the authority and otherwise participate in or observe the proceedings of the authority consistent with Title 1, section 405.  
[2005, c. 665, §3 (new) .]

**5. Indemnification.** Each member of the authority must be indemnified by the authority against expenses actually and necessarily incurred by the member in connection with the defense of any action or proceeding in which the member is made a party by reason of being or having been a member of the authority and against any final judgment rendered against the member in that action or proceeding.  
[2005, c. 665, §3 (new) .]

**6. Staff.** At the request of the authority, the commission or any other state agency with expertise in communications services or advanced communications technology infrastructure shall provide to the authority staff designated by the commission or agency. Staff resources provided by the commission and other agencies may not exceed in total the equivalent of 3 full-time employees. The salaries and costs of such staff must be allocated proportionately to the authority. The authority may retain staff in addition to the staff designated and provided by the commission or other state agencies.  
[2005, c. 665, §3 (new) .]

35-A §09203

ConnectME Authority

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**Title 35-A, Chapter 93, ADVANCED TECHNOLOGY  
INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

**§9204. Duties of authority (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

**1. Establish criteria defining unserved and underserved areas.** The authority, by rule adopted pursuant to section 9205, subsection 3, shall establish criteria to define unserved and underserved areas. The authority shall establish criteria that ensure that an area is not determined to be an unserved or underserved area if the effect of that determination would inhibit or impede private investment in any area or diminish the value of prior investment in advanced communications technology infrastructure within any area. Criteria established by the authority must include but are not limited to whether investment is planned in an area within a reasonable time. [2005, c. 665, §3 (new).]

**2. Enhance communications technology infrastructure.** The authority, through partnerships, grants, direct investment, loans, demonstration projects and other appropriate means, shall, in a competitively neutral fashion and without giving preference to any one form of technology over another:

A. Monitor wireless coverage in areas where the authority determines the quality of the coverage is inadequate; [2005, c. 665, §3 (new).]

B. Determine whether an area is an unserved or underserved area; [2005, c. 665, §3 (new).]

C. Expand the availability of broadband to residential and small business customers in unserved or underserved areas; [2005, c. 665, §3 (new).]

D. Expand the availability of broadband with bandwidth, synchronicity, reliability and security adequate to serve business, education and enterprise consumers in unserved or underserved areas; [2005, c. 665, §3 (new).]

E. Otherwise enhance the State's communications technology infrastructure in unserved and underserved areas; and [2005, c. 665, §3 (new).]

F. Cover reasonable administrative costs of the authority. [2005, c. 665, §3 (new).]  
[2005, c. 665, §3 (new).]

**3. Additional duties.** In addition to its duties established under this chapter, the authority shall:

A. Collect, aggregate, coordinate and disseminate information and data concerning communications services and advanced communications technology infrastructure in the State; [2005, c. 665, §3 (new).]

B. Track investment in advanced communications technology infrastructure; [2005, c. 665, §3 (new).]

C. Continually assess the availability of and need for advanced communications technology infrastructure in unserved or underserved areas within the State; [2005, c. 665, §3 (new).]

D. Identify and secure federal and other funding sources for broadband or wireless deployment or education; [2005, c. 665, §3 (new).]

E. Identify opportunities for coordination among providers, consumers and state and local governmental entities, including coordination with the statewide emergency radio network; and [2005, c. 665, §3 (new).]

F. Create and facilitate public awareness and educational programs to encourage the use of broadband services. [2005, c. 665, §3 (new).]  
[2005, c. 665, §3 (new).]

**4. Limitations on activities of the authority.** The authority may not develop, acquire, fund, coordinate or otherwise undertake any project or make any grant, direct investment or loan under this chapter unless:

A. The action is taken on behalf of, in partnership with or in support of one or more communications service providers that are remitting assessments to the authority under section 9211; and [2005, c. 665, §3 (new).]

**Title 35-A, Chapter 93, ADVANCED TECHNOLOGY  
INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

B. The authority determines that, without the authority's action, the installation of adequate advanced communications technology infrastructure in an unserved or underserved area would not otherwise occur. [2005, c. 665, §3 (new) .]

Notwithstanding any other provision of this chapter, the authority may not provide any wireline, wireless, satellite, voice, data or video service at retail or wholesale.

[2005, c. 665, §3 (new) .]

**5. Public notice and opportunity for private investment.** Prior to taking any action described in subsection 4, the authority shall provide public notice of its intention to take the action. The authority may not take the action if a service provider franchised or certificated to provide a communications service to the area submits a timely certification to the authority that the service provider will commence within 45 days and will complete within one year the installation of sufficient advanced communications technology infrastructure to provide broadband or wireless service in a manner that would render the authority's action unnecessary or redundant. [2005, c. 665, §3 (new) .]

35-A §09204

Duties of authority

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW) .

**§9205. General powers (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

In order to carry out the purposes of this chapter, the authority has the following powers with respect to a project together with all powers incidental to or necessary for the performance of these powers: [2005, c. 665, §3 (new) .]

**1. Power to sue and be sued.** To sue or initiate or appear in any proceeding. The authority may be sued on its written contracts or in accordance with Title 1, section 409; Title 5, chapter 375; or Title 14, chapter 741;

[2005, c. 665, §3 (new) .]

**2. Official seal.** To adopt and have an official seal and alter the seal at pleasure;

[2005, c. 665, §3 (new) .]

**3. Bylaws; rules.** To adopt bylaws and any rule necessary or useful for carrying out any of the authority's powers or duties pursuant to this chapter. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A;

[2005, c. 665, §3 (new) .]

**4. Acquire real or personal property.** To acquire real or personal property or any interest in real or personal property, including rights or easements, on either a temporary or long-term basis by gift, purchase, transfer, foreclosure, lease or otherwise; to improve, hold, sell with or without public bidding, assign, lease, rent, encumber, mortgage or otherwise dispose of any real or personal property, any interest in real or personal property or mortgage interests owned or in its control, custody or possession; and to release or relinquish any right, title claim, lien, interest, easement or demand, however acquired, including threat of foreclosure;

[2005, c. 665, §3 (new) .]

**5. Prepare and plan projects and facilities.** To prepare or cause to be prepared plans, specifications, designs and estimates of costs for the construction and equipment for a project and attendant facilities and from time to time to modify or cause to be modified those plans, specifications, designs or estimates;

[2005, c. 665, §3 (new) .]

**6. Improve and equip project and attendant facilities.** By contract or contracts to construct, acquire, alter, repair, reconstruct, rehabilitate, improve and equip a project and necessary and usual attendant facilities;

[2005, c. 665, §3 (new) .]

**7. Maintain, reconstruct and operate.** To maintain, reconstruct and operate, or cause to be maintained, reconstructed and operated, a project;

[2005, c. 665, §3 (new) .]



**Title 35-A, Chapter 93, ADVANCED TECHNOLOGY  
INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

**8. Fix and collect fees.** To fix and collect fees, lease-rentals and other charges for the use of a project to transmit voice, data or video signals and to provide for the adoption of such reasonable and proper rules as may be necessary to ensure the maximum use at all times of the facilities of any project;  
[2005, c. 665, §3 (new).]

**9. Provide for financing or refinancing.** To provide financing for a project or to provide for refinancing of existing indebtedness and for the financing of the project and of other necessary and usual attendant facilities;  
[2005, c. 665, §3 (new).]

**10. Make and execute contracts.** To make and execute contracts and other instruments and enter into such transactions as necessary or convenient for the exercise of the authority's powers and functions under this chapter;  
[2005, c. 665, §3 (new).]

**11. Agreements; acceptances; contributions; aid; grants.** To enter into agreements with and accept loans, aid, contributions, grants and the cooperation or assistance of the United States, or any agency of the United States, or of the State or any agency or governmental subdivision in furtherance of the purposes of this chapter, including, but not limited to, the development and financing of a project, and to do all things necessary in order to avail the authority of those loans, aid, contributions, grants and cooperation;  
[2005, c. 665, §3 (new).]

**12. Accept aid or contributions.** To receive and accept from any source aid or contributions of money, property, labor or other things of value, to be held, used and applied to carry out the purposes of this chapter, subject to the conditions upon which those grants and contributions are made, including, but not limited to, gifts or grants from any department or agency of the United States or the State for any purpose consistent with this chapter;  
[2005, c. 665, §3 (new).]

**13. Insurance.** To procure insurance against any loss in connection with the authority's securities and its property and other assets in such amounts and from such insurers as it considers desirable;  
[2005, c. 665, §3 (new).]

**14. Modification of contract, lease, indenture or agreement.** To consent to any modification of any contract, lease, indenture or agreement of any kind to which the authority is a party;  
[2005, c. 665, §3 (new).]

**15. Manage or operate real and personal property.** To manage or operate, or cause to be managed or operated, real and personal property, to take assignments of leases and rentals or to take any other action necessary or incidental to the performance of the authority's duties under this chapter;  
[2005, c. 665, §3 (new).]

**16. Lease or rent facilities or equipment used to transmit voice, data or video signals.** To lease or rent any facilities or equipment for a project for such amounts as the authority determines to a communications service provider to further the purposes of this chapter, as long as the obligation of the service provider is considered a binding contract with the authority and as long as no liability on account of the authority may be incurred beyond the money available for that purpose and may be considered a liability of the State;  
[2005, c. 665, §3 (new).]

**17. Investments.** Except as otherwise provided in this chapter, to invest any funds not needed for immediate use, including any funds held in reserve, in property or in securities in which fiduciaries in the State may legally invest funds;  
[2005, c. 665, §3 (new).]

**18. Appearances.** To appear on the authority's own behalf before boards, commissions, departments or agencies of a municipality or the State Government or the Federal Government;  
[2005, c. 665, §3 (new).]

**19. Executive director; other employees.** To employ an executive director, consulting engineers, architects, attorneys, accountants, construction and financial experts and such other employees and agents as may be necessary in the authority's judgment; and  
[2005, c. 665, §3 (new).]

**20. All acts granted or implied.** To do any act necessary or convenient to exercise the powers granted in this chapter or reasonably implied by this chapter.

**Title 35-A, Chapter 93, ADVANCED TECHNOLOGY  
INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

[2005, c. 665, §3 (new).]

35-A §09205

General powers

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9206. ConnectME Advisory Council (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

The ConnectME Advisory Council, referred to in this section as "the advisory council," is established to advise the authority in accordance with this section. [2005, c. 665, §3 (new).]

**1. Membership.** The advisory council is composed of the following members:

A. Four members who have experience with issues concerning advanced communications technology infrastructure, appointed by the Governor; [2005, c. 665, §3 (new).]

B. Two members who have experience with issues concerning the telecommunications and technology infrastructure implemented by the State's education community, appointed by the Governor; [2005, c. 665, §3 (new).]

C. One member who serves on the Maine Telecommunications Education Access Fund Advisory Board established by rules adopted by the commission, or a successor board, appointed by the Governor; [2005, c. 665, §3 (new).]

D. One member from the Maine Technology Institute appointed by the Director of the Office of Innovation within the Department of Economic and Community Development; [2005, c. 665, §3 (new).]

E. One member representing the Small Enterprise Growth Fund, established in Title 10, section 383, appointed by the Director of the Office of Innovation within the Department of Economic and Community Development; and [2005, c. 665, §3 (new).]

F. Up to 2 additional members, appointed by the authority, as needed to ensure adequate representation and expertise. [2005, c. 665, §3 (new).]

Compensation of members is as provided in Title 5, section 12004-I, subsection 85-A.

[2005, c. 665, §3 (new).]

**2. Duties; rules.** The advisory council shall provide advice and counsel to the authority on technical, policy, financial and economic issues. The advisory council shall also perform limited functions assigned to it by the authority or as provided for by rule adopted by the authority pursuant to section 9205, subsection 3.

[2005, c. 665, §3 (new).]

35-A §09206

ConnectME Advisory Council

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9207. Collection of data (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

Subject to the provisions in this section, the authority may collect data from communications service providers and any wireless provider that own or operate advanced communications technology infrastructure in the State concerning infrastructure deployment and costs, revenues and subscribership. [2005, c. 665, §3 (new).]

**1. Confidential information.** If the authority, on its own or upon request of any person or entity, determines that public access to specific information about communications service providers in the State could compromise the security of public utility systems to the detriment of the public interest or that specific information is of a competitive or proprietary nature, the authority shall issue an order designating that information as confidential. Information that may be designated as confidential pursuant to this subsection includes, but

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is not limited to, network diagrams. The authority may designate information as confidential under this subsection only to the minimum extent necessary to protect the public interest or the legitimate competitive or proprietary interests of a communications service provider. The authority shall adopt rules pursuant to section 9205, subsection 3 defining the criteria it will use to satisfy the requirements of this paragraph and the types of information that would satisfy the criteria. The authority may not designate any information as confidential under this subsection until those rules are finally adopted.

Information designated as confidential under this subsection is not a public record under Title 1, section 402, subsection 3.  
[2005, c. 665, §3 (new).]

**2. Protection of information.** A communications service provider may request that confidential or proprietary information provided to the authority under subsection 1 not be viewed by those members of the authority who could gain a competitive advantage from viewing the information. Upon such a request, the authority shall ensure that the information provided is viewed only by those members of the authority and staff who do not stand to gain a competitive advantage and that there are adequate safeguards to protect that information from members of the authority who could gain a competitive advantage from viewing the information.  
[2005, c. 665, §3 (new).]

35-A §09207

Collection of data

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9208. Legislative oversight; report to committee (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

No later than January 15th of each year, the authority shall provide a report to the joint standing committee of the Legislature having jurisdiction over utilities matters that: [2005, c. 665, §3 (new).]

**1. Budget.** Includes a report on the budget of the authority;  
[2005, c. 665, §3 (new).]

**2. Activities.** Documents the activities of the authority, including review of applications for funding received by the authority;  
[2005, c. 665, §3 (new).]

**3. Investments.** Contains a listing of any investments of money in the ConnectME Fund, as established pursuant to section 9211, and a tracking of the infrastructure improvements resulting from the investments; and  
[2005, c. 665, §3 (new).]

**4. Market conditions.** Contains an analysis of the availability of communications services and advanced communications technology infrastructure, including an analysis of the competitive market in the State for communications services and advanced communications technology infrastructure and whether the communications services provided in the State are reasonably comparable to services provided regionally and nationwide.  
[2005, c. 665, §3 (new).]

After receiving a report under this section, the joint standing committee of the Legislature having jurisdiction over utilities matters may report out legislation relating to the authority. [2005, c. 665, §3 (new).]

35-A §09208

Legislative oversight; report to committee

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9209. Conflicts (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

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INFRASTRUCTURE (HEADING: PL 2005, c. 665, §3 (new))**

A member of the authority may not participate in any decision on any contract entered into by the authority under this chapter if that member has any interest, direct or indirect, in any firm, partnership, corporation or association that is party to the contract. The interest must be disclosed to the authority in writing and must be set forth in the minutes of the authority. [2005, c. 665, §3 (new).]

35-A §09209

Conflicts

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9210. Actions against authority (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

A member of the authority, while acting within the scope of this chapter, is not subject to any personal liability resulting from the exercise or carrying out of any of the authority's purposes or powers. [2005, c. 665, §3 (new).]

35-A §09210

Actions against authority

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9211. ConnectME Fund (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

**1. ConnectME Fund established.** The ConnectME Fund, referred to in this section as "the fund," is established as a nonlapsing fund administered by the authority for the purposes of supporting the activities and projects of the authority under this chapter. [2005, c. 665, §3 (new).]

**2. Assessment.** After receiving authorization pursuant to Title 5, section 8072 to finally adopt major substantive rules under section 9205, subsection 3 or after January 15, 2007, whichever is later, the authority may require every communications service provider to contribute on a competitively neutral basis to the fund. The assessment may not exceed 0.25% of the revenue received or collected for all communications services provided in this State by the communications service provider. A facilities-based provider of wireless voice or data retail service may voluntarily agree to be assessed by the authority as a communications service provider under this subsection. [2005, c. 665, §3 (new).]

**3. Explicit identification on customer bills.** A communications service provider assessed pursuant to subsection 2 may recover the amount of the assessment from the provider's customers. If a provider recovers the amount from its customers, it must explicitly identify the amount owed by a customer on the customer's bill and indicate that the funds are collected for use in the ConnectME Fund. [2005, c. 665, §3 (new).]

35-A §09211

ConnectME Fund

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW).

**§9212. Gifts and contributions (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

The authority may accept gifts and contributions on behalf of the authority for the purpose of designing, constructing, reconstructing, renovating or acquiring a project. [2005, c. 665, §3 (new).]

The authority, in accepting gifts of money, federal funds or other types of income, shall place this money in a special account for the purpose for which it is provided. The authority may invest the money in accordance with the purposes of this chapter, subject to any limitations imposed by the donor. [2005, c. 665, §3 (new).]

35-A §09212

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Gifts and contributions

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW) .

**§9213. Use of revenues (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

The revenues derived by the authority from any assessment, transfer of funds, lease, assignment, rental agreement or other disposition or any other revenue must be used for the purposes of this chapter and applied in a competitively neutral fashion and without giving preference to any one form of technology over another. [2005, c. 665, §3 (new) .]

35-A §09213

Use of revenues

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW) .

**§9214. No franchise fees (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

The authority may not establish or collect a franchise fee pursuant to 47 United States Code, Section 542 or Title 30-A, section 3008. If any tax, fee, charge or assessment or portion thereof established by the authority is held by a court of competent jurisdiction to be a franchise fee, the imposition of that tax, fee, charge or assessment or portion thereof is unenforceable. [2005, c. 665, §3 (new) .]

35-A §09214

No franchise fees

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW) .

**§9215. Repeal (CONTAINS TEXT WITH VARYING EFFECTIVE DATES)**

(WHOLE SECTION TEXT EFFECTIVE UNTIL 1/31/09)

This chapter is repealed January 31, 2009. [2005, c. 665, §3 (new) .]

35-A §09215

Repeal

(WHOLE SECTION TEXT REPEALED 1/31/09 by T. 35-A, §9215 (rp); PL 2005, c. 665, §3 (new))

PL 2005, Ch. 665, §3 (NEW) .

**Chapter 101: ConnectME AUTHORITY**

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**SUMMARY:** This Chapter describes the operation of the ConnectME Authority.

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## § 1 PURPOSE

The purpose of this Chapter is to implement the provisions of the Advanced Technology Infrastructure Act contained in 35-A M.R.S.A. §§ 9201-9215 and 36 M.R.S.A. §2017. This Chapter describes the operation of the ConnectME Authority.

As stated in 35-A §9204, duties of the Authority include:

1. Establish criteria defining unserved and underserved areas;
2. Enhance communications technology infrastructure;
3. Monitor wireless coverage in areas where the authority determines the quality of the coverage is inadequate;
4. Expand the availability of broadband to residential and small business customers in unserved or underserved areas;
5. Expand the availability of broadband with bandwidth, synchronicity, reliability and security adequate to serve business, education and enterprise consumers in unserved or underserved areas;
6. Otherwise enhance the State's communications technology infrastructure in unserved and underserved areas;
7. Collect, aggregate, coordinate and disseminate information and data concerning communications services and advanced communications technology infrastructure in the State;
8. Track investment in advanced communications technology infrastructure;
9. Continually assess the availability of and need for advanced communications technology infrastructure in unserved or underserved areas within the State;
10. Identify and secure federal and other funding sources for broadband or wireless deployment or education;
11. Identify opportunities for coordination among providers, consumers and state and local governmental entities, including coordination with the statewide emergency radio network; and
12. Create and facilitate public awareness and educational programs to encourage the use of broadband services.



## § 2 DEFINITIONS

As used in this Chapter, the following terms have the following meanings.

- A. **Advanced Communications Technology Infrastructure.** “Advanced communications technology infrastructure” means any communications technology infrastructure or infrastructure improvement that expands the deployment of, or improves the quality of, broadband availability or wireless service coverage.
- B. **Authority.** “Authority” means the ConnectME Authority established in 35-A M.R.S.A. §9203.
- C. **Broadband Service.** “Broadband service” means a two-way, always-on, communications service that provides access to public data networks and the Internet, and meets certain performance criteria determined periodically by the Authority to be the minimum necessary to use common applications and network services.
- D. **Broadband Service Provider.** “Broadband service provider” means a communications service provider that provides broadband service, but does not include a provider of commercial mobile service as defined under 47 United States Code, Section 332(d).
- E. **Certificate of Qualification.** “Certificate of Qualification” means the certificate issued to an applicant by the Authority in accordance with the requirements of section 3 of Maine Revenue Services Rule No. 324 (18-125 CMR 324) as a prerequisite to applying for tax reimbursement from Maine Revenues Services in accordance with 36 M.R.S.A. §2017.
- F. **Communications Service.** “Communications service” means any wireline voice, satellite, data, fixed wireless data or video retail service.
- G. **Communications Service Provider.** “Communications service provider” means:
  1. Any entity offering retail communications service to customers in the State; or
  2. Any facilities-based provider of retail mobile wireless voice or data retail service that voluntarily chooses to be assessed by the Authority under 35-A M.R.S.A. §9211.
- H. **Infrastructure.** “Infrastructure” means a physical component or collection of physical components that provide the basic support for distributing communication services.
- I. **Mobile Communications Service Provider.** “Mobile communications service provider” means any facilities-based provider of retail mobile wireless voice or data service.
- J. **Public Data Networks.** “Public Data Networks” means a network available to the public for the transmission of data, usually using packet switching protocol.
- K. **Qualifying ConnectME Zone.** “Qualifying ConnectME Zone” means a geographic area that the Authority has determined is an unserved or underserved area by advanced communications technology infrastructure on the date the sale of machinery and equipment to the applicant occurs for reimbursement of Maine sales and use taxes under 36 M.R.S.A. §2017.

- L. **Underserved Area.** "Underserved Area" means any geographic area where broadband service or mobile communications service exists, but where the Authority determines that the service is inadequate.
- M. **Unserved Area.** "Unserved Area" means any geographic area without broadband service or mobile communications service.

### § 3 REQUIRED FILING OF DATA

- A. **Broadband Service Provider.** All communications service providers that are required to file FCC Form 477, will file copies of the form, filed at the Federal Communications Commission, with the Authority. All other providers will file the data required in subsection 3(A)(3), using the schedule in subsection 3(A)(1).
  - 1. **Schedule**
    - a. Reports containing data for the period July 1 through December 31 are due March 1 the following year or within 30 days after filing at the FCC, whichever is later.
    - b. Reports containing data for the period January 1 through June 30 are due September 1 of the same year or within 30 days after filing at the FCC, whichever is later.
  - 2. **Filing Procedure.** Filings shall be made via a secure electronic transmission, under procedures determined by the Authority.
  - 3. **Description of Products and Services.** Along with filing the FCC Form 477 data with the Authority, each broadband service provider will provide additional information that describes its services as of December 31 or June 30, depending on the filing date. The additional information must include, at a minimum:
    - a. A description of each type of broadband service offered and technology used to provide the service;
    - b. The prices for each offering; and
    - c. The total number of customers purchasing each offering.
- B. **Mobile Communications Service Provider.** By March 1 of each year, each mobile communications service provider that contributes to the ConnectME Fund will file the following information with the Authority, with information current as of December 31 of the previous year, a mobile communications service provider that does not contribute to the ConnectME fund is not required to file the information:
  - 1. **Map One.** A coverage map at -95 dB in a GIS format and in real-world coordinate space (such as MapInfo TAB or MIF or ESRI SHP). This map layer must be a true or false depiction indicating where the mobile communications

- service provider network operates at -95dB or better, and need not include a continuous qualitative depiction of signal quality across the network;
2. **Map Two.** A coverage map at -85 dB in a GIS format and in real-world coordinate space (such as MapInfo TAB or MIF or ESRI SHP). This map layer must be a true or false depiction indicating where the mobile communications service provider network operates at -85dB or better, and need not include a continuous qualitative depiction of signal quality across the network; and
  3. Description of Service. A description containing:
    - a. Frequency and/or spectrum used in each area served;
    - b. Transmission technology (TDMA, CDMA, GSM, etc.) in each area served;
    - c. Areas of digital and analog service; and
    - d. Number of mobile communications devices provided in Maine.

#### § 4 PROTECTION OF CONFIDENTIAL INFORMATION

A. **Protected Information.** Pursuant 35-A M.R.S.A. §9207, the Authority may, on its own or upon request of any person or entity, designate information as protected and exempt such information from public disclosure to protect the security of public utility systems or to protect the legitimate competitive or proprietary interests of communications service providers and mobile communications service providers. An entity submitting information protected under section 4 or an Authority-issued protective order, will mark the top of each page in large, conspicuous typeface "CONFIDENTIAL." Each type of confidential information contained in the document must contain a reference to the specific subsection or protective order providing protection.

##### 1. Critical Infrastructure Information

- a. **Standard.** The Authority will protect from public disclosure information concerning any communication service infrastructure that could facilitate the intentional, illegal interference with a communications service or mobile communications service.
- b. **Criteria.** In determining what information is protected as critical infrastructure information, the Authority considers:
  - i. The extent to which the information could facilitate the disruption of critical emergency or other government communication services such as E911;
  - ii. The extent to which the information could facilitate the disruption of public communication services; and

- iii. The ease or difficulty with which a person could acquire or duplicate the information from other sources.
- c. **Protected Information.** The Authority must automatically protect precise infrastructure location information, including geo-referenced data, without a motion for protective order submitted by any provider. This includes, but is not limited to:
  - i. Digital Subscriber Line Access Multiplexers (DSLAMs);
  - ii. Wireless towers and transmitters;
  - iii. Repeaters; and
  - iv. Distribution plant (including, but not limited to copper and fiber telephone plant as well as coaxial cable).
- d. **Information Protected Upon Request.** Upon request, the Authority will designate information other than that described in subsection (4)(1)(c) above as protected if it finds that such information meets the criteria of this subsection.

## 2. **Proprietary Business Information**

- a. **Standard.** The Authority will protect from public disclosure information of a competitive or proprietary nature to the minimum extent necessary to protect the legitimate competitive or proprietary interests of communications service providers and mobile communications service providers.
- b. **Criteria.** In determining what proprietary business information will be protected, the Authority will consider:
  - i. The value of the information to the provider and its competitors;
  - ii. The amount of effort or money the provider expended in developing the information;
  - iii. The extent of measures taken by the provider to guard the secrecy of the information;
  - iv. The ease or difficulty with which others could properly acquire or duplicate the information; and
  - v. The degree to which third parties have placed the information in the public domain or rendered the information “readily ascertainable.”
- c. **Protected Information.** The Authority must protect the following proprietary business information without further showing from the providers:

- i. Information provided pursuant to section 3, except if it is otherwise publicly available;
    - ii. Equipment make and model; and
    - iii. Non-public financial statements.
  - d. **Information Protected Upon Request.** Upon request, the Authority will consider designating other information as protected if it finds that such information meets the criteria of this subsection.
- B. Issuance of Protective Orders.** The Authority may, on its own motion or by motion of any person or entity, protect specific information or a class of information that has not been previously designated by the Authority as protected.
1. **Motion for Protective Order.** The party seeking the protective order must submit a Motion for Protective Order or Notice of Protective Order showing how the information meets the standards of either subsection 4(A)(1) or 4(A)(2), and how the protection it seeks is narrowly tailored.
  2. **Filing and Notice.** The Motion for Protective Order or Notice of Protective Order must be submitted to the Authority which will then post it on its website and distribute to interested parties.
  3. **Opposition to Motion or Notice.** Filings in opposition to or support of the Motion for Protective Order or Notice of Protective Order must be made within seven days of the filing of the Motion or Notice.
  4. **Protective Order Decision.** No later than 14 days after the filing of the Motion Protective Order or Notice of Protective Order the Authority will either issue the Protective Order or deny the motion for the Protective Order, stating its reasons for issuance or denial.
- C. Revocation of Confidential Treatment of Information.** The Authority, upon its own motion or upon motion from any party seeking access to information protected under a Protective Order issued by the Authority or designated confidential by a provider pursuant to these rules, may revoke any prior confidential treatment or overrule a particular provider's designation of specific documents as confidential.
1. **Filing of Motion of Revocation.** The party seeking access to the confidential information contained in a Protective Order will file a Motion for Revocation of Protective Order (or in the case of the Authority, a Notice of Revocation of Protective Order) explaining why the information sought does not meet the criteria for protection as established by the Authority in this Chapter or otherwise.
  2. **Notice of Motion.** If the Motion for Revocation of Protective Order is directed at a specific Provider, the Motion must be served on that Provider and filed with the Authority. If the Motion is directed to a class of Providers, it need only be filed

with the Authority. The Authority will post all Motions for Revocation of Protective Order on its website and distribute it to interested parties.

3. **Opposition.** Filings in opposition or support of a Motion for Revocation of Protective Order must be made within seven days of the date the Motion was filed.
  4. **Protective Order Decision.** No later than 14 days after the filing of the Motion, the Authority will either issue the Revocation of Protective Order or deny the request for Revocation of the Protective Order, stating its reasons for issuance or denial.
- D. **Exception to Public Record Law.** Information designated as confidential by the Authority is not a public record under Title 1, section 402, subsection 3, per the authority granted in §9207(1).

## § 5 DESIGNATION OF BROADBAND SERVICE AND ELIGIBLE AREAS

- A. **Broadband Service.** At least annually, the Authority must update the minimum performance criteria for broadband service, for the purposes of this Chapter. The Authority must base its criteria on the state of the market as well as the performance necessary to meet the current broadband needs of common applications and network services in use in the State.
1. **Criteria Governing Performance.** To determine minimum performance criteria, the Authority may consider:
    - a. Minimum sustained bandwidth for both upstream and downstream transmission;
    - b. Maximum latency;
    - c. Maximum jitter;
    - d. Minimum reliability; and
    - e. Any other performance criteria necessary for the use of common broadband applications and network services.
  2. **Criteria Governing Common Applications and Network Service.** To determine common applications and network services, the Authority may consider:
    - a. Real-time voice and video communication;
    - b. Audio and video streaming;
    - c. Network applications;
    - d. Network storage;

- e. Collaborative work environments;
  - f. Interactive gaming;
  - g. File-sharing; and
  - h. Any other application or network service that facilitates communication, and data and content exchange.
3. **Initial Standard.** Until the Authority makes the performance designation provided for in subsection 5(A), broadband is designated as a service capable of being used for the transmission of information at a rate that is not less than 500kbps in both directions (symmetric or bi-directional) for residential and small business users, providing access to the Internet.
- B. **Unserved Areas.** At least annually, the Authority must designate unserved areas for broadband service and mobile communications service, using data under section 3 of this Chapter. The Authority may also designate unserved areas based on verifiable data provided by an individual or group.
- 1. **Broadband Unserved Areas.** In designating an unserved area for broadband service, the Authority must find the following characteristics:
    - a. The area is currently unserved by a broadband service provider; and
    - b. A project to provide broadband service will not be completed in the area within one year.
  - 2. **Mobile Communications Service Unserved Areas.** In designating an unserved area for mobile communications service, the Authority will designate as unserved any area:
    - a. Outside the -95dB area as indicated in maps provided pursuant to subsection 3(B) of this Chapter; and
    - b. For which a project to provide mobile communications service will not be completed in the area within one year.
- C. **Underserved Areas.** At least annually, the Authority will designate underserved areas for broadband service and mobile communications service, using data under section 3 of this Chapter. The Authority may also designate underserved areas based on data provided by an individual or group.
- 1. **Broadband.** In designating an underserved area for broadband service the Authority will consider the following:
    - a. The lowest cost broadband service that is available is provided at a price that exceeds 150% of the statewide average for reasonably similar service; or

- b. The overall capacity, reliability, or quality of the broadband service available is inadequate to meet current or projected needs for the area.

## § 6 ConnectME AUTHORITY SUPPORT

A. **Eligible Areas.** The Authority will determine whether an unserved or underserved area is eligible for ConnectME support. The Authority's first priority will be to support projects in unserved areas where there are no prior plans to develop infrastructure improvements. In determining eligibility, the Authority will consider the following criteria:

1. **Broadband.** An eligible unserved or underserved area for broadband service may create an overlap in existing broadband coverage for less than twenty percent (20%) of households in the proposed coverage area;
2. **Mobile Communications Service.** An eligible unserved or underserved area for mobile communications service, one or more of these priorities:
  - a: Population data census blocks with more than 100 people per square mile;
  - b: Any public road with over 500 vehicles per day usage; or
  - c: Service center communities and high usage service "holes."
3. **Private Investment.** Authority support for projects in the unserved or underserved area will not inhibit or impede private investment in the area; and
4. **Prior Investment.** Authority support for projects in the unserved or underserved area will not diminish the value of prior investment in advanced communications technology infrastructure used to provide broadband service or mobile communications service within the area.

B. **Eligible Applicants.** Any grants, direct investments, or loans under this Chapter will be made on behalf of, in partnership with, or in support of, one or more communications service providers that are remitting assessments to the Authority under 35-A M.R.S. A. §9211. Projects contained in approved proposals must be completed within one year of funding unless a waiver is granted by the Authority due to unique or unforeseen circumstances. The Authority must also determine that, without the Authority's action, the installation of adequate advanced communications technology infrastructure in an unserved or underserved area would not otherwise occur. Applicants eligible to receive Authority support for advanced communication infrastructure projects may include:

1. General-purpose local governments (municipalities and counties);
2. Local government authorities, and joint or multi-county development authorities;
3. Private for-profit companies that provide broadband; and
4. Any other responsible entity or group determined by the Authority to be capable of installing, using, and managing advanced communications technology infrastructure in the area.



- C. **Eligible Activities.** Eligible uses of funds provided under the ConnectME Fund include activities, facilities, and services described in 35-A M.R.S.A. §§ 9204-9205. Eligible activities include: the provision of public infrastructure, services, facilities and improvements needed to implement new broadband services, enhance existing broadband services, implement new mobile communications service, or enhance existing mobile communications service. Funds may also be used for matching requirements, "gap" financing, and grants, that may assist projects in qualifying for other sources of funding, as well as any other necessary activities that are integral and necessary for the development, installation and use of a broadband or mobile communications system.
- D. **Application Process.** Within 90 days of the effective date of this Chapter, the ConnectME Authority will establish an application process that, at a minimum, includes the following provisions:
1. **Content of Application.** The application will include, at a minimum, the following:
    - a. a description of the area proposed to be served by the project and sufficient information to establish that it is an unserved or underserved area;
    - b. a description of the proposed project, including public-private partnerships that have been established, evidence that the private partner in the project is eligible to receive funding from the Authority, the type of service to be provided and, in the case of broadband service, the upstream and downstream speeds of the service to be provided, an estimate of the time required to complete the proposed project, the percentage distribution of households and businesses within the area to be served by the project and the estimated price per customer of the service to be provided by the proposed project;
    - c. the total amount of funding requested from the Authority;
    - d. the applicant's financial commitment to the project in addition to the funding requested from the Authority;
    - e. the estimated number of customers who will directly benefit from the project who are currently unserved or underserved; and
    - f. evidence of community support for the proposed project, which may include letters or signatures of residents or businesses located within the area of the proposed project.
  2. **Evaluation of Applications.** The application evaluation process will allow the Authority to concurrently evaluate all applications submitted during a particular application period that has been set by the Authority. The scoring of applications is based on a 100-point scale. A project with a total score of less than 50 points may not be funded. A project that serves an underserved area may only be funded if funds are available after all eligible applications for projects to serve unserved areas have been funded. The application will be judged using the following four scoring categories:

- a. **Cost-Benefit.** This category is worth at least 33 points. The cost-benefit scoring is based on relevant factors, including, but not limited to, the amount of funding requested from the Authority per customer eligible to be served by the project, with lower funding per customer receiving a higher cost-benefit score;
  - b. **Community Support.** The community support score is based on relevant factors, including, but not limited to, evidence of community support for the project and the percentage of a municipality that will be served by the proposed project;
  - c. **Project Scope.** The project scope score is based on relevant factors, including, but not limited to, the number of customers to be served by the project, the type and, when relevant, the speed of service to be offered by the project and the applicant's financial commitment to the project; and
  - d. **Project Value.** The project value score is based on relevant factors, including, but not limited to, the estimated price per customer to receive service from the proposed project and any other details of the project that may benefit customers in the area proposed to be served by the proposed project.
- E. **Certificate of Qualification.** A certificate to be developed within 90 days of the effective date of this Chapter and issued to an applicant by the Authority in accordance with the requirements of section 3 of Rule No. 324 (18-125 CMR 324) as a prerequisite to applying for tax reimbursement from Maine Revenues Services in accordance with 36 M.R.S.A. §2017.
- F. **Public Notice.** Within 14 days of determining the applications that will receive support, the Authority will notify the applicant and post the awards on its website. The Authority will also notify all known broadband service providers and mobile communications service providers, as appropriate, of the approved projects.
- G. **Private Investment Criteria.** Within 14 days of the Authority's notifications made under subsection 6(F) a broadband service provider or mobile communications service provider may submit a certification to the Authority that it will commence within 45 days, and will completely install within one year of the date of the Authority's notification, sufficient advanced communications technology infrastructure to provide broadband or wireless service in a manner that would render the Authority's support of other projects in an area unnecessary or redundant (unless a waiver is granted by the Authority due to unique or unforeseen circumstances). Any broadband service provided must meet the minimum performance criteria and affordability standards of the Authority contained in subsection 5(A). If the Authority determines the certification to be invalid the support award will be cancelled.

**§ 7 ConnectME FUND**

- A. **Assessment.** An assessment at the rate of 0.25% is imposed on the value of the following:
1. All retail revenues received or collected from communications services provided in Maine.
  2. All retail revenues received or collected from mobile communications service providers that voluntarily agree to be assessed by the Authority.
- B. **Fund Administrator.** The Authority will contract with an appropriate independent fiscal agent to serve as the Fund Administrator. The administrator will establish the time and procedures for payment after consultation with the Authority.

**§ 8 WAIVER OF PROVISIONS OF CHAPTER**

Upon the request of any person subject to the provisions of this Chapter or upon its own motion, the Authority may, for good cause, waive any of the requirements of this Chapter that are not required by statute. The waiver may not be inconsistent with the purposes of this Chapter or 35-A M.R.S.A. §§ 9201-9215 and 36 M.R.S.A. §2017.

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STATUTORY AUTHORITY: 23 M.R.S.A. §3360-A, 35-A M.R.S.A. §§ 9201-9215.

EFFECTIVE DATE: This chapter, a major substantive Final Adoption (filing 2007-228), was approved as to form and legality by the Attorney General on May 30, 2007. It was filed with the Secretary of State on May 30, 2007 and becomes effective on June 29, 2007.